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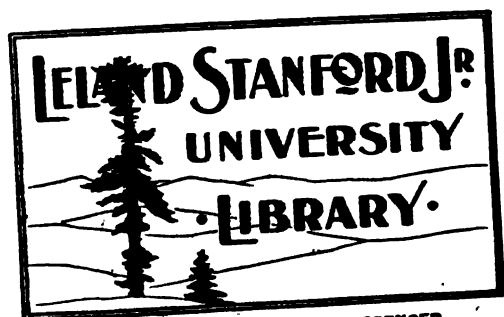
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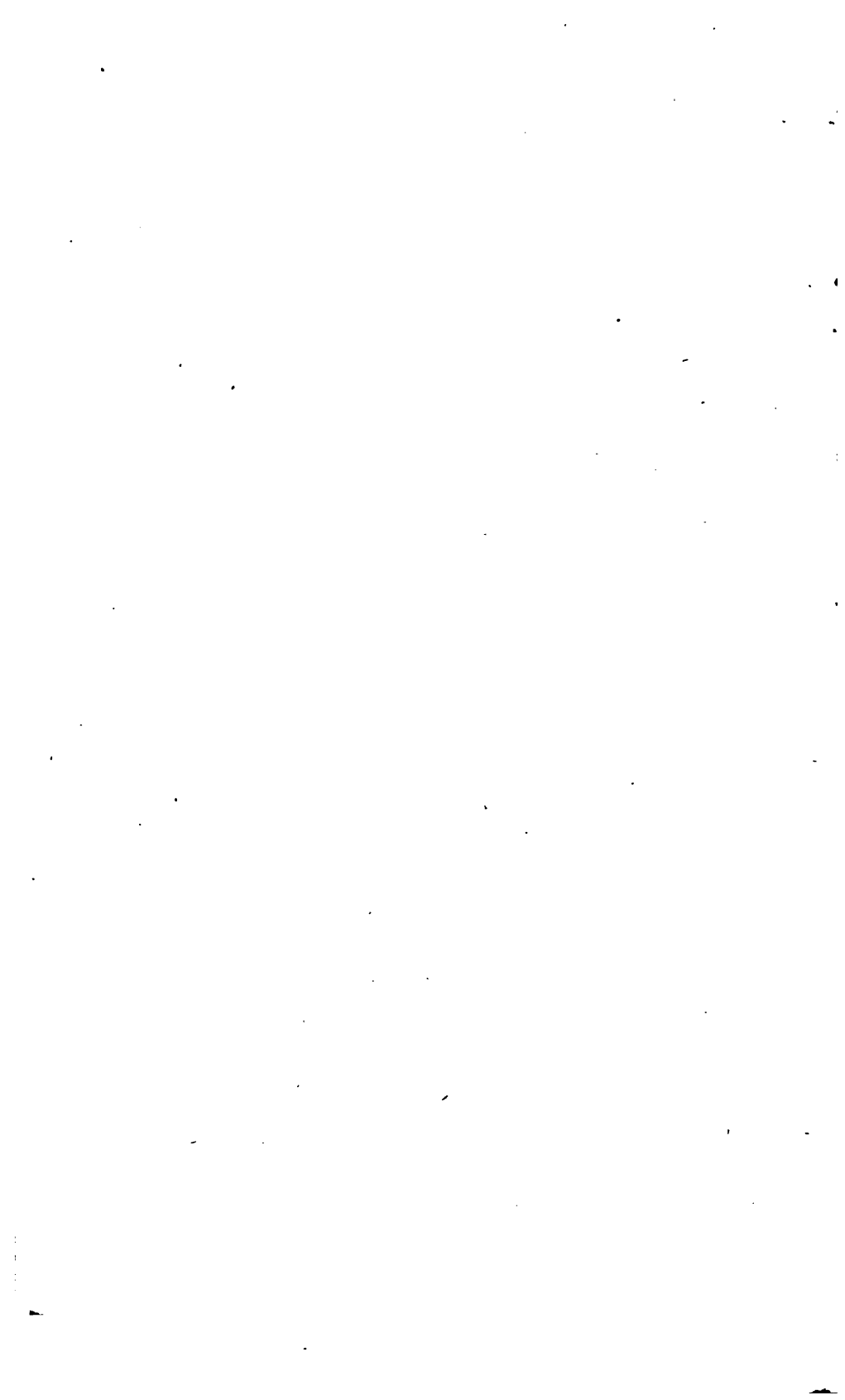
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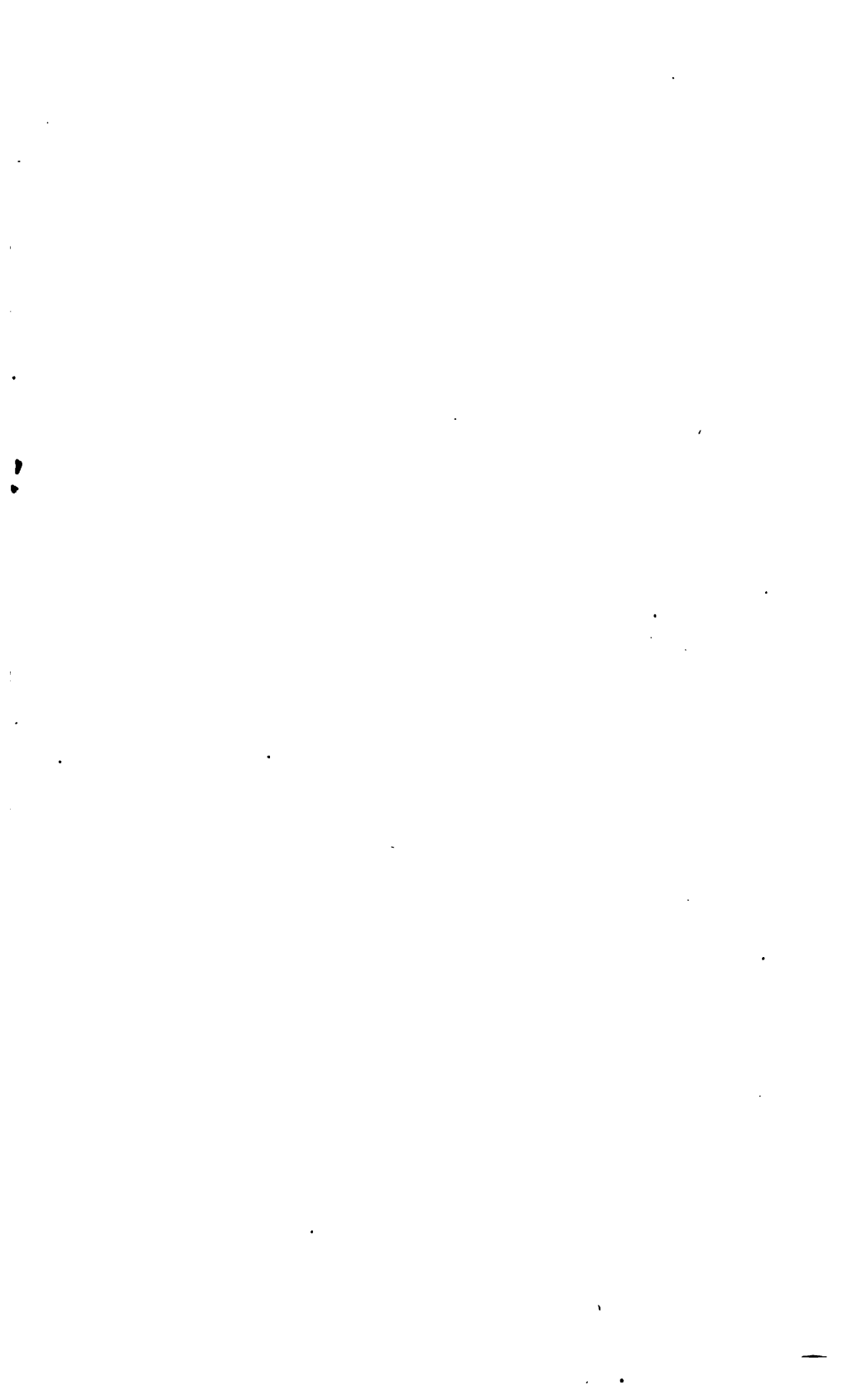
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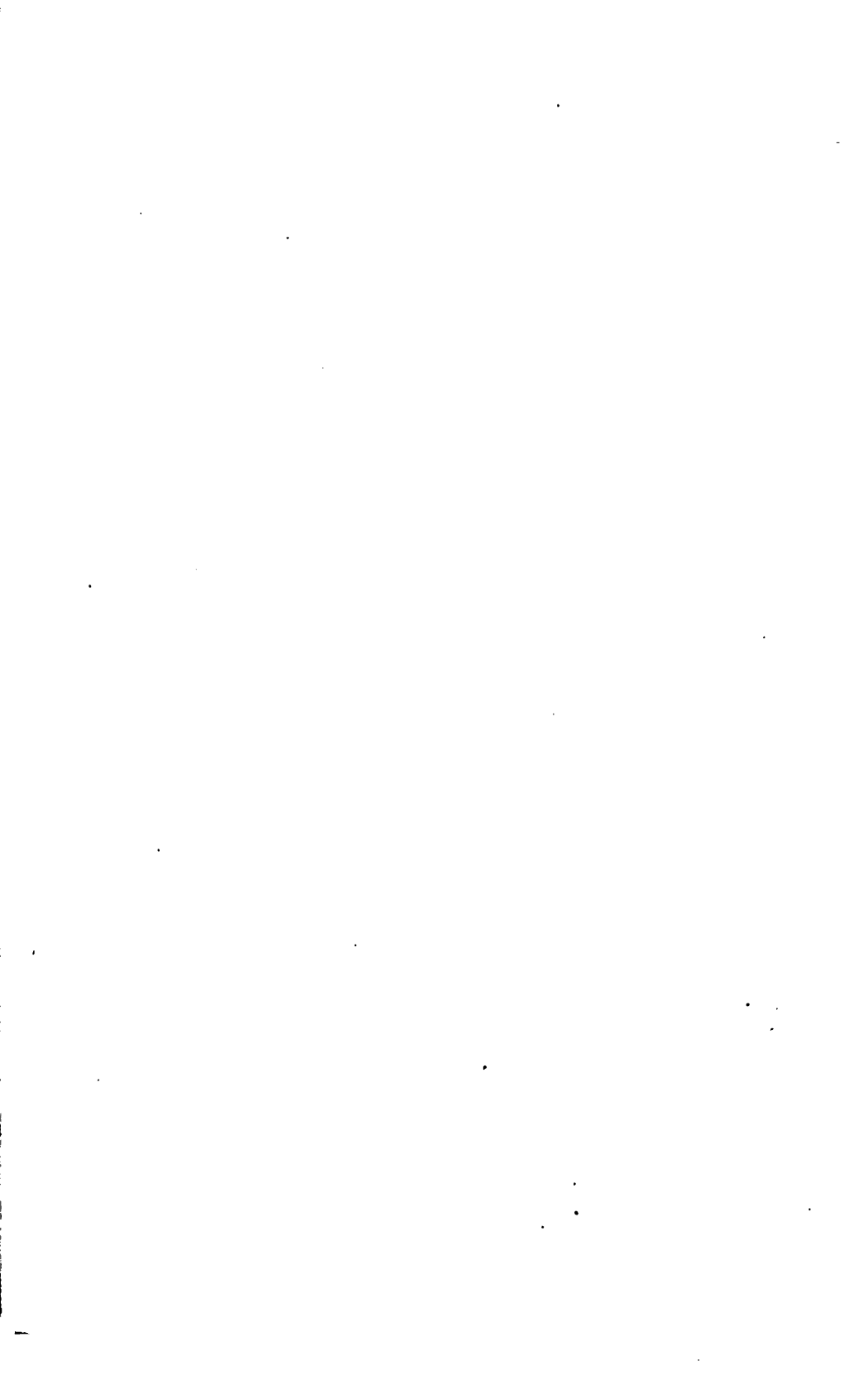












AN ANALYTICAL DIGEST  
OF  
ALL THE REPORTED CASES,  
DETERMINED IN  
THE HOUSE OF LORDS,  
THE SEVERAL COURTS OF COMMON LAW,  
IN BANC AND AT NISI PRIUS;  
AND  
THE COURT OF BANKRUPTCY:  
AND ALSO  
THE CROWN CASES RESERVED,

FROM  
MICH. TERM, 1756, TO MICH. TERM, 1834.

TOGETHER WITH  
A FULL SELECTION OF EQUITY CASES,  
AND  
THE MANUSCRIPT CASES FROM THE BEST MODERN TREATISES NOT ELSEWHERE  
REPORTED.

By S. B. HARRISON, Esq.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

FIRST AMERICAN FROM SECOND LONDON EDITION.

VOL. I.

PHILADELPHIA:

DESILVER, THOMAS & CO. 247 MARKET STREET.

1835.

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**Q 29,139**



## PREFACE.

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THE considerations to be attended to in the construction of a work like the present, are—that it should be a faithful and correct epitome of the several Cases of which it purports to give the substance;—that it should contain ALL THE CASES determined within the period of time which it professes to embrace;—that the period at which it commences should be judiciously determined upon;—and that the arrangement should include both the analysis of science, and the technicality of practical habit, so as to suit, with equal readiness, every branch of a profession which has almost every grade of intellectual acquirement.

The execution of the first of these requisites I must submit to the candour of the Profession, with this remark alone, that I have taken every pains and care to render the work in this respect as perfect as possible.

With respect to the Cases admitted, it is right to observe, that, from the period determined upon as a commencement, every reporter has been included without any partiality or undue preference. As the leading object was to make the work useful as a Common Law Digest, I have inserted ALL the Cases determined in the several Courts of Common Law, both in Banc and at Nisi Prius, and the Court of Bankruptcy; and also the Crown Cases reserved: and, with the view of extending its general usefulness, I have made a very full selection of all such determinations in the House of Lords and the several Courts of Equity as appeared to me to be of value in general practice. Besides this, there will be found collected many important notes of Cases, which are taken from the best modern treatises, and which are not elsewhere reported; and the Cases determined in the Court of King's Bench in Ireland, reported by Messrs. Alcock & Napier.

As the enactments of the Legislature have of late made such important alterations in the state of the law, and as so many of the recent cases turn entirely upon the language of the Statutes, it appeared to me that the work could not be considered as at all complete without an abridgment of those enactments; I have, therefore, added, under the proper heads, the Statutes in more or less of an abridged form; but as far as it was possible to do so, I have retained the words of the Legislature.

The year 1756,—the time at which Lord Mansfield became Lord Chief Justice of the Court of King's Bench,—was fixed upon as the period of

commencement, because only from that period have the Reports been systematically brought down in a regular series to the present time. It presented also an æra, which, besides being of great importance in the view of the lawyer, was so remote, as to bring within the scope of the work many decisions on the first principles and general rules of law, which, having been then clearly defined, are but slightly alluded to in the later reporters; and at the same time so recent, as to avoid the introduction of the old Cases, which, however learned, are not new, either from statutory alteration, or from the changes wrought by time, so much the object of practical reference. I should, however, remark, that, although this is the period from which the Digest professes to commence, yet, wherever any of the cases in a book of Reports were within the time, I have taken the whole of them.

The work has been entirely recast since the former edition, so as to get the Cases upon the same subject under one head. The effect has been not so much an alteration of arrangement, as the accomplishment of the object which was originally in view, but which the necessary difficulty of a first attempt rendered imperfect. There is one alteration which perhaps I should notice:—I have considered the titles **PLEADING** and **PRACTICE** as including the whole course of an action at law; to the latter I have allotted all the proceedings previous to the declaration, and again subsequent to the issue; and, to the former, the proceedings from the declaration to the issue, whether connected with what is usually denominated Pleading strictly, or what is more commonly considered as Practice. This change from the usual course enabled me to bring more fully under one view all the Cases connected with the several minor branches of the proceeding: a reference to the head **VENUE** will sufficiently, I think, show the effect produced.

In the **TABLE OF NAMES OF CASES**, for the sake of compression, the Cases have been indexed only once.

The Cases published during the time the work has been in the press, down to the present date, have been introduced by way of **ADDENDA**, where also will be found a few cases inadvertently omitted in their proper places in the body of the Digest.

I cannot omit acknowledging the obligation I am under to, my friend, Mr. J. Collyer, of the Equity Bar, for the additional value he has given to the work, by his preparation of the title "**WILL**."

S. B. HARRISON.

2, Pump Court, Temple,  
1st November, 1834.

# A LIST

## OF THE

### ABBREVIATIONS USED IN THIS DIGEST.

| <i>Abbreviations.</i> | <i>Name of Reporter.</i>                 | <i>Name of Court.</i> |
|-----------------------|--|-----------------------|
| Abb. Ship.            | Abbott on Shipping.                      |                       |
| Ad. Eject.            | Adams on Ejectment.                      |                       |
| Adol. & Ellis.        | Adolphus and Ellis's Reports.            | King's Bench.         |
| Alcock & Napier.      | Alcock & Napier's Reports.               | Irish King's Bench.   |
| Amb.                  | Ambler's Reports.                        | Chancery.             |
| Anst.                 | Anstruther's Reports.                    | Exchequer.            |
| Bayl. Bills.          | Bayley on Bills.                         |                       |
| B. & A.               | Barnewall & Alderson's Reports.          | King's Bench.         |
| B. & Adol.            | Barnewall & Adolphus's Reports.          | King's Bench.         |
| B. & C.               | Barnewall & Cresswell's Reports.         | King's Bench.         |
| Bing.                 | Bingham's Reports.                       | Common Pleas.         |
| Bing. N. R.           | Bingham's Reports, New Series.           | Common Pleas.         |
| Bligh.                | Bligh's Reports.                         | House of Lords.       |
| Bligh N. S.           | Bligh's Reports, New Series.             | House of Lords.       |
| B. & P.               | Bosanquet & Puller's Reports.            | Common Pleas.         |
| Bott's P. L.          | Bott's Poor Laws.                        |                       |
| B. & B.               | Broderip & Bingham's Reports.            | Common Pleas.         |
| Bro. C. C.            | Browne's Chancery Cases.                 | Chancery.             |
| Bro. P. C.            | Browne's Cases in Parliament.            | House of Lords.       |
| Buck.                 | Buck's Reports.                          | Bankruptcy.           |
| Bull. N. P.           | Buller's Law of Nisi Prius.              |                       |
| Burr.                 | Burrow's Reports.                        | King's Bench.         |
| Burr. S. C.           | Burrow's settlement Cases.               | King's Bench.         |
| Cald.                 | Caldecott's Settlement Cases.            | King's Bench.         |
| C. & J.               | Crompton & Jervis's Reports.             | Exchequer.            |
| C. & M.               | Crompton & Meeson's Reports.             | Exchequer.            |
| C., M., & Ros.        | Crompton, Meeson, & Roscoe's Reports.    | Exchequer.            |
| C. & P.               | Carrington & Payne's Nisi Prius Reports. | K. B. & C. P.         |
| Camp.                 | Campbell's Nisi Prius Reports.           | K. B. & C. P.         |
| Car. C. L.            | Carrington's Criminal Law.               |                       |
| Clark & Fin.          | Clark & Finnely's Reports.               | House of Lords.       |
| Chit.                 | Chitty's Reports.                        | King's Bench.         |
| Coop. C. C.           | Cooper's Reports.                        | Chancery.             |
| Cox.                  | Cox's Reports.                           | Chancery.             |
| Cowp.                 | Cowper's Reports.                        | King's Bench.         |
| Daniel.               | Daniel's Reports.                        | Exchequer.            |
| Deac. & Chit.         | Deacon & Chitty's Reports.               | Bankruptcy.           |
| Dougl.                | Douglas's Reports.                       | King's Bench.         |
| Dow.                  | Dow's Reports.                           | House of Lords.       |
| Dowl. P. C.           | Dowling's Practice Cases.                | K. B., C. P., & Exch. |
| Dow & Clark.          | Dow & Clark's Reports.                   | House of Lords.       |
| D. & R.               | Dowling & Ryland's Reports.              | King's Bench.         |
| D. & R. N. P. C.      | Dowling & Ryland's Nisi Prius Reports.   | King's Bench.         |
| East.                 | East's Reports.                          | King's Bench.         |
| East, P. C.           | East's Pleas of the Crown.               |                       |
| Eden.                 | Eden's Reports.                          | Chancery.             |
| Esp.                  | Epinasse's Nisi Prius Reports.           | K. B. & C. P.         |
| Forrest.              | Forrest's Reports.                       | Exchequer.            |
| Glyn & J.             | Glyn & Jameson's Reports.                | Bankruptcy.           |
| Gow.                  | Gow's Nisi Prius Reports.                | Common Pleas.         |
| H. Black.             | Henry Blackstone's Reports.              | Common Pleas.         |

| <i>Abbreviations.</i> | <i>Name of Reporter.</i>               | <i>Name of Court.</i> |
|-----------------------|--|-----------------------|
| Holt.                 | Holt's Nisi Prius Reports.             | Common Pleas.         |
| Hull. Costa.          | Hullock on the Law of Costa.           |                       |
| Jacob.                | Jacob's Reports.                       | Chancery.             |
| J. & W.               | Jacob & Walker's Reports.              | Chancery.             |
| Ld. Ken.              | Lord Kenyon's Notes of Cases.          | King's Bench.         |
| Leach, C. C.          | Leach's Crown Cases.                   |                       |
| Lofft.                | Lofft's Reports.                       | King's Bench.         |
| Madd.                 | Maddock's Reports.                     | Chancery.             |
| Marsh.                | Marshall's Reports.                    | Common Pleas.         |
| Marsh. Ins.           | Marshall on Insurance.                 |                       |
| M. & M.               | Moody & Malkin's Reports.              | K. B. & C. P.         |
| M. & R.               | Manning & Ryland's Reports.            | King's Bench.         |
| M. & Rob.             | Moody & Robinson's Nisi Prius Reports. | K. B., C. P., & Exch. |
| M. & P.               | Moore & Payne's Reports.               | Common Pleas.         |
| M. & S.               | Maule & Selwyn's Reports.              | King's Bench.         |
| MClel.                | MClelland's Reports.                   | Exchequer.            |
| MClel. & Y.           | MClelland's & Younge's Reports.        | Exchequer.            |
| Mer.                  | Merivale's Reports.                    | Chancery.             |
| Mont.                 | Montague's Reports.                    | Bankruptcy.           |
| Mont. & Ayr.          | Montague & Ayrton's Reports.           | Bankruptcy.           |
| Mont. & Bligh.        | Montague & Bligh's Reports.            | Bankruptcy.           |
| M. & Scott.           | Moore & Scott's Reports.               | Common Pleas.         |
| Moore.                | J. B. Moore's Reports.                 | Common Pleas.         |
| Mylne & K.            | Mylne & Keen's Reports.                | Chancery.             |
| N. R.                 | Bosanquet & Fuller's New Reports.      | Common Pleas.         |
| Nev. & M.             | Neville & Manning's Reports.           | King's Bench.         |
| Nolan.                | Nolan's Reports.                       | King's Bench.         |
| Park, Ins.            | Park on Insurance.                     |                       |
| Peake.                | Peake's Nisi Prius Reports.            | King's Bench.         |
| Peake's Add. Cas.     | Peake's Additional Cases.              | K. B., C. P., & Exch. |
| Phil. Evid.           | Phillips on Evidence.                  |                       |
| Price.                | Price's Reports.                       | Exchequer.            |
| Rose.                 | Rose's Reports.                        | Bankruptcy.           |
| Russ.                 | Russell's Reports.                     | Chancery.             |
| Russ. & Mylne.        | Russell & Mylne's Reports.             | Chancery.             |
| Russ. C. & M.         | Russell on Crimes and Misdemeanours.   |                       |
| R. & R. C. C.         | Russell & Ryan's Crown Cases.          |                       |
| R. & M.               | Ryan & Moody's Nisi Prius Reports.     | K. B. & C. P.         |
| R. & M. C. C.         | Ryan & Moody's Crown Cases.            |                       |
| Sim.                  | Simon's Reports.                       | Chancery.             |
| Sim. & Stu.           | Simon & Stuart's Reports.              | Chancery.             |
| Selw. N. P.           | Selwyn's Law of Nisi Prius.            |                       |
| Smith.                | Smith's Reports.                       | King's Bench.         |
| Stark.                | Starkie's Nisi Prius Reports.          | K. B. & C. P.         |
| Swans.                | Swanston's Reports.                    | Chancery.             |
| Taunt.                | Taunton's Reports.                     | Common Pleas.         |
| T. R.                 | Term Reports.                          | King's Bench.         |
| Tidd's Prac.          | Tidd's Practice.                       |                       |
| Turn. & Russ.         | Turner & Russell's Reports.            | Chancery.             |
| Tyr.                  | Tyrwhitt's Reports.                    | Exchequer.            |
| Ves. jun.             | Vesey, junior's, Reports.              | Chancery.             |
| Ves. & B.             | Vesey & Beame's Reports.               | Chancery.             |
| Wightw.               | Wightwick's Reports.                   | Exchequer.            |
| Wils.                 | Wilson's Reports.                      | K. B. & C. P.         |
| Wils. C. C.           | Wilson's Chancery Cases.               | Chancery.             |
| Wils. Exch.           | Wilson's Exchequer Reports.            | Exchequer, Equity.    |
| Woodf. L. & T.        | Woodfall's Law of Landlord and Tenant. |                       |
| W. Black.             | Sir Wm. Blackstone's Reports.          | K. B. & C. P.         |
| Y. & J.               | Younge & Jervis's Reports.             | Exchequer.            |
| Younge.               | Younge's Reports.                      | Exchequer, Equity.    |

# CHRONOLOGICAL LIST

OF

## REPORTS, &c. COMPRISED IN THIS DIGEST.

### IN THE HOUSE OF LORDS.

|                                  |                                     |                           |
|----------------------------------|-------------------------------------|---------------------------|
| Brown's Reports—G. 2 to 40 G. 3. | Bligh—58 Geo. 3 to present time.    | Clark & Finnelley—1 Will. |
| Dow—53 Geo. 3 to 58 Geo. 3       | Dow & Clark, 8 Geo. 4 to 1 Will. 4. | 4 to the present time.    |

### KING'S BENCH.

|  |   |
|--|---|
| Wilson's Reports—16 Geo. 2 to 26 Geo. 2.       | Adolphus & Ellis—4 Will. 4 to present time.         |
| Sir William Blackstone—20 Geo. 2 to 10 Geo. 3. | Dowling & Ryland—3 to 8 Geo. 4.                     |
| Burrow—30 Geo. 2 to 12 Geo. 3.                 | Manning & Ryland—8 Geo. 4 to 3 Will. 4.             |
| Lofft—12 to 14 Geo. 3.                         | Neville & Manning—3 Will. 4 to the present time.    |
| Cowper—14 to 18 Geo. 3.                        | Chitty—various periods from 1770 to 1822.           |
| Douglas—18 to 25 Geo. 3.                       | Smith—44 to 46 Geo. 3.                              |
| Term Reports—25 to 40 Geo. 3.                  | Burrow's Settlement Cases—6 & 7 Geo. 2 to 8 Geo. 3. |
| East—40 to 53 Geo. 3.                          | Caldecott's Ditto—17 to 27 Geo. 3.                  |
| Mauks & Selwyn, 53 to 57 Geo. 3.               | Kenyon's notes—26 to 32 Geo. 2.                     |
| Barnwall & Alderson—57 Geo. 3 to 3 Geo. 4.     | Nolan—32 to 34 Geo. 3.                              |
| Barnwall & Cresswell—3 to 11 Geo. 4.           |   |
| Barnwall & Adolphus—11 Geo. 4 to 4 Will. 4.    |   |

### COMMON PLEAS.

|  |  |
|--|--|
| Wilson's Reports—26 Geo. 2 to 14 Geo. 3. | Marshall—54 to 57 Geo. 3.                    |
| Sir William Blackstone—10 to 20 Geo. 3.  | Moore—57 Geo. 3 to 8 Geo. 4.                 |
| H. Blackstone—28 to 36 Geo. 3.           | Moore & Payne—8 Geo. 4 to 1 Will. 4.         |
| Bosanquet & Fuller—36 to 44 Geo. 3.      | Moore & Scott—1 Will. 4 to the present time. |
| New Reports—44 to 47 Geo. 3.             | Broderip & Bingham—59 Geo. 3 to 3 Geo. 4.    |
| Taunton—47 to 59 Geo. 3.                 | Bingham—3 Geo. 4 to the present time.        |

### EXCHEQUER.

|                                       |   |
|---------------------------------------|---|
| Anstruther's Reports—32 to 37 Geo. 3. | Younge & Jervis—7 to 10 & 11 Geo. 4.                      |
| Forrest—41 Geo. 3.                    | Crompton & Jervis—10 & 11 Geo. 4 to 3 Will. 4.            |
| Wightwick—50 & 51 Geo. 3.             | Crompton & Meeson—3 to 4 Will. 4.                         |
| Price—54 Geo. 3 to 5 Geo. 4.          | Crompton, Meeson, & Roscoe—4 Will. 4 to the present time. |
| McClelland—4 & 5 Geo. 4.              | Tyrwhitt—1 Will. 4 to the present time.                   |
| McClelland & Younge—5 to 7 Geo. 4.    |   |

### NISI PRIUS.

|                                       |   |
|---------------------------------------|---|
| Peake's Reports—30 to 35 Geo. 3.      | Moody & Robinson—1 Will. 4 to the present time. |
| Espinasse—33 to 47 Geo. 3.            | Holt—55 to 58 Geo. 3.                           |
| Campbell—47 to 56 Geo. 3.             | Gow—58 & 59 Geo. 3.                             |
| Starkie—54 Geo. 3 to 4 Geo. 4.        | Carrington & Payne—3 Geo. 4 to present time.    |
| Ryan & Moody—5 Geo. 4.                | Dowling & Ryland's Nisi Prius Cases—3 Geo. 4.   |
| Moody & Malkin—8 Geo. 4 to 1 Will. 4. |   |

### MS. CASES IN

|                                |                        |                               |
|--------------------------------|------------------------|-------------------------------|
| Abbott on the law of Shipping. | Buller's Nisi Prius    | Phillipps on Evidence.        |
| Adams on ejectment.            | Hullock on Costs.      | Selwyn's Nisi Prius.          |
| Bayley on Bills.               | Marshall on Insurance. | Tidd's Practice.              |
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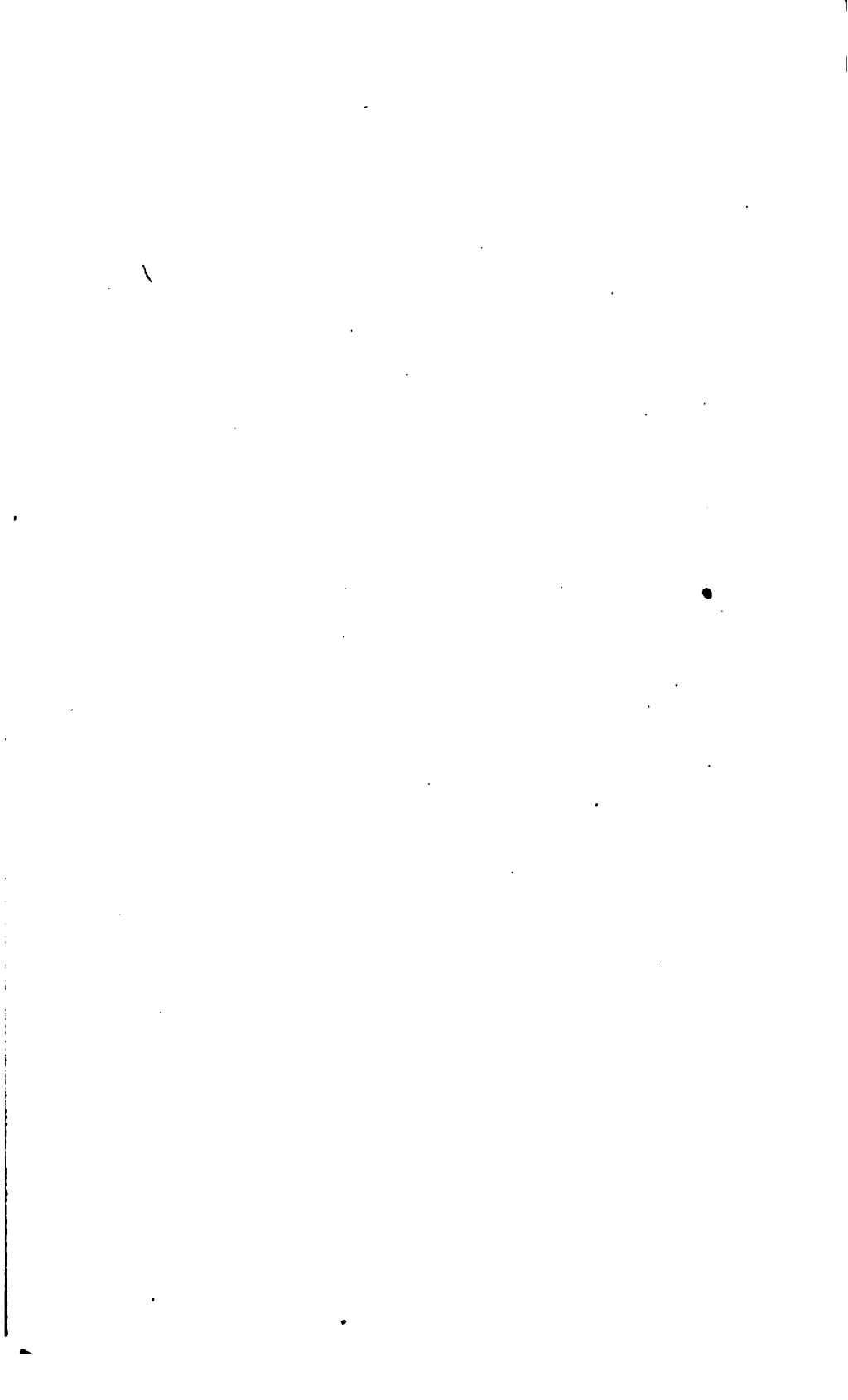
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# ANALYTICAL

## DIGEST OF REPORTS.

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### ABATEMENT.

- I. OF ACTION.—See ACTION.
- II. OF PROCEEDINGS IN BANKRUPTCY.—See BANKRUPT.
- III. OF NUMERICAL.—See CASE—WAY.
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### ACCIDENT.

- I. LIABILITY IN CONSEQUENCE OF.
- II. TO SERVANTS.—See MASTER AND SERVANT.
- III. TO PAUPERS.—See POOR.

#### I.—LIABILITY IN CONSEQUENCE OF.

A merely accidental involuntary trespass may be justified. *Beckwith v. Shordike*, 4 Burr. 2092. If, in the prosecution of a lawful act, an accident, which is purely so, arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*, 2 Chit. 639.

But it seems otherwise where any blame is imputable, though a person be innocent of any intention to injure; as, if he drives a spirited horse improperly, or uses imperfect harness, and the horse takes fright and kills another. *Wakeman v. Robinson*, 8 Moore, 63; 1 Bing. 213.

The court of C. P., however, refused to grant a new trial, although the judge, after summing up the evidence, told the jury that the defendant was liable even though the accident was unavoidable, and no blame was imputable to him, omitting to direct them to consider whether the accident was unavoidable or not. *Id.*

Where A., by the wrongful act of B., loses his presence of mind, and, in consequence, runs into danger, and receives an injury from the act of B.:—Held, that the latter is not protected by a warning given to A. immediately before the accident; and that an action would lie for the injury sustained. *Wooley v. Scovell*, 3 M. & R. 105.

In an action of trespass for injury done to a horse by a pony and chaise running against it, it was sworn, on the part of the defendant, that his wife was holding the pony by the bridle, and

a showman came by and frightened the pony, who ran off with the chaise:—Held, that, if true, this was a good defence on a plea of not guilty. *Goodman v. Taylor*, 5 C. & P. 410. Denman.

### ACCOMPLICE.—See CRIMINAL LAW.

### ACCORD AND SATISFACTION.

Accord without satisfaction cannot be pleaded alone to a deed. *Parker v. Ramabottom*, 5 D. & R. 138; 3 B. & C. 257.

Where to a declaration in assumpsit by the assignees of a bankrupt to recover 1000*l.* had and received by the defendant before the bankruptcy, he pleaded, that, on an account stated between him and the bankrupt before the bankruptcy, the former was found to be indebted to the bankrupt in the sum of 400*l.*, for which said sum of 400*l.* the bankrupt drew a bill of exchange upon the defendant, payable to him or his order, which the defendant accepted for and on account of the said several promises in the declaration mentioned, and returned it to the bankrupt, whereby the defendant became, and was, and still is, liable to pay the said sum of 400*l.* to the bankrupt or his order, or to his assignees or their order: and the plaintiff replied, that, before the bankruptcy, the bill became due, and was presented to and refused payment by the defendant, who still refused to pay the same to the assignees:—Held, on a general demurrer to the replication, that the defendant's plea was no answer to the action, as it was pleaded to the whole of the demand, and the giving a bill for 400*l.* was not a legal satisfaction of 1000*l.*, being the amount of the debt claimed. *Thomas v. Heathorne*, 3 D. & R. 647; 2 B. & C. 477; and see *Roules v. Lusty*, 4 Bing. 428; 1 M. & P. 102.

So, where the defendant pleaded a payment in discharge and satisfaction, and the plaintiff replied a writ sued out before such payment, the plea was held bad on demurrer, because it did not allege the payment to have been made in discharge of the costs and damages as well as of the promises, and it appeared upon the record that the plaintiff had still a cause of action un-

satisfied. *Francis v. Crywell*, 1 D. & R. 546; 5 B. & A. 886.

An account stated is no plea to the demand of a debt of the same nature. *Roades v. Barnes*, 1 Burr. 9; 1 Ld. Ken. 391; *S. C. nom. Rolls v. Barnes*, 1 W. Black, 65; *S. P. Adderly v. Evans*, 1 Ld. Ken. 250.

A note of hand cannot be pleaded in bar to an action upon simple contract, though a bond may; but not one bond to another. *Id.*

A bill taken for an antecedent debt without indorsement, proving bad, the antecedent debt may be resorted to. Otherwise, if the bill is discounted without indorsement, and no antecedent debt. *Ex parte Blackburne*, 10 Ves. jun. 206.

B. and C. being jointly indebted to A., the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce the plaintiff's demand if he gained a verdict, and proposed to put an end to the action by paying part of the debt, and the costs of suit. This was acceded to, and a receipt given for the sum paid, which was stated to be for debt and costs in that action. A. afterwards sued C.:—Held, that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B., and, therefore, it was no defence for C. *Walters v. Smith*, 2 B. & Adol. 889.

A. and B., brothers, were principal and surety in an annuity bond. By an agreement afterwards executed by them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property was made among the three, and the annuity bond was declared to be B.'s (the surety's) debt:—Held, that this agreement (whether subsequently acted upon or not (was a binding accord between A. and B., and that B.'s administrator, having been obliged to pay arrears of the annuity, could not recover them from A. *Cartwright v. Cooke*, 3 B. & Adol. 701.

### ACCOUNT.

In an action of account, nothing can be pleaded before auditors contrary to what has been pleaded to the action, and been found by verdict: therefore, where defendant, charged as surviving bailee of goods delivered to him and his co-bailee to be merchandized, and to render an account, goes to issue upon the question, whether, upon his delivering over the goods to the deceased bailee, his concern in the trust thereof ceased, and the issue is found against him, he cannot afterwards plead before auditors, that he delivered the goods to his co-bailee with the plaintiff's consent; for, this might have been given in evidence on the issue. *Godfrey v. Saunders*, 3 Wils. 73, 94.

Two principal officers of the court of K. B. were appointed auditors, on motion, after judgment of quod computet. *Smith v. Smith*, 2 Chit. 10; *S. P. Archer v. Pritchard*, 3 D. & R. 596.

The rule to appoint auditors is absolute in the first instance. *Archer v. Pritchard*, 3 D. & R. 596.

The defendant cannot pay money into Court. *Anon.* Bull. N. P. 128. Willea. See *Tomkins v. Wiltshire*, 1 Marsh. 115; 5 Taunt. 431.

### ACCOUNT STATED—See ASSUMPSIT.

### ACCOUNTANT GENERAL.

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## IX. CONSOLIDATION OF ACTION.—See PRACTICE.

## X. COMPOUNDING PENAL ACTIONS.—See PRACTICE.

## XI. SUITS FOR INJUNCTION.—See INJUNCTION.

## 1. BY AND AGAINST WHOM MAINTAINABLE.

1. *Judicial Persons.*

An action lies against the judge of an ecclesiastical court, who has acted beyond the jurisdiction of the court: as, where a party was excommunicated for refusing to obey an order of the ecclesiastical court, which it had no authority to make, or where the party had not been previously served with a citation or monition, nor had due notice of the order. *Beaurain v. Scott*. 3 Camp. 388. *Ellenborough*.

An action was held not to lie against the vicar-general of the bishop for excommunicating plaintiff for contumacy, in not taking upon him administration of an intestate's effects, to whom plaintiff was next of kin, and had intermeddled with the goods, &c., although the citation by which plaintiff was cited was void, by reason that it required him to appear and take administration, &c., without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for, the vicar-general had jurisdiction over the subject-matter, viz. the granting administration, and there was no malice. *Ackerley v. Parkinson*, 3 M. & S. 411.

No action will lie against the judge of a court of record (a coroner), for an act done by him in his judicial capacity. *Garnett v. Ferrand*, 6 B. & C. 611; 9 D. & R. 657.

Where a sheriff issues a warrant of execution in his judicial character, as judge in a county court, he is not liable in an action, for the act of the bailiff. *Tinsley v. Nassau*, M. & M. 52; 2 C. & P. 582. *Best*.

Therefore an action will not lie against a sheriff, where his bailiff took the goods of a wrong person under a warrant issued by him in his judicial character. *Id.*

The steward of a court-baron is a judicial officer, and an action will not lie against him where his bailiff by mistake took the goods of B. under a precept commanding him to take in execution the goods of A. *Holroyd v. Breare*, and *Same v. Holmes*, 2 B. & A. 473.

The court of Chancery will stay proceedings in an action against its officers, where the question to be tried is, how far they have conducted themselves with propriety in the execution of its orders. *Ex parte Clarke*, 1 Russ. & Mylne, 563.

If the judgment of commissioners of appeal in

certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass. *Radnor (Earl) v. Reeve*, 2 B. & P. 391.

2. *Justices.*

An action will not lie against a magistrate for any thing done under a conviction, unless there is an entire want of jurisdiction. *Fawcett v. Foulis (Bart.)* 7 B. & C. 394; 1 M. & R. 102.

Nor for any thing done by him in the discharge of his duty, unless he be made acquainted with every fact necessary to enable him to determine when called upon to act. *Pike v. Carter*, 10 Moore, 376; 3 Bing. 78.

Thus, an action of trespass does not lie against justices acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend. *Louther v. Radnor (Earl)*, 8 East, 113.

If a person be charged on oath before a magistrate, with an offence amounting to felony, and he issues his warrant; and, on the party being brought before him, the charge is substantiated, and the offender is committed to prison, the magistrate committing is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. *Mills v. Collett*, 3 M. & P. 242; 6 Bing. 85.

Where, therefore, a party was charged under the statute 7 & 8 Geo. 4, c. 30, s. 19, with having maliciously cut down a tree adjoining a dwelling-house, and was committed to prison as a felon; and the party laying the information did not prosecute:—Held, that the magistrate was not liable in trespass although it appeared on the face of the depositions upon which the person was committed, that he was the occupier of the land on which the tree grew. *Id.*

An action does not lie against justices of peace, for refusing a licence to keep an inn or an alehouse. *Bassett v. Godschall*, 3 Wils. 121.

Two magistrates having, at a landlord's request, given possession of a dwelling-house as deserted and unoccupied, pursuant to the 11 Geo. 2, c. 19, s. 16, the judges of assize of the county, on appeal, made an order for the restitution of the farm to the tenant, with costs. The latter brought an action of trespass for the eviction, against the magistrates, the constables, and the landlord:—Held, that the proceeding before the magistrates was an answer to the action on behalf of all the defendants. *Ashcroft v. Bourne*, 3 B. & Adol. 684.

A single magistrate is not liable to pay for the expenses incurred in preparing plans for a county jail advertised for by the sessions of which he was one. *Tuck v. Ruggles*, 5 Esp. 237. *Mansfield*.

By an act of parliament for rebuilding a bridge, justices of peace were empowered to contract for its erection, and the contractor was to give sufficient security for the due performance of his contract to the clerk of the peace; and the

justices were empowered to appoint superintending justices at a general quarter sessions. The expenses of rebuilding the bridge were to be charged on the county rates, and all actions or proceedings at law, to be prosecuted or defended in pursuance of the act, were to be brought in the name of the clerk of the peace, who should be deemed the plaintiff or defendant, and be reimbursed all such costs and expenses as he should have paid, out of the money arising by virtue of the act. The superintending justices at the general sessions covenanted by deed with the plaintiff, who undertook to rebuild the bridge, that the justices or the treasurer of the county should pay him a certain sum by instalments, until the bridge was completed. In an action of covenant brought against such justices by the plaintiff for non-payment of two of the instalments:—Held, that they were not individually liable; and that his remedy was by action against the clerk of the peace. *Allen v. Waldegrave*, 2 Moore, 621.

### 3. Foreign States and Governments.

*Quære*, whether a foreign sovereign can sue in a municipal court of this country. *Barclay v. Russell*, 3 Ves. jun. 431.

A bill in the court of Chancery cannot be maintained by a sovereign prince in India against the East India Company, for an account of monies, &c. paid. *Nabob of Arcot v. East India Company*, 4 Bro. C. C. 180.

*Quære*, whether a foreign state not acknowledged by this country can maintain a suit here for stock vested in trustees by the former government. *Dolder v. Huntingfield*, 11 Ves. jun. 283.

A foreign state may sue in the court of Chancery; but, where a bill was filed by "The Government of the State of Colombia and Don M. I. Hurtado, a citizen of that state, and minister plenipotentiary from the same to the court of his Britannic Majesty, and residing at 33, Baker Street, Portman Square, in the county of Middlesex, a general demurrer was allowed to the bill, because the description of the plaintiff did not enable the defendants to know upon whom process was to be served, in case a cross bill were filed. *Colombian Government v. Rothschild*, 1 Sim. 94.

### 4. Government Officers.

It is clear that a suit may be maintained against a public officer, having in his hands money issued by government for the use of an individual, for the recovery of such money. *Priddy v. Rose*, 3 Mer. 102.

But an action cannot be maintained against the secretary at war, by a retired clerk of the war office, for his retired allowance, on the grounds that the secretary is only chargeable in his public and official character; and that an action cannot be maintained against him as such, for any thing done by him in that character, although it may amount to a breach of employment; as it would tend to expose him to an infinite number of actions, to be brought by any persons who

might suppose themselves aggrieved; although he may have received the money applicable to such specific purposes. *Gidley v. Palmerston* (Lord) 7 Moore, 91; 3 B. & B. 275.

An action of trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for an injury committed by him in Minorca. *Mostyn v. Fabrigas*, Cowp. 161.

An officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. *Macbeath v. Haldimand*, 1 T. R. 172.

Nor even when contracting by deed, on account of government, is he personally answerable. *Unwin v. Walsely*, 1 T. R. 674. See *Thompson v. Pearce*, 1 B. & B. 25.

In one case, however, a person entering into a charter party in his own name, on the behalf of government, was held to be personally liable. *Cunningham v. Collier*, 4 Dougl. 233.

No action lies against the commander of a British ship of war for seizing and detaining a vessel on suspicion of her being hostile prize: though he afterwards dismiss her without libelling her in the court of Admiralty; and though he detain her partly on suspicion of matters which are merely causes of forfeiture if she is British. *Faith v. Pearson*, 6 Taunt. 439; 2 Marsh. 133; 4 Camp. 357; Holt, 113.

If a ship be seized as forfeited under the Navigation Act (12 Car. 2, c. 18), by a governor of a foreign country belonging to Great Britain, the owner cannot maintain trespass against the party seizing, although the latter do not proceed to condemnation; for, by the forfeiture, the property is divested out of the owner. *Wilkins v. Despard*, 5 T. R. 112.

### 5. Public Commissioners, &c.

Where the acts of commissioners, appointed by a paving act, occasion a damage to an individual without any excess of jurisdiction on their part, the commissioners, or pavors acting under them, are not liable to an action. *British Cast Plate Glass Manufacturers v. Meredith*, 4 T. R. 794.

Where a company has been intrusted by the legislature with the execution of a power from which mischief may result, it is bound to take especial precaution to guard against such mischief, and in default is responsible in damages. *Weld v. Gas Light Company*, 1 Stark. 189. *Ellenborough*.

An action may be maintained against an incorporated water works company, where workmen employed by persons who contract with the company to lay down pipes for conducting water through a public street, do the work in a negligent manner, whereby an individual passing along the street receives an injury. *Matthews v. West London Water Works Company*, 3 Camp. 403. *Ellenborough*.

An action lies against the commissioners under a paving act for raising the street, and there-

by injuring plaintiff's houses. *Leader v. Maxon*, 3 Wils. 461.

Clerks to commissioners, under a lighting and paving act, intrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence of artificers and labourers employed under their authority. *Hall v. Smith and Billington v. Same*, 9 Moore, 226; 2 Bing, 156.

Where trustees, under the general Turnpike Act, 3 Geo. 4, c. 126, by improving the course of a public road, had effected a consequential injury to a private individual whose estate abutted on the road:—Held, that they were not liable to an action, it appearing that they had not exceeded the authority given them by the statute. *Bolton v. Croxther*, 4 D. & R. 195; 2 B. & C. 703.

The trustees of a public road, who were empowered and required by act of parliament to place lamps along the road, if they should think necessary, and to make contracts for the cleansing of the road, and to take a night toll for the purpose of enabling them to light and watch the same, were held not liable in an action upon the case for an injury suffered by an individual in crossing the road at night, by falling over a heap of scrapings left on the road side after cleansing the road, without any lights. *Harris v. Baker*, 4 M. & S. 27.

Trustees of a turnpike road are not liable in damages for any injury occasioned by the negligence of contractors, or others employed under them in the performance of public works on the road, unless they personally interfere in the management of the works. *Humphreys v. Mears*, 1 M. & R. 187.

*Quere*, what degree of personal interference would be sufficient to render them so liable. *Id.*

One who, in the exercise of a public function, without emolument, which he is compellable to execute, acting without malice, and according to his best skill and diligence, and obtaining the best information he can, does an act which occasions consequential damage to a subject, is not liable to an action for such damage. *Sutton v. Clarke*, 6 Taunt. 29; 1 Marsh. 429: and see *Miller v. Seare*, 2 W. Black. 1141.

By a turnpike act, trustees were appointed with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. By the same act it was provided that all actions for any thing done in pursuance of the act, should be brought within six months after the doing of the thing complained of. A drain was cut by an order signed by a competent number of trustees and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter was overflowed. An action was brought against one of the trustees only, more than six months after the act done and the first injury sustained, but within six months after a subsequent injury accrued:—Held, first, that the action, if it could have been supported at all, was well brought against the defendant only; but, secondly, that the trustees, having acted to the best of their

skill and with the best advice, were not answerable for the damage which had accrued. *Id.*

The acting commissioners for making a brook navigable, with power to borrow money, &c. employed the plaintiff to do different parts of the works, and such of the commissioners as were present at the several meetings made orders relative thereto. Every one of them was present at some of the meetings, but no one was present at all the meetings. The fund proving deficient,—Held, all the acting commissioners were personally liable to pay plaintiff. *Horsley v. Bell*, Amb. 778.

#### 6. Other public persons.

Under an act of 50 Geo. 3, c. 149, by which the trustees are empowered to sue and be sued in the name of their treasurer for the time being, where the trustees have been changed since the cause of action accrued and new treasurers have been appointed since the change, an action can be maintained in the name of the new treasurers; the act of parliament providing that actions may be brought by the treasurer for the time being, and that they shall not abate or be discontinued by his death or removal, and that the treasurer for the time being shall always be deemed plaintiff or defendant in every action. *Whitmore v. Wilks*, M. & M. 214. Tenterden. Rule for new trial refused. *Id.*

Plaintiff, clerk to commissioners of paving, drew up a contract for paving, of which contract defendant, the contractor, was, by agreement, to pay the expense: defendant offered to execute the contract, but refused to pay plaintiff's charges, as unreasonable; plaintiff refused to allow the contract to be executed until his charges were paid. Under an act authorizing the commissioners to sue by their clerk:—Held, that he could not sue as such clerk for these charges. *Curling v. Johnson*, 10 Bing. 89; 3 M. & Scott.

If certain commissioners under a private act of parliament may sue and be sued by their clerk, it is not necessary at the trial of an action brought in the name of the clerk, to prove that he sues by their authority. *Truwhitt v. Depree*, 2 C. & P. 557. Abbott.

If a builder do work at an intended hospital on the order of the physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only. *Pink v. Scudamore*, 5 C. & P. 71. Tindal.

The subscribers who attend a committee for managing the concerns of an hospital, are liable to the creditors of the hospital; and the proper question for the consideration of the jury is, whether the defendant had so acted as to induce the plaintiff to believe that he was to look to the defendant and the other members of the com-

mittee for payment. *Burle v. Smith*, 5 M. & P. 735; 7 Bing. 705.

No action on the case lies by the bailiff of a liberty,—such as the honor of Pontefract, in the county of York,—who has the execution and return of writs therein, against a party for suing out a writ of capias with a non omittas clause, without a prior writ of latitat first issued, and a return made, upon an allegation that it was wrongfully, injuriously, and deceitfully caused to be issued by him, to the damage of the bailiff in his office. *Carrett v. Smallpage*, 9 East, 330.

In trespass, for throwing down a stack of chimneys, and thereby damaging plaintiff's house, defendant may justify that he was a fireman, and that the chimneys were in danger of falling on a public footpath, the adjoining house having been burnt down. *Dewey v. White*, M. & M. 56. Best.

## II.—FOR WHAT MAINTAINABLE.

### 1. Judgments and Decrees.

*Judgments and Decrees of Superior Courts.*—If an action be brought on a judgment, which is irregular, the whole proceedings may be set aside in one rule. *Barlow v. Kaye*, 4 T. R. 688.

Action on a judgment may be stayed on payment of the sum recovered, and costs, without interest, although the defendant absconded for seven years since the judgment. *Thomas v. Edwards*, 2 Anst. 558.

In an action on a judgment obtained in an action on a former judgment, execution shall be stayed after the third judgment, on the defendant paying into court the debt and costs recovered on the second. *Simpson v. Stone*, 2 W. Black. 785.

But the action of debt on a judgment is not to be favoured. *Biddleston v. Whitel*, 1 W. Black. 507.

An action is not maintainable on a decree in equity for the payment of interest on purchase-money and the costs of a bill for a specific performance. *Carpenter v. Thornton*, 3 B. & A. 52.

Nor on a mere interlocutory order. *Fry v. Malcolm*, 4 Taunt. 705; *S. P. Biddle v. Dowse*, 9 D. & R. 404.

*Judgments of Foreign Courts.*—An action is not maintainable on a colonial judgment, unless it appear that the defendant was regularly served with process, and had an opportunity of defending the suit, even although it appear to be the practice of that court not to give a personal notice. *Buchanan v. Rucker*, 9 East, 192; 1 Camp. 65.

For, the law will not raise an assumpsit upon such a judgment obtained by default against a party who, upon the face of the proceedings, appeared only to have been summoned by mailing up a copy of the declaration at the court-

house door; it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time the suit commenced and afterwards, although, by a law of the colony, if a defendant be absent from the island, and without an attorney, manager, or overseer there, such mode of summoning him shall be deemed a good service. *Id.*

An action will not lie in the courts of Westminster upon a judgment of a foreign court, unless it clearly appear by the transcript of the proceedings that the defendant was subject to the jurisdiction of the foreign court, and that the judgment pronounced against him was final, and for a definite sum. *Obicini v. Bligh*, 1 M. & Scott, 477; 8 Bing. 335, overruling *Malony v. Gibbons*, 2 Camp. 504.

*Semble*, that a decree of a vice-admiralty court, called an "interlocutory," is in effect final; and that such a decree, requiring a party to pay a certain sum, may be enforced in the courts at Westminster. *Id.*

Quære, whether a judgment obtained in a prize court by the agent of a foreign power, against a native of this country, can be enforced here by the personal representative of such agent? *Id.*

An action is maintainable without declaring upon or proving the cause of action upon which judgment was given. *Crawford v. Whittall*, 1 Dougl. 4, n.; Lofft, 154.

Or the ground of the judgment. *Walker v. Witter*, 1 Dougl. 1.

Unless the contrary be shown, the court will presume that the decision in a foreign judgment is consonant to the justice of the case. *Arnott v. Redfern*, 3 Bing. 353; 11 Moore, 209; 2 C. & P. 88.

An action of debt will lie upon the decree of a colonial court of equity, for the balance of an account between partners. And, in such an action, the court will look at the substance, without regarding the form of the proceedings upon which the decree is founded. *Henley v. Soper*, 2 M. & R. 153; 6 B. & C. 16.

In assumpsit on two judgments recovered in the supreme court of Jamaica, copies of the judgments, purporting to be signed by the clerk of the court, and certified by him to be true copies, accompanied by a certificate of a notary public of his being clerk of the said court, and by another certificate of the governor, under the seal of the island, that the person so certifying was a notary public, were held to be inadmissible evidence to prove the judgments. *Appleton v. Braybrook*, (Lord), 6 M. & S. 34.

A foreign judgment cannot be questioned in the courts of Chancery in this country. Therefore, a bill for a discovery and a commission to examine witnesses abroad, in aid of the plaintiff's defence to an action brought in this country on a foreign judgment, is demurrable. *Martin v. Nicolls*, 3 Sim. 458.

In covenant to indemnify plaintiff from all debts due from the late partnership of plaintiff,

defendant, and D. B., and from all suits, &c.: proof, on a copy of the proceedings in a foreign court in a suit there instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer, per quod a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, &c. was held to be conclusive against defendant: and that defendant was not at liberty to show that the proceedings were erroneous. *Turleton v. Turleton*, 4 M. & S. 20.

Assumpsit will not lie on a decree of a foreign court whereby the defendant is ordered to pay a certain sum of money to the plaintiff on a certain day, first deducting thereout the defendant's costs to be taxed by the proper officer, where the defendant's costs have not been taxed either at his own request or upon an ex parte proceeding at the instance of the plaintiff. *Saddler v. Robins*, 1 Camp. 253. Ellenborough.

To render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shown clearly and unequivocally to be so. *Becquet v. Mac Carthy*, 2 B. & Adol. 951.

Where the law of a British colony required that, in a suit instituted against an absent party, the process should be served upon the king's Attorney-General in the colony; but it was not expressly provided that the Attorney-General should communicate with the absent party: Held, that such law was not so contrary to natural justice as to render void a judgment obtained against a party who had resided within the jurisdiction of the court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. *Id.*

Upon the effect of judgments in foreign courts, see *Phillips v. Hunter (in error)*, 2 H. Black. 40.

*Judgments of Irish and Scotch Courts.*—An action of assumpsit lies in the English superior courts on a Scotch judgment of horning against a Scotchman born, for a debt contracted in Scotland. *Douglas v. Forrest*, 4 Bing. 686; 1 M. & P. 663.

Assumpsit lies upon a judgment recovered in Ireland since the Union, as such judgment is not a record in England. *Harris v. Saunders*, 6 D. & R. 471; 4 B. & C. 411.

Quere, whether in an action upon an Irish judgment the grounds of such judgment are examinable by the courts here. *Guinness v. Carroll*, 1 B. & Adol. 459.

*Judgments of Inferior Courts.*—An action of debt lies upon a judgment of nonsuit in an inferior court. *Murray v. Wilson*, 1 Wils. 316.

No action will lie in the court of C. P. to recover costs ordered to be paid by a rule of an inferior court, in the course of a suit there, notwithstanding the defendant shall not be liable to an attachment of the inferior court by being re-

sident out of its jurisdiction. *Emerson v. Lashley*, 2 H. Black. 248.

## 2. General Equitable Jurisdiction.

Quere, whether one court of equity will prevent a party from suing in another court of equity. *Jackson v. Leaf*, 1 J. & W. 229.

It does not follow of course, that, because a plaintiff has a defence at law, he cannot come into a court of equity for relief. *Campbell v. French*, 2 Cox, 366.

A court of equity will not interfere in favour of a party who omits to avail himself of his legal remedy in due time. *Drewry v. Barnes*, 3 Russ. 94.

## 3. What destroys a Right of Action.

A right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done. *Willoughby v. Backhouse*, 4 D. & R. 539; 2 B. & C. 821; *S. P. Sells v. Hoare*, 8 Moore, 451; 1 Bing. 401; 1 C. & P. 28.

Acceptance of a less, cannot be a satisfaction in law of a greater sum than due: nor can it operate as an extinguishment of the original cause of action, though accompanied by a conditional promise to pay the residue when of ability. *Fitch v. Sutton*, 5 East, 230; 1 Smith, 415.

In actions on the case, satisfaction made to the plaintiff pending the suit, takes away the plaintiff's remedy. *Bird v. Randall*, 1 W. Black. 388.

And, if the plaintiff, in an action against several, accept satisfaction from one, and drop the action, it seems he cannot afterwards sue the others. *Dufresne v. Hutchinson*, 3 Taunt. 117.

One of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant on which bill judgment was recovered: Held, that such judgment was no bar to an action of covenant against the three, such bill not being averred to have been accepted as satisfaction, nor to have produced it in fact. *Drake v. Mitchell*, 3 East, 251.

A judgment by cognovit against one of the makers of a joint and several promissory note, and a levy of part under a fi. fa. is no discharge of the other. *Ayrey v. Davenport*, 2 N. R. 474.

A rule of court giving specific relief in a case where, by law, the party is not entitled to two different remedies, is a bar to an action for the same cause. *Cameron v. Reynolds*, Cowp. 406.

In an action for money had and received, if the defendant shew a deed of assignment of the money to himself, and a receipt indorsed, it is a good discharge, notwithstanding circumstances of suspicion. *Rowntree v. Jacob*, 2 Taunt. 141.

If A. be indebted to B. and pay such debt to the attorney of a person suing A. in B.'s name, but without his authority, A. is notwithstanding

obliged to pay B. again; and A.'s remedy is against the attorney, though such attorney conceived that he was acting at the time under the real authority of B. *Robson v. Eaton*, 1 T. R. 62.

A. having, in a compromise with a person who, by pretending to be his executor, had received a debt due from B. to A., allowed such debt, cannot afterwards sue B.: but otherwise, if the action be commenced before the compromise. *Jones v. Booth*, 2 Esp. 600. Eyre.

To an action on the case for unskilfully doing work, it is no defence that the defendant recovered in a former action for work and labour, which was the same for the unskilfulness of which the action is brought. *Sintzenick v. Lucas*, 1 Esp. 43. Kenyon.

But, where it was agreed between A. and B. that A., for certain commission, should ship a cargo of wheat of a specific quality, at a foreign port, for B., in England, and the wheat was found, upon its arrival, to be of an inferior quality, for which breach of the agreement, B. recovered damages against A. in an action:—Held, that A. could not afterwards maintain an action against B. for the commission, as his claim there-to might have been given in evidence in the former action, in reduction of damages. *Kist v. Atkinson*, 2 Camp. 63. Ellenborough.

If a plaintiff deposit a negotiable instrument on which he is suing, at the same time giving notice of the action, he does not thereby part with his right of action; and, if the depositary sues on the same instrument, the court of C. P. will not, at the instance of the defendant, stay the proceedings in the first action. *Semb.* that the court would restrain the depositary from suing on the instrument, on the ground that he, receiving it with notice of the suit then pending, must be considered as having consented that the first action shall proceed. *Marsh v. Newell*, 1 Taunt. 109.

The terms of compromise of a suit and an action, agreed upon out of court, and afterwards disregarded, cannot be enforced on a motion in the suit. *Forsyth v. Mantou*, 5 Madd. 78.

#### 4. Defence arising after Action brought.

Matter of defence arising after action brought cannot be pleaded in bar of the action generally, and therefore cannot be given in evidence under the general issue. *Lee v. Levy*, 6 D. & R. 475; 4 B. & C. 399; 1 C. & P. 553, 675.

But matter of defence arising after the action brought may be given in evidence, if it happen before plea pleaded, in cases where the special matter might be given in evidence under the general issue. *Sullivan v. Montague*, 1 Dougl. 106.

In actions by bill in the King's Bench, the defendant might, under the general issue, give in evidence matter (amounting to accord and satisfaction of the debt or damages and costs) which occurred after the issuing of the *latitat* and before declaration; and such matter was an answer

to the action. *Worwick v. Bewick*, 10 B. & C. 676.

#### 5. Former Recovery.

*In what cases.*—Quære, whether a replevin suit in an inferior court can be pleaded in bar to trespass in C. P. *White v. Willis*, 2 Wils. 87.

Where in an action of assumpsit improperly brought against an administratrix, she pleaded in abatement, that others were jointly liable, which she failed to prove, in consequence of which the plaintiff recovered a verdict with one shilling damages:—Held, that such a verdict did not amount to satisfaction, so as to bar the plaintiff from recovering against the other contractors. *Godson v. Smith (Bart.)*, 2 Moore 157.

One personal action not going on to judgment, is no bar to another for the same cause. *Hitchin v. Campbell*, 2 W. Black. 831; 3 Wils. 304; Lofft. 208.

Unless judgment be had on the merits. *Id.*

The having included a demand in a declaration for another cause of action, to which the evidence was confined on a writ of inquiry, and on which only the verdict was taken, will not prevent the plaintiff from bringing another action for the demand to which the evidence and verdict did not apply. *Seddon v. Tutop*, 6 T. R. 607; 1 Esp. 401.

It is no bar to an action for goods sold, that the plaintiff had in a previous action of assumpsit recovered one demand from the same defendant, and in which he might have recovered the present demand, but it was not made a subject of inquiry in the first action. *Id.*

*Aliter*, if the present demand were inquired into in the former action. *Id.*

A. brought an action for an attorney's bill against B., but only recovered a small sum for money lent, as there had been no bill delivered:—Held, that A. might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was a part of his demand in the first action; and that it was not necessary that he should have been nonsuited in the first action, to entitle him to bring the second. *Heming v. Wilton*, 5 C. & P. 54. J. Parke.

If assignees of a bankrupt have brought an action, and have attempted to prove one item of their demand, and fail, because they could not prove an act of bankruptcy sufficiently early, they cannot bring another action for that claim which they could not before succeed in; and the record in the former action is evidence in the second action, without being pleaded, though not conclusive, as an estoppel. *Stafford v. Clark*, 2 Bing. 377; 9 Moore, 724; 2 C. & P. 403.

A. advances to B. 875*l.* bank stock, for which B. executes a bond condition for the replacing the stock on a day certain, and the payment to A. of all dividends, bonuses, and profits, which would have arisen from the same in the meantime. B. makes default. A. recovers judgment with

damages assessed upon both breaches:—Held, that the plea of judgment recovered is a good bar to a sci. fa.: and that A. is not entitled to further dividends, &c. after verdict, whatever delay there may be in his suing out execution. *Saville v. Jackson*, M'Clel. 377; 11 Price, 343; 13 Price, 715.

The withdrawing a juror by consent of the parties, is no bar to a future suit on the same cause of action. *Sanderson v. Nestor*, R. & M. 402. Abbott.

Discharging a jury by consent does not terminate the suit, but is the same, in this respect, as withdrawing a juror: and where the plaintiff, instead of going on with such suit, brought a new action for a cause admitted to be the same, the court stayed the proceedings, but would not grant the defendant his costs of the latter suit. *Everett v. Youells*, 3 B. & Adol. 349.

If a plaintiff discontinue an action stayed in another court by a consolidation rule, and commence an action against the same defendant for the same cause in C. P., the court will stay proceedings until after the trial of the cause mentioned in the consolidation rule. *Parkin v. Scott*, 1 Taunt. 565.

The court of K. B. stayed proceedings in an action of trespass, because the plaintiff had before brought replevin and recovered damages for the same cause of action. *Lamb v. Nutt*, 1 Tidd's Prac. 572.

A landlord sued his tenant for rent, and on the money counts, and gave particulars on the count for money had and received for a quantity of stone quarried and carried away by the defendant. At the trial he took a general verdict, but for the amount of the rent only. The plaintiff brought another action against the defendant in case for quarrying and carrying away the stone, and a few days before the trial of the first action, delivered a particular in the second action for the same stone, exactly corresponding with the particular delivered on the count for money had and received in the first action:—Held, that the recovery in the first action was no bar to the plaintiff's recovering in the second. *Hadley v. Green*, 2 C. & J. 374; 2 Tyr. 390.

A promissory note for 100*l.*, on the face of it payable on demand, was given to the trustee of a building society to secure certain instalments, fines, and interest. The payee having sued upon the note, took a cognovit for the instalments then due, and costs, which were afterwards paid; and he gave a receipt as for debt and costs in the action:—Held, that he could not maintain another action on the note for instalments which subsequently became due. *Siddall v. Rowcliffe*, 1 C. & M. 487.

The plaintiff declared against the defendant in assumpsit, as the acceptor of a bill of exchange. The declaration also contained counts for goods sold, work and labour, and the common money counts. The defendant suffered judgment by default, upon which the plaintiff signed interlocutory judgment for want of plea, and the judgment

was entered generally to the whole declaration. The plaintiff afterwards obtained a rule to compute principal and interest on the bill, and taxed his costs, and signed final judgment accordingly. After taxation, the plaintiff entered a *nolle prosequi*, as follows, namely, that he would not further prosecute his suit as to the promises and undertakings in the second and subsequent counts of the declaration; therefore, as to such promises, let the defendant be acquitted, &c.:—Held, that such entry was in effect a remittitur of the damages after judgment; and, therefore, that plaintiff was precluded from suing the defendant again for the original cause of action on the common counts. *Bowden v. Herne*, 5 M. & P. 756.

*Pleadings.*]—In a plea of former recovery in K. B., it is not sufficient to state that a judgment was recovered in the Court of the Bench, for these words apply only to the court of C. P., and cannot be construed to extend to the court of K. B. *Mill v. Pollon*, 1 Moore, 19; 7 Taunt. 271.

A plea of judgment recovered in a plea of trespass on the case on promises to the damage of the defendant, is bad on general demurrer. *Id.*

To a plea in an action of debt on a judgment recovered, that, after the recovery of the judgment, the plaintiff sued out a ca. sa. against the defendant, by virtue of which writ the sheriff took and arrested the defendant, and had him in custody for the debt and damages, concluding with a verification; the plaintiff, in his replication, protested that no such writ had been sued out and delivered to the sheriff; and that the sheriff did not, under and by virtue of any such writ take the defendant:—Held sufficient, as such an allegation is traversable, it being matter of law connected with fact. *Saville v. Jackson*, M'Clel. 377; 11 Price, 343; 13 Price, 715.

Where a plea to a declaration of assumpsit for goods sold and delivered, stated that the plaintiff had sued the defendant in an inferior court for the same causes of action in the declaration mentioned, and that the defendant recovered against the plaintiff by the judgment of that court, and that such judgment still remained in full force; and the plea proceeded to set out the declaration in the court below, in which it was not stated that the goods were sold, or that the consideration for the promise arose within the jurisdiction of that court; and plaintiff in his replication alleged that both he and the defendant, at the time of levying the plaint in the court below, and the latter obtaining judgment, resided out of the jurisdiction of that court; and that the cause of action arose out of such jurisdiction:—Held, on special demurrer, that the replication was sufficient, on the ground that the proceedings in the court below were *corum non judice*, and altogether void. *Briscoe v. Stephens*, 9 Moore, 413; 2 Bing. 213.

Where plaintiff sued his steward in an inferior court for 4000*l.*, which was a less sum than he knew to be due to him upon the final investiga-

tion of the defendant's accounts, and upon judgment by default verified 3,400*l.* only:—Held, upon a plea of judgment recovered in answer to a second action in K. B. for the balance due, that the plaintiff was concluded by the action brought in the inferior court. *Bagot (Lord) v. Williams*, 5 D. & R. 87; 3 B. & C. 235; 5 D. & R. 719; 3 B. & C. 772.

A judgment obtained by defendant in the colonial courts cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shown that the judgment so obtained would be final and conclusive in the colonies. *Plummer v. Woodburne*, 7 D. & R. 25; 4 B. & C. 625.

A plea of a former recovery for the same offence, to a penal action, must set out that the plaintiff in the former action had priority of suit, or it will be bad on demurrer. *Jackson v. Gisleng*, Bull. N. P. 197.

To an action of indebitatus assumpsit for the value of goods, a judgment for the defendant in trover for the same goods may be pleaded in bar by means of proper averments. *Hitchin v. Campbell*, 3 Wils. 304; but see 2 W. Black. 779, 827; Loft, 208.

Declaration by the assignees of a bankrupt for goods sold by the bankrupt, alleging promises made to him before his bankruptcy; also upon an account stated with the plaintiffs as assignees: plea, a former action brought by the bankrupt, upon the same promises, before his bankruptcy, and still pending:—Held, on demurrer, that the plea was bad; first, because the former action could not be brought upon the account stated with the plaintiffs as assignees; secondly, because the assignees could not continue the former suit even if they wished it. *Biggs v. Cox*, 7 D. & R. 409; 4 B. & C. 920.

#### 6. Another Suit depending.

The court of K. B. will not stay the proceedings on the ground of the pendency of another action for the same cause against the defendant jointly with another person, except in a case of oppression or vexation. *Soutter v. Dunston*, 1 M. & R. 508.

If such a case is made out, they will interfere in a summary manner, or allow the party to plead in abatement, notwithstanding the four days have expired—semble. *Id.*

Where separate actions were brought against several persons for the same debt, who (if at all) were jointly liable, the defendant in one action having paid the debt and costs in that action, the court stayed the proceedings in the others, without costs. *Carne v. Legh*, 6 B. & C. 124; 9 D. & R. 126.

A suit pending in England, is not a good plea in bar to a subsequent suit in the plantations for the same matter. *Boyley v. Edwards*, 3 Swan. 703.

### III.—NOTICE OF ACTION.

#### 1. To Magistrates.

By stat. 24 Geo. 2, c. 44, it is enacted, that no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him or left at the usual place of his abode, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; in which notices shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justice; and on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode.

A magistrate is entitled to notice of action under the 24 Geo. 2, c. 44, s. 1, when he acts as a magistrate, though what he does is not strictly within the scope of his office. *Bird v. Gunston*, 2 Chit. 459; 4 Dougl. 275; S. C. not S. P. Hull. on Costs, 240.

So, where he acts upon a subject matter of complaint, over which he has authority, but which arises out of his jurisdiction. *Prestidge v. Woodman*, 2 D. & R. 43; 1 B. & C. 12; S. P. *Graves v. Arnold*, 3 Camp. 242.

If a justice acts, believing that his jurisdiction extends to the subject matter in question, he is entitled to notice of action, though it may turn out, on investigation, to be a case over which no justice of the peace has jurisdiction. *Jones v. Williams*, 5 D. & R. 654; 3 B. & C. 762; 1 C. & P. 459, 669.

Quære, whether deputy justices of the peace are entitled to notice of action. *Id.*

If a person claims a right to act as a justice, he is entitled to notice of action, although the ground on which the plaintiff goes is a denial of such right. *Id.*

But, in an action against a person for the penalty given for acting as a magistrate without a proper qualification, the defendant is not entitled to notice of action. *Wright v. Horton*, Holt, 458; 1 Stark. 400; 2 Chit. 25; 6 M. & S. 50.

Justices are not protected by the statute in acts done under colour and pretence of their office. *Anon. Loft*, 243.

The lord of the manor, who is also a justice of the peace, is entitled to notice of an action brought against him for taking away a gun in the house of an unqualified person, for, it will be presumed that he acted as a justice. *Briggs v. Evelyn (Knt.)*, 2 H. Black 114.

Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4*s.* from a publican resident within the borough for renewing his annual license, although it appeared that for fifty-seven years a similar fee



had been uniformly received by the mayor for the time being, from every publican within the borough applying to have a license:—Held, that such fee was illegal, and that the defendant was not entitled to notice of an action to recover it back, as the fee could not be taken by him by virtue or in execution of his office as a justice of the peace. *Morgan v. Palmer*, 4 D. & R. 283; 2 B. & C. 729.

One magistrate committing the mother of a bastard to custody for not affiliating the child, is entitled to the notice required by the statute, though, by the stat. 18 Eliz. c. 3, s. 2, jurisdiction over the subject-matter is committed to two magistrates. *Weller v. Toke*, 9 East, 364.

If A. be indicted for felony, and the judge who tries the cause order the justice before whom the information was laid to retain the goods in his possession until it appears who is entitled to them, it is not necessary to give such justice a notice previously to commencing an action against him for the conversion of them. *Licet v. Reid*, Peake, 35. Kenyon.

All persons acting under a justice's warrant, and within his jurisdiction, are within the protection of the stat. 24 Geo. 2. *Jackson's case*, Loft, 249.

The 2 Geo. 3, c. 28, which gives an additional protection to the justices in cases of actions brought against them for any thing done in pursuance of that act, but which does not require notice of action, does not deprive them of their right to the notice required by the 24 Geo. 2, c. 44, which requires notice in cases of actions brought against justices for any thing done in execution of their office. Therefore, where in an action against a magistrate under the 2 Geo. 3, c. 28, the plaintiff proved service of a notice not perfectly conformable with the requisites of the 24 Geo. 2, c. 44, and was thereupon nonsuited:—Held, that the nonsuit was right. *Rodgers v. Broderip*, 9 D. & R. 194.

In trespass against a justice for taking goods, the plaintiff cannot recover more than the value stated in his notice of action. *Stringer v. Martyr*, 6 Esp. 134. Macdonald.

The month in a notice begins with the day on which the notice is served. *Castle v. Burdett*, 3 T. R. 623.

A notice of action against a magistrate, under 24 Geo. 2 c. 44, is sufficient to warrant a writ, and proceeding against the magistrate and a constable jointly. *Jones v. Simpson*, 1 C. & J. 174; 1 Tyr. 32.

And where the notice stated the nature of the writ intended to be sued out, and also the cause of action; and a writ was sued out and served, but afterwards discontinued; and, within the time allowed by the statute, another writ ejusdem generis was sued out and served, in which another person was joined as defendant: the court, after verdict, held that the notice was sufficient. *Id.*

## 2. To Excise and other Officers.

An excise officer is entitled to notice under 23 Geo. 3, c. 70, s. 30, before an action is brought against him for an act not warranted by his official capacity, if done bona fide in the supposed execution of his duty. *Daniel v. Wilson*, 5 T. R. 1.

Quære, what is a sufficient notice under this statute. *Wood v. Folliott*, 3 B. & P. 552, n.

A notice is not necessary in an action against a revenue officer to recover back money paid to release goods which had been seized as forfeited, but were not so in fact. *Irving v. Wilson*, 4 T. R. 485.

Nor in assumpsit to recover the amount of an excessive charge made by the defendants as collectors, on a distress for arrears of taxes, under 43 Geo. 3, c. 99, s. 70. *Umphelby v. McLean*, 1 B. & A. 42.

It is necessary in assumpsit for money had and received against an excise officer, to recover duties received by him after the act imposing them is repealed, and he has paid them over to his superior. *Greenway v. Hurd*, 4 T. R. 553.

Notice of action for an excessive levy is not necessary to be given to a sheriff, under the 43 Geo. 3, c. 99, s. 70, where he has levied arrears of taxes under the statute 48 Geo. 3, c. 141, No. 5. par. 2. *Copland v. Powell*, Moore, 400; 1 Bing. 369.

A statute enacted that no plaintiff should recover in any action commenced against any person for any thing done or performed in execution or under the authority of the act, unless notice thereof, in writing, should be previously given twenty-eight days before the commencement of the action:—Held, that a notice was necessary in those cases only in which the party against whom the action was brought had reasonable grounds for supposing that the thing done by him was done in execution of or under the authority of the act. *Cook v. Leonard*, 6 B. & C. 351; 9 D. & R. 339.

The stat. 39 & 40 Geo. 3, c. 69, s. 184, directs that the West India Dock Company shall be sued in the name of their treasurer, and extends the protection of the stat. 24 Geo. 2, c. 44, for privileging justices of the peace in actions brought against them as such, to the Lord Mayor and Aldermen of London, acting under this act beyond the limits of the city; and directs that "no action shall be commenced against any person or persons for any thing done in pursuance or under colour of this act, until after 14 days' notice in writing, or after tender of amends," &c.—Held, that the treasurer of the Company is a person within the protection of the said clause, and, being sued for an act done by the company which induced an injury to the plaintiffs, is entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts, but quære whether in assumpsit. *Wallace v. Smith*, 5 East, 114; 1 Smith, 346.

Notice of action is required by a penal statute on the commencement of a suit, so as to subject

the plaintiff or his agent to an attachment for misbehaviour previous to the suing out of the writ. *Gordon v. Powis*, 2 W. Black. 781.

In an action against excise officers, the notice of action must be proved in the first instance, before any other evidence is given. *Johnson v. Lord, M. & M.* 444. Tenterden.

The owner of property arresting a person, in the bona fide belief that he was acting in pursuance of 7 & 8 Geo. 4, c. 30, s. 28, is entitled to the notice of action required by s. 41 of that statute. *Beechy v. Sides*, 4 M. & R. 634; 9 B. & C. 806.

Defendant, as fenreeve, having the care of certain lands over which the plaintiff was making a road, asked him by what authority he acted; the plaintiff said, by authority of the magistrates, but did not exhibit any warrant; whereupon the defendant apprehended and took him before a magistrate:—Held, that defendant was entitled to notice of action under 7 & 8 Geo. 4, c. 30, s. 41, although the plaintiff was not committing a malicious injury. *Wright v. Wales*, 5 Bing. 336; 2 M. & P. 613; 3 C. & P. 96.

Defendant entered plaintiff's house in search of S., against whom he had a warrant signed by the commissioners of the Southwark Court of Requests. S. was not in the house:—Held, that defendant, as acting in pursuance of the Court of Requests' Act, 46 Geo. 3, c. 87, s. 21, was entitled to notice of an action of trespass. *Cook v. Clark*, 10 Bing. 19; 3 M. & Scott.

The 136th section of the 57 Geo. 3, c. 29, requiring twenty-one days' notice of action, applies to the case of an action brought against a contractor for the removal of dust, &c. appointed by the commissioners of sewers for the city of London, for an alleged trespass, in seizing a cart supposed to contain dust, beating the horse, and assaulting and imprisoning the driver. *Breedon v. Murphy*, 3 C. & P. 574. Tenterden.

### 3. Form.

A notice of action under statute 24 Geo. 2, c. 44, must specify the sort of writ or process intended to be sued out, as well as the cause of action. *Lovelace v. Curry*, 7 T. R. 631.

It need not specify the form of action to be brought. *Sabin v. De Burgh*, 2 Camp. 196. ELL.

Where the notice given was of an action on the case for false imprisonment and assault, and the action brought was for trespass and false imprisonment:—Held, not sufficient. *Strickland v. Ward*, 7 T. R. 631, n.

It is not necessary to name all the parties meant to be included in the action, or to express whether the action is intended to be joint or several. *Bar. v. Jones*, 5 Price, 168.

A notice of action to magistrates is not vitiated by being in the form of a declaration, and unnecessarily ample, if it express the cause of action with sufficient clearness. *Gimbert v. Coyney*, M'Clel. & Y. 469; and see *Robson v. Spearman*, 3 B. & A. 493.

If the notice of action against a magistrate for wrongful distress under a conviction, states the person to whom the warrant is directed, it must state it correctly: therefore, when the warrant was directed to the constable of H., and the notice stated that it was directed to J. B.:—Held, that the notice was insufficient. *Aked v. Stocks*, 4 Bing. 509; 1 M. & P. 346.

The notice of action, in case, against bricklayers, for negligence in repairing a public sewer, is not to be construed with the same strictness as is generally required in pleading, provided there is a sufficient cause of action shown upon the face of it: therefore, a notice under a local act, "that the defendants made, altered, repaired, cut, dug, worked, and enlarged the sewer in so negligent, incautious, unskilful, improvident, and improper a manner, that the plaintiff's premises fell, and were greatly damaged, weakened, and destroyed," is a sufficient notice, though the proof was, first, that the defendants had not propped and shored up the plaintiff's house in the progress of the work; and, secondly, that the immediate cause of the injury was the falling of other houses, which drew the plaintiff's after them. *Jones v. Bird*, 1 D. & R. 497; 5 B. & A. 837.

But a notice, under an act of parliament, against a toll-gate keeper, "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll in and by a certain act of parliament intituled &c. is too uncertain," and bad. *Freeman v. Line*, 2 Chit. 673.

Notice of action against a custom-house officer, "for breaking the plaintiff's house in C. Street, in the parish of G." is not a sufficient description of the plaintiff's place of abode within the stat. 23 Geo. 3, c. 70, s. 30, and 24 Geo. 3, sess. 2, c. 47, s. 35. *Williams v. Burgess* 3 Taunt. 127.

A separate notice to each of several persons intended to be sued in trespass, is sufficient to found a joint action against all of them, for acts committed in pursuance of an act of parliament, which provides that no plaintiff shall recover in an action for any thing done in pursuance thereof, without notice to the defendant or defendants of such intended action, although none of the other persons who are afterwards joined in the action are named in the notice to either of them. *Agar v. Morgan*, 2 Price, 126.

A letter from the plaintiff's attorney, declaring that he is instructed to take legal proceedings unless goods are delivered up, is not sufficient notice of action. *Lewis v. Smith*, Holt, 27. Gibbs.

One person acted as clerk to two bodies of public officers. A notice of action required by the statute was given him, addressed to him as clerk to the one body, the cause of action arising under the authority of the other body:—Held, that the notice was insufficient. *Hider v. Dorrell*, 1 Taunt. 353.

*Quere*, whether, in an action against excise officers for a seizure, the notice of action properly

describes the plaintiffs as of their place of business, the statute requiring it to state their place of abode. *Jackson v. Lord*, M. & M. 444. Tenderden.

#### 4. Signature.

Where a notice is given to a magistrate under stat. 24 Geo. 2, c. 44, it is sufficient, in indorsing the attorney's name, to put the initial only of his Christian name. *Mayhew v. Locke*, 2 Marsh. 377; 7 Taunt. 63.

It is sufficient, if signed by a firm of two attorneys who are partners, and are employed by the plaintiff: and if it be signed T. & W. A. W. this is good, though the Christian name of one is T. A., and of the other W. A., if there was no other firm of the same surname in the same place at which the notice bore date. *James v. Swift*, 6 D. & R. 625; 4 B. & C. 681; 2 C. & P. 237.

A description of the attorney, as of a place in "London," when in fact the place is in Westminster, is fatal. *Stears v. Smith*, 6 Esp. 138. Ellenborough.

In a notice of action to a magistrate, the residence of the plaintiff's attorney was described as of Half-moon Street, Piccadilly, London. Quære, whether it was sufficient, Half-moon Street being in the county of Middlesex. *Mills v. Collett*, 3 M. & P. 242; 6 Bing. 85.

And when signed thus—"given under my hand at Durham, the 11th day of, &c. Richard Ratcliffe, attorney for, &c.:" it was held insufficient. *Taylor v. Fenwick*, 3 B. & P. 553, n; 7 T. R. 635, n; 3 Dougl. 178.

An indorsement with the name of the plaintiff's attorney, and the words, "of Birmingham," as describing the place of his abode:—Held, sufficient. *Osborn v. Gough*, 3 B. & P. 551.

So, of "Bolton-en-le-Moor," *Crooke v. Curry*, 1 Tidd's Prac. 28.

Seemle, that, before an attorney can sign a notice of action, he must have regularly taken out his certificate. *Sabin v. De Burgh*, 2 Camp. 196. Ellenborough.

It is sufficient if the name be in the body instead of on the back of the notice. *Crook v. Curry*, 1 Tidd's Prac. 28.

#### 5. Service.

Under 24 Geo. 2, c. 44, the notice must be delivered to the magistrate himself, or left at his last place of abode. *Castle v. Burdett*, 3 T. R. 623.

The notice in writing required by 57 Geo. 3, c. 99, s. 40, to be given to the bishop previously to the commencement of an action for penalties for non-residence, is not properly served by leaving it in the hands of the registrar or deputy registrar of the diocese: such notice must be left at the registry office. *Vaux v. Vollans*, 1 Nev. & M. 307.

The notice need not be served by the attorney who sues it out. *Vaux v. Vollans*, 1 Nev. & M. 307.

The motion under Reg. Gen. H. T. 2 Will. 4, s. 49, that sticking up a notice may be deemed a good service, where the defendant's residence is unknown, is absolute in the first instance. *Bridger v. Austin*, 1 M. & Scott, 520; 1 Dowl. P. C. 272.

#### IV. PARTIES TO ACTIONS.

*Plaintiff.*—A party cannot be both plaintiff and defendant in an action at law; and therefore, where plaintiff sued as executor, and defendant pleaded that the promises were made jointly with plaintiff, the court held it a good plea in bar. *Moffat v. Van Mullinger*, 2 Chit. 539; S. P. 2 B. & P. 124, n.: and see *Lloyd v. Williams*, 2 M. & S. 484.

To an action of covenant by tenants in common for not repairing a messuage; plea, that the lessee, after the demise to him, and before the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with the plaintiffs:—Held, ill on general demurrer, and that the action was properly brought. *Gates v. Cole*, 5 Moore, 554; S. C. nom. *Yates v. Cole*, 2 B. & B. 660.

Assumpsit by A., B., and C., against D. as one of the indorsers of a promissory note drawn by E. in favour of C., D., and (himself) E., then in partnership, and by them indorsed to A., B., and C.:—Plea in bar, that C., one of the plaintiffs, was liable as an indorser together with D.:—Held, good on special demurrer. *Mainwaring v. Newman*, 2 B. & P. 120.

Different plaintiffs who have different rights may each sue the same defendant in respect of separate injuries, though arising out of one transaction. *Knight v. Legh*, 4 Bing. 589; 1 M. & P. 528.

Quære, if money be paid by two persons for the benefit of a third, whether they ought to bring a joint action for the whole sum, or separate actions for the sum each has advanced. *May v. May*, 1 C. & P. 44: and see *Id.* 336. See also *Osborne v. Harper*, 5 East, 225. *Brand v. Boulcott*, 3 B. & P. 235.

The criterion by which the property of the joinder or nonjoinder of parties to a covenant in an action for breaches is to be ascertained, is the nature of the interest of the covenantees. If the interest be several, the action may be several; if joint, it must be joint; and the terms or language of the covenant do not control that principle. *James v. Emery*, 5 Price, 529; 2 Moore, 195.

Where several persons, jointly interested, agreed to horse a coach, each of them one stage, on the road from L. to B., and that, in case of default, one of them should sue the defaulter for a penalty, which should be divided among the non-defaulters:—Held, that an action might be maintained on the agreement, against a defaulter, by the party so appointed to sue, and that the others need not join in the ac-

tion. *Radenhurst v. Bates*, 3 Bing. 463; 11 Moore, 421.

An action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong done to the other. Where, therefore, an action was brought and a verdict obtained by two plaintiffs against a defendant for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both as well as the expenses incurred by them, the court ordered the judgment to be arrested. But the jury, having by their verdict confined the damages to the expenses which the plaintiffs had been jointly put to in procuring their liberty, the court ordered the *postea* to be amended. *Barratt v. Collins*, 10 Moore, 446.

A landlord demised to three jointly, and two of them, without his consent, assigned their interest to the other; the landlord having distrained the goods of the plaintiff on the premises for rent:—Held, that a joint action would lie against the three for money paid by him to redeem the goods so taken by the landlord as a distress. *Exall v. Partridge*, 8 T. R. 308; 3 Esp. 8.

Two of three persons who were jointly and severally bound in a bond of indemnity to the sheriff, in a matter in which they are severally interested, cannot, after having paid the whole, join in an action against the third for contribution. *Kelby v. Steel*, 5 Esp. 194. Ellenborough.

The several members of a club, associated for the purpose of buying coals, and dividing them in proportion amongst themselves, cannot maintain separate actions for penalties against the seller. *Everett q. t. v. Tindall*, 5 Esp. 169. Ellenborough.

The dippers at Tonbridge Wells all join and with their husbands bring an action against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute:—Held, a good joinder of action. *Weller v. Baker*, 2 Wils. 414.

So a herald and pursuivant at arms may maintain a joint action for work and labour in making out a pedigree, both having been on duty when the order was given, although only one of them was applied to by the defendant. *Townsend v. Neal*, 2 Camp. 190. Ellenborough.

Where one of several plaintiffs dissents to bringing the action, the court will not interpose, unless upon a suggestion of fraud. *Emery v. Mucklow*, 10 Bing. 23; 3 M. & Scott.

*Defendants.*—In all actions on contracts, the plaintiff is obliged to sue all the contracting parties; but in actions for torts, he may sue all the parties implicated, or any one of them. *Scott v. Godwin*, 1 B. & P. 67; *S. P. Sutton v. Clarke*, 6 Taunt. 29; 1 Marsh. 429.

The same plaintiff may bring separate actions against several parties, in respect of the same injury, where he does not obtain adequate redress in the action against the party first sued. *Morris v. Robinson*, 5 D. & R. 35; 3 B. & C. 196.

In trespass against several, the plaintiff can only recover against all for matters in which all are jointly implicated. *Aaron v. Alexander*, 3 Camp. 35. Ellenborough.

So in trover. *Nicholl v. Glennie*, 1 M. & S. 588.

Joint contractors must be all sued, although one has become bankrupt and obtained his certificate; and if not sued, the others may plead in abatement. *Bovill v. Wood*, 2 M. & S. 23; 2 Rose 155: and see *Hawkins v. Ramsbottom*, 6 Taunt. 179. But see 3 & 4 Will. 4, c. 42, ss. 3, 9, 10.

By a local act for the government of the poor of the parish of G., the churchwardens and overseers, and nine guardians and directors, or any five or more of them, were empowered to contract for the supply of the poor with provisions, and the parochial funds were directed to be paid into the hands of a treasurer, who was to apply the money under the orders of the governors and directors. Where the plaintiff contracted with the governors and directors for supplying the poor-house with goods, and acted under the orders of the churchwardens and overseers:—Held, that the latter were personally liable, and that the plaintiff was not bound to join the governors and directors in the action. *Lambert v. Knott*, 6 D. & R. 122.

Where a party of several persons dine together at a tavern, they are jointly liable for the whole expense, and not merely each for his own share. *Forster v. Taylor*, 3 Camp. 49. Ellenborough.

In an action, if it appear that the plaintiff has once given credit to A. he cannot afterwards shift his claim, so as to charge B. or any other person. *Leggat v. Reid*, 1 C. & P. 16. Park. And see *Taylor v. Britton*, Id. Garrow.

## V. FORM OF ACTION.

### 1. *Account or Assumpsit.*

Assumpsit as well as account lies to recover the balance of a banker's account, however voluminous it may be. *Tomkins v. Willshear*, 5 Taunt. 431; *S. C. nom. Tomkins v. Wiltshire*, 1 Marsh. 115.

And merely the length of the account forms no objection to the action. *Arnold v. Webb*, 5 Taunt. 432, n. Dampier.

But ruled at Nisi Prius, that, upon a running account current between a merchant and a broker, an action of account should be brought instead of assumpsit. *Scott v. Mcintosh*, 2 Camp. 238. Ellenborough.

### 2. *Assumpsit or Case.*

The plaintiff may waive a tort or trespass, and bring indebitatus assumpsit where it is for the benefit of the defendant. *Felham v. Tyrrell*, Loft, 207, 261. *S. C. nom. Felham v. Terry*, Cowp. 419.

The master of an apprentice who has been se-

duced from his service to work for another person, may waive the tort, and bring an action of *indebitatus assumpsit* for work and labour done by his apprentice, against the person who tortiously employed him. *Lightly v. Clouston*, 1 Taunt. 112.

Where the plaintiff's apprentice deserted from his ship, and went on board the defendant's, and secreted himself until the ship sailed, when he discovered himself to the defendant, who carried him to H., to which place he worked his passage, receiving his food; and during their passage to H. the plaintiff's and defendant's ships were within hail, but defendant did not make known to plaintiff that he had the apprentice on board; and on the arrival of the defendant's ship at H. the apprentice wished to leave her, but defendant persuaded him to remain, promising him either wages, or clothes and pocket-money, under which persuasion the apprentice sailed with him to E., and did duty as one of the crew, but received no wages, or clothes, or pocket-money:—Held, that the plaintiff was entitled to waive the tort, and bring *assumpsit* against defendant for the work and labour of his apprentice, and to recover a reasonable compensation for the services of the apprentice from H. to E. *Foster v. Stewart*, 3 M. & S. 191.

*Assumpsit* lies instead of *trover* for the value of goods where there was a lawful taking, but an unlawful detaining. *Hitchin v. Campbell*, Loft, 208; 3 Wils. 304; 2 W. Black, 779, 827.

Where goods are taken in execution and sold under a warrant of distress, grounded on a conviction which is afterwards quashed, the owner may waive the tort, and bring an action for money had and received. *Feltham v. Terry*, Cowp. 419; *S. C. nom. Feltham v. Tyrell*, Loft, 207, 261.

A. was left in the possession of a refuse spar, produced from a lead mine, situate in land demised to B. (as tenant from year to year), and paid rent for the spar to B.'s landlord, and exercised dominion over it by disposing of it as his property; C. from time to time entered upon the land and carried away portions of the spar, for the value of which A. brought an action of *assumpsit*: after a verdict, finding that B. had an interest in the spar, and had not surrendered it to his landlord:—Held, that the latter could not convey such a title to A. as would enable him (supposing his possession was clearly established) to waive the tortious taking and bring *assumpsit* for the value of the spar, in the absence of an express contract of sale, though the tenant had never disturbed his possession. *Lee v. Shore*, 2 D. & R. 198; 1 B. & C. 94.

Two several firms, respectively carrying on the business of bankers in the same country town, were in the habit of changing notes and securities with each other, and settling their balances by a prescribed mode. One of the firms became bankrupt; and at the time of the act of bankruptcy each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprized of this fact, pre-

sented and obtained payment of the notes of the solvent firm, partly at their bank, and partly at the house of their agents in London, who did not know the situation in which the parties stood: Held, that the solvent firm might sue the provisional assignee for the amount of the notes in *assumpsit* for money had and received, though the conduct of the latter savoured of tort. *Edmeads v. Newman*, 2 D. & R. 568; 1 B. & C. 418.

If the miller to a vendor of corn receive an order from such vendor to deliver a quantity of flour to the vendee, and actually deliver a part under several sub-orders from the agent of the vendee, and afterwards refuse to deliver the remainder, on the ground of his having no more of the vendor's flour in his possession, the vendee may maintain *trover* against him, and will not be put to bring a special action of *assumpsit* on an implied promise to deliver the whole. *Smith v. Cook*, 2 C. & P. 276. Best.

In an action against three, wherein the plaintiff declared that they had the loading of a hogshead of the plaintiff's, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that the defendants so negligently conducted themselves in the loading, &c., that the hogshead was damaged:—Held, that the gist of the action was the tort, and not the contract out of which it arose; and, therefore, that on plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. *Govett v. Radnige*, 3 East, 62.

In case for a deceit in a warranty made by two upon a joint sale by both, of sheep, their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only, as of his separate property; the action, though laid in tort, being founded on the joint contract alleged. *Weall v. King*, 12 East, 452.

*Assumpsit* lies for the value of a lamb belonging to the plaintiff, drove to London and sold by the defendant, unless it has been stolen, in which case *trover* is the only proper remedy. *Simpson v. Gisling*, Bull. N. P. 131.

In an action on the case, against the proprietors of a stage coach, to recover damages for an injury sustained by a passenger, in consequence of their coachman having upset the coach on which he was riding, the declaration may be framed in case, for a breach of duty by the negligence of the defendant's servants; and proof of a contract is not necessary to support such action, as against common carriers, as they may be sued in trespass on the case for the injury, as arising *ex delicto*: and such actions are not necessarily to be considered quasi *ex contractu*, or founded on contract; and therefore, if framed in case, the rules of pleading as applicable to case prevail, and not such as apply to contracts. *Brotherton v. Wood (in error)*, 6 Moore, 141; 3 B. & B. 54; 9 Price, 408.

Therefore, a verdict recovered against some of several defendants, in an action against them all, was held to be consistent with the form of action

in trespass on the case, and that it was not in substance an action bottomed on contract, but might be supported against some of the defendants, by proof of the injury sustained by the plaintiff; although a verdict of not guilty was found for the others. *Brotherton v. Wood* (in error,) 6 Moore, 141; 3 B. & B. 54; 9 Price, 408.

### 3. Assumpsit or Covenant.

Where parties contract by deed, but the defendant does not execute it, the plaintiff may sue in assumpsit, notwithstanding the deed. *Sutherland, v. Lishnan*, 3 Esp. 42. Eldon.

But where a ship was let to freight by charter-party, a clause in the deed, that "it was thereby covenanted and agreed by and between the said parties, that forty days should be allowed for unloading and loading again," &c. was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the forty days; and if he detain her for any longer time, the owner's remedy is covenant and not assumpsit, as upon an implied new contract. *Randal v. Lynch*, 12 East, 179; S. C. not S. P. 2 Camp. 352.

Assumpsit lies where a sealed charter-party was afterwards altered by parol, where the subsequent parol contract was distinct from, and not inconsistent with the contract by deed; being anterior to it in point of time and execution. *White v. Parkin*, 12 East, 578: and see *Davies v. Hawkins*, 3 M. & S. 488.

The plaintiffs having contracted by charter-party sealed to let a ship, then in the Thames, to freight to the defendants for eight months, to commence from the day of her sailing from Gravesend on the voyage there stated, and having covenanted that she should sail from the Thames to any British port in the English Channel, there to load such goods as the freighters should tender, and sail to the West Indies, and bring back a return cargo to London, afterwards agreed by parol with the defendants, that the ship, instead of loading at some port in the Channel, should load in the Thames, and that the freight should commence from her entry outwards at the custom-house:—Held, that this subsequent parol contract was distinct from, and not inconsistent with the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of assumpsit. *Id.*

So where the plaintiff covenanted to sail from London to Gibraltar, and there to deliver an outward cargo, and receive from the agents of the freighter at Gibraltar, or at Malaga, Cadiz, or Seville, as should be ordered by the agents at Gibraltar, such goods as they might load on board for the homeward cargo, and that the vessel should return direct to the port of London, and deliver the homeward cargo; and the agents at Gibraltar ordered the plaintiff to proceed to Cadiz, at which place other agents directed by parol that the homeward cargo should be delivered at Liverpool instead of London:—Held, that

the plaintiff having delivered the cargo at Liverpool could not recover the freight, the substitution by parol of Liverpool for London being inconsistent with the covenant contained in the charter-party, *Thomson v. Brown*, 1 Moore, 358; 7 Taunt. 656.

Where a cargo consisting of oranges had been materially damaged through the improper conduct of the captain, who was also a part owner of the vessel, and the freighters brought an action on the case against him and his copartners, for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charter-party under seal with the freighters, by which he engaged to convey the cargo to its port of destination; it not appearing from that instrument that he possessed any other character or interest than that of commander or master. *Leslie v. Wilson*, 6 Moore, 415; 3 B. & B. 171.

Assumpsit lies upon an express promise, for the amount of a balance struck on a partnership account, though there was a covenant between the parties to account. *Moravia v. Levy*, 2 T. R. 483, n.

Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it, an action of assumpsit lies on such express promise. *Foster v. Allanson*, 2 T. R. 479.

A servant who has contracted with a feme covert by deed, and performed the stipulated service, may have an action of assumpsit against the husband. *White v. Cuyler*, 6 T. R. 176; 1 Esp. 200.

A tenant under a lease cannot maintain assumpsit on an implied promise, for money paid under a distress by a superior landlord: the remedy is covenant, on the express contract. *Schlenker v. Mozey*, 5 D. & R. 747; 3 B. & C. 789; S. C. not S. P. 1 C. & P. 178.

Quære, if B. assign the lease of a house to A. by deed, subject to certain covenants, and A. take possession, whether B.'s remedy for a breach of the covenants is by an action of covenant, though A. never executed the deed. *Hawkins v. Sherman*, 3 C. & P. 459.

Assumpsit or case, not covenant, will lie by lessee against his assignee, who had afterwards assigned his interest to another person, for breaches of covenant in the original lease, for which the lessor had recovered against the lessee. *Burnett v. Lynch*, 8 D. & R. 368; 5 B. & C. 589; but see *Jones v. Hill*, 7 Taunt. 392; 1 Moore, 100.

A. covenants by deed to do work for B., the remuneration to be fixed by C.—C. fraudulently awards that nothing is due. A. cannot sue B. in assumpsit. *Churchill v. Day*, 3 M. & R. 71.

In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant, executed by the plaintiffs, whereby the defendant covenanted to pay over all monies received by him on account of the plaintiffs; notice having been given to the plaintiffs to produce the counterpart of this deed:—Held, that the defendant's having possession of the plaintiff's part of the deed, was presumptive evidence that he had executed the counterpart; and that this was equally a ground of nonsuit, whether the counterpart had been lost or not. *East India Comp. v. Lewis*, 3 C. & P. 358—Tenterden.

#### 4. Assumpsit or Debt.

In an action for money lost by stock-jobbing, under 7 Geo. 2, c. 8, the plaintiff declared in assumpsit instead of debt; the court allowed the declaration to be amended by changing its form to debt. *Billing v. Flight*, 2 Marsh. 124; 6 Taunt. 419: and see *Billing v. Pulley*, 2 Marsh. 125, n.; 6 Taunt. 422.

Where a surety bound with his principal for the payment of money by instalments, takes a bond as a security, he cannot maintain an action of assumpsit. *Toussaint v. Martinant*, 2 T. R. 100.

But the assignee of a Scotch bond may maintain an action of assumpsit even against the obligor, in his own name. *Innes v. Dunlop (Bart.)*, 8 T. R. 595.

#### 5. Debt or Case.

A navigation act (34 Geo. 3, c. 53) empowered a company to sue for calls "by action of debt or on the case":—Held, that an action on the case in tort lay. *Huddersfield Canal Com. v. Buckley*, 7 T. R. 38.

#### 6. Covenant or Case.

Case, in nature of waste, will lie against a tenant for years after the expiration of his term, as well as covenant, for the breach of those contained in his lease. *Kinlyside v. Thornton*, 2 W. Black. 1111.

Case (not covenant) lies by the assignor against the assignee of a lease, assigned by deed-poll, upon his implied duty to perform the covenants in the original lease, although the assignor has, by the assignment, parted with all his interest; and although assumpsit might lie, case was the better form of action for the injury sustained by the assignor in consequence of the assignee's breaches of covenant. *Burnett v. Lynch*, 8 D. & R. 368; 5 B. & C. 589.

#### 7. Case or Trespass.

##### (a) Generally.

Upon this point the distinction is, that where the injury is immediate from an act of force done by the defendant, the remedy is in trespass; where the injury is only consequential to an act before done by the defendant, then an action on the case lies. *Leame v. Bray*, 3 East, 593; 5 Esp.

18: *S. P. Day v. Edwards*, 5 T. R. 648; *Loten v. Cross*, and *Covell v. Laming*, 1 Camp. 498.

Trespass lies for originally throwing a squib, which, after having been thrown about in self defence by other persons, at last put out the plaintiff's eye. *Scott v. Shepherd*, 2 W. Black. 592; 3 Wils. 403.

The captain of a merchant ship is liable in trespass, for procuring a mutinous seaman to be flogged and imprisoned in a foreign port by the local authorities, if he took an active part in the proceedings, and did not merely leave the local authorities to act as they thought fit. *Aitken v. Bodwell*, M. & M. 68—Tenterden.

A master is not liable in trespass for the wilful act of his servant, done without his direction or assent; but he is liable to answer for any damage arising from the negligence or unskilfulness of his servant acting in the course of his employ. *Manus v. Crickett*, 1 East, 106: and see *Brucker v. Fromont*, 6 T. R. 659.

A stable-keeper, who lets horses on hire, which are injured by the defendant having driven a cart against them, should bring case for the injury, and not trespass. *Hall v. Pickard*, 3 Camp. 187—Ellenborough.

But if his own servant have the care of the horses, he may maintain trespass. *Dean v. Branthwaite*, 5 Esp. 35—Ellenborough.

Where injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act be immediate, so long as it is not a wilful act. *Williams v. Holland*, 10 Bing. 112.

Trespass lies for procuring by awe, fear, and influence, and contrary to his own inclination, a sovereign, independent, absolute prince to imprison the plaintiff. *Rafael v. Verelst*, 2 W. Black. 983, 1055.

If A. states positively to the commander of a pressgang that B. is liable to the impress service, who in truth is not so, and B. in consequence of this information is impressed, A. is liable to an action of trespass and false imprisonment at the suit of B. *Flewster v. Royle*, 1 Camp 187—Ellenborough.

##### (b) Injuries by Carriages and Cattle.

Where one accidentally drives his carriage against another's the remedy is trespass, and not case; the injury being immediate upon the act done, though he were no otherwise blameable than in driving on the wrong side of the road on a dark night. *Leame v. Bray*, 3 East, 593; 5 Esp. 18.

An action on the case, stating that the defendant's servant wilfully drove against the plaintiff's carriage, whereby it was damaged, cannot be supported, and the court will arrest the judgment after verdict. *Savignac v. Roome*, 6 T. R. 125.

An action on the case for a personal injury, in consequence of the negligent, careless, and improper driving of the horse and chaise of the defendant against the plaintiff:—Held to have been

proper in form; although the evidence proved that the act was violent, and the injury which resulted, immediate. *Graham, B., dissentiente. Lloyd v. Needham*, 11 Price, 608.

An action on the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff's carriage by the servant of the defendant negligently driving his carriage against it. *Morley v. Gaisford*, 2 H. Black. 442.

It is a direct trespass to injure the person of another by driving a carriage against a carriage wherein such person is sitting, although the last-mentioned carriage be not the property nor in the possession of the person injured. *Hopper v. Reeve*, 7 Taunt. 698; 1 Moore, 407.

A declaration in case for driving a cart against the plaintiff's horse with force and violence alleging it to have been done "by and through the mere negligence, inattention, and want of proper care" of the defendant:—Held good, on demurrer for not being in trespass. *Rogers v. Imbleton*, 2 N. R. 117.

But a plaintiff cannot declare in case for so furiously driving a cart, that by the improper conduct of the defendant it was driven with great force against the plaintiff's carriage, per quod the loss happened, his proper remedy being trespass. *Day v. Edwards*, 5 T. R. 648.

Trespass is also the proper remedy for killing the plaintiff's horse, though the injury arose from negligence. *Sheldrick v. Abery*, 1 Esp. 55—Kenyon.

A declaration in case, against three proprietors of a stage coach, stated that the coach was under the care of the defendants, and that through their negligence the coach ran against the plaintiff, and injured him; the evidence was, that one of the defendants was driving when the accident happened; the jury found that the accident was occasioned by his negligent driving: Held, that the plaintiff might maintain case against all the proprietors. *Semble*, that he might have maintained trespass against the one who was driving. *Moreton v. Harden*, 6 D. & R. 275; 4 B. & C. 223.

Where a master and servant are together in a vehicle, and an accident occurs, from which an immediate injury ensues, the master is liable in trespass and not case, although the servant was driving, and not only no evidence is given on the part of the plaintiff of any interference on the master's part, but the evidence on the part of the defendant distinctly negatives any interference; so that the mere presence of the master with the servant will constitute him a trespasser, if the act of the servant amount to a trespass. *Chandler v. Broughton*, 1 C. & M. 29.

#### (c) *Injuries to Ships.*

If one ship run against another by the negligence of the pilot, while the owner is on board; the remedy against the owner is an action on the case, and not trespass. *Huggett v. Montgomery*, 2 N. R. 446.

But it was held, at *Nisi Prius*, that trespass

would lie where the defendant was himself at the helm. *Covell v. Laming*, 1 Camp. 497—Ellenb.

If A. wilfully run his vessel against B.'s, and damage ensues, B. may bring trespass; but if A. so negligently steer his vessel that it run foul of B.'s, then case is the proper action. *Ogle v. Barnes*, 8 T. R. 188.

A declaration in case for sinking a boat, which, after averring a nonfeasance as the cause, stated the defendant to have acted with great force and violence in accomplishing the injury:—Held sufficient, on error brought because it should have been trespass, and not case, and because the two actions were mixed. *Turner v. Hawkins*, 1 B. & P. 472.

If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time. *Bowcher v. Noidstrom*, 1 Taunt. 568.

#### (d) *Distresses.*

The proper remedy for taking an excessive distress is case upon the statute of Marlbridge, 52 H. 3, c. 4. *Hutchins v. Whitaker*, 2 Ld. Ken. 204; S.C. nom. *Hutchins v. Chambers*, 1 Burr. 58J.

Even though the tenant had tendered the rent due to his landlord before the distress was levied. *Branscomb (Lady) v. Bridges*, 2 D. & R. 256; 1 B. & C. 145; 3 Stark. 171.

Case lies, as well as trespass, for an excessive distress after tender of the rent due. *Holland v. Bird*, 10 Bing. 15.

A tenant, tendering his rent after distress taken, but before it is impounded or removed, may maintain trespass for a subsequent removal of the distress. *Virtue v. Beasley*, 1 M. & Rob. 21—Parke.

Trespass will not lie for merely an irregular distress. *Messing v. Kemble*, 2 Camp. 115—Ellen.

The true construction of stat. 11 Geo. 2. c. 19, § 19, is, that an action of trespass or case must be brought with reference to the nature of the irregularity. *Id.*

But trespass will lie for continuing on the premises, and disturbing the plaintiff's possession after the time allowed by law. *Winterbourne v. Morgan*, 2 Camp. 117; 11 East, 395; *S. P. Etherington v. Popplewell*, 1 East, 139.

And trespass, and not case, is the proper remedy for taking goods under an irregular distress since the stat. 11 Geo. 2. c. 19, § 19. *Wallace v. King*, 1 H. Black. 13.

Case is not maintainable for detaining cattle distrained damage feasant, where a tender of sufficient amends was made after the impounding. *Sheriff v. James*, 8 Moore, 334; 1 Bing. 341: and see *Anscamb v. Shore*, 1 Taunt. 261; 1 Camp. 285, 290.

Where goods are distrained which are not liable, an action of trover may be brought by the owner without a demand and refusal. *Ward v. Ventom*, Peake's Add. Cas. 126—Kenyon.

#### (e) *Tortious Legal Proceedings.*

Where a justice of the peace maliciously grants



a warrant against a person without any information upon a supposed charge of felony, the remedy against the justice is trespass, and not case. *Morgan v. Hughes*, 2 T. R. 225.

Upon an imprisonment under a warrant for felony after an acquittal, of which the defendant had notice, the proper action is trespass, and not case. *Webb v. Allen* (in error), 1 Anst. 261.

Trespass lies against the attorney who had sued out the ca. sa. against the defendant, and delivered it himself to the officer, who by his order arrested him thereon. *Barker v. Braham*, 2 W. Black. 866; 3 Wils. 368: and see *Rogers v. Popkin*, 2 Stark. 404.

But case, and not trespass, lies, for falsely, maliciously, and without any probable cause, procuring the warrant of a magistrate to search the premises, and apprehend the person of the plaintiff on suspicion of felony, and thereby causing his premises to be searched and his person imprisoned. *Elsce v. Smith* (in error), 1 D. & R. 97; 2 Chit 304.

If A, having been robbed, suspect B. to be guilty, and take him and deliver him into the charge of a constable present, B. (if innocent) may maintain trespass against A. *Stonehouse v. Elliott*, 6 T. R. 315: 1 Esp. 272.

#### (f) Crim. Con. and Seduction.

An action for debauching plaintiff's daughter, per quod servitum amisit, is an action of trespass, *Woodward v. Walton*, 2 N. R. 476.

Quære, whether an action for criminal conversation is in its nature an action of trespass or on the case. *Macfadzen v. Olivant*, 6 East, 387; 2 Smith, 486.

Where a declaration for seducing plaintiff's daughter was framed in trespass, but omitted the words "with force and arms:"—Held, that the objection was cured by verdict. *Parker v. Bailey*, 4 D. & R. 215.

The declaration for crim. con. held in effect to be in case, not trespass. *Cook v. Sayer*, 2 Ld. Ken. 371.

#### (g) Other Cases.

Both case and trespass will lie for a voluntary waste committed by a tenant holding over after the expiration of a regular notice to quit. *Burchell v. Hornsby*, 1 Camp. 360—Ellenborough.

An action on the case, and not trespass, is the proper remedy for nailing a board so as to overhang the plaintiff's close. *Pickering v. Rudd*, 4 Camp. 219; 1 Stark. 56—Ellenborough.

So, for the continuance of an act (as driving hold-fast) for which trespass lies, and in which form of action the plaintiff has before recovered. *Lawrence v. Obee*, 1 Stark. 22—Ellenborough. & C. not S. P. 3 Camp. 514.

Where the plaintiffs, who were employed as contractors to complete a navigable canal, erected a dam composed of wood and earth, with the consent of the owner of the soil:—Held, that they might maintain trespass against the defendants as

wrong-doers for breaking and destroying the same, and that an action on the case would not lie. *Dyson v. Collick*, 1 D. & R. 225; 5 B. & A. 600

#### VI.—ELECTION OF ACTION.

The court of C. P. will not compel a party, who has proceeded both by indictment and action for the same assault, to make his election upon which he will rely. *Jones v. Clay*, 1 B. & P. 191: *S. P. Murphy v. Cadell*, 2 B. & P. 137.

A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and has received from the treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant to recover more than nominal damages. *Jacks v. Bell*, 3 C. & P. 316—Tenterden.

The plaintiff being indicted for felony, sued a banker for money the plaintiff had paid him, which was surmised to be the produce of the felony; the Court of C. P., on application, will give time to plead in a month after the trial of the indictment. *Deakin v. Fraed*, 4 Taunt. 825.

After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shown to have colluded in procuring such acquittal. *Crosby v. Leng*, 12 East, 409.

A plaintiff was put to his election where suing in the Court of Chancery, and in a foreign court of law. *Pieters v. Thompson*, Coop. C. C. 294.

Where a vessel is seized and returned forfeited for smuggling, and the seizing officer also prosecutes in the Admiralty as for a prize, the Court of Exchequer will not make him elect. *Att. Gen. v. Appleby*, 3 Anst. 863.

#### VII.—ABATEMENT OF ACTION.

##### 1. By Death of Parties.

*What Proceedings abate.*—Where the cause of action is money due, or a contract to be performed, gain or acquisition by the labour or property of another, or a promise by a testator expressed or implied, the action survives against the executor; otherwise, if it be a tort, or arises ex delicto, supposed to be by force, and against the peace. *Hambly v. Trott*, Cowp. 375.

An action for libel abates by the death of the plaintiff after the signing of interlocutory judgment, and execution of a writ of inquiry, but before the next day in bank. *Ireland v. Champneys*, 4 Taunt. 384.

The stat. 17 Car. 2, c. 8, which enacted, that in certain cases a suit shall not be abated by the death of either party between verdict and judgment, does not apply to cases of nonsuit. *Dowbiggen v. Harrison*, 10 B. & C. 480.

The plaintiff, being nonsuited, obtained a rule nisi for a new trial: afterwards, and before the rule came on for argument, the defendant died:

Held, that the suit did not thereby abate. *Bull v. Price*, 5 M. & P. 10; 7 Bing. 237.

If an ejectment be against two, and one die after issue joined, but before trial, the death must be suggested on the roll; but the judgment need not say *quod querens nil capiat per billam* against the dead defendant; and it is not to be for a moiety only, but that he recover his term. *Fer v. Dean*, 1 Burr. 362.

Where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action:—Held, that it thereby abated, and that defendant could not afterwards have judgment as in case of nonsuit. *Checchi v. Powell*, 6 B. & C. 253; 9 D. & R. 243.

The 8 & 9 W. 3, c. 11, § 7, applies to writs of error, and therefore a writ of error does not abate by the death of one of several plaintiffs in error. *Clark v. Rippon*, 1 B. & A. 586.

A writ of error was brought in K. B. in the life of King George I. but was not argued till after the accession of King George II. when the judgment was affirmed: on a writ of error in parliament this judgment was reversed: it being held that the first writ of error (the king being the sole plaintiff in the cause), was absolutely abated. *Armagh (Archbishop) v. Att. Gen.* 3 Bro. P. C. 507.

Though a writ of error abate by the death of the plaintiff in error, before it be returned and certified, yet execution cannot afterwards be issued on the judgment without the leave of the court. *Kinnaird (Lord) v. Lyall*, 7 East, 296; 3 Smith, 280.

Therefore the court refused leave for the plaintiff below to issue a test, *fi. fa.*, tested in the last term on the return day of the original *fi. fa.*, which was after the allowance and service of the writ of error. *Id.*

Where an action is brought on a judgment recovered in K. B., and after the judgment the defendant brings a writ of error, and obtains a rule to stay proceedings in the mean time, and the plaintiff dies before judgment affirmed, the court will not permit judgment to be entered *nunc pro tunc*. *Bates v. Lockwood*, 1 T. R. 637.

*Death before Judgment.*—Where the defendant died before the time given to plead expired, and judgment was signed after with process thereon: Held irregular. *Wallop v. Jewin*, 1 Wils. 315.

The death of the defendant between the commission-day and day of trial is not a ground for setting aside a verdict for the plaintiff. *Jacobs v. Miniconi*, 7 T. R. 31.

If a defendant die on the night before the trial of a cause at the sittings in term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the court. *Taylor v. Harris*, 3 B. & P. 549.

Where a plaintiff dies after verdict but before judgment, it must be entered as of the term, the plaintiff having lived over the day in bank. *Barber v. Steers*, 1 Ld. Ken. 378.

If the plaintiff die after verdict for the defend-

ant, and the defendant does not enter up judgment within two terms after the verdict, the Court of C. P. have no authority to permit it to be entered up afterwards *nunc pro tunc*. *Copley v. Day*, 4 Taunt. 702.

Where, at the Spring Assizes, 1826, a cause was referred, a verdict having been taken for the plaintiff, subject, as to damages, to an award, and the arbitrator published his award, which, in the Michaelmas term following, was set aside; after which, in Hilary term, plaintiff obtained a rule nisi to issue execution, unless the defendants would consent again to refer the cause, which rule was discharged:—Held, the plaintiff having died in Sept, 1826, that the court had no power to grant an application made in Hilary term, that judgment might be entered up as of the Michaelmas term preceding. If the plaintiff die after verdict for him, and no judgment is entered up within two terms after the verdict, the court will not interfere, and permit it to be entered *nunc pro tunc*, where laches are imputable to the party interested in the judgment. *Lawrence v. Hodgson*, 1 Y. & J. 368.

If a defendant die pending the argument on a point reserved, on which judgment of nonsuit is afterwards given, his representatives are entitled, upon application to the court, to enter up the judgment of the term next after the trial, that they may get the costs of the nonsuit. *Toulmin v. Anderson*, 1 Taunt. 385.

Proceedings allowed by the court to be carried on by consent after the plaintiff's death since the first day of term after verdict, and the judgment to be entered as in his lifetime. *Pond v. King*, 1 Wils. 124.

Where a plaintiff dies after a verdict, and before the day in bank, although the judgment be right, yet a *sci. fa.* must be awarded before execution. *Earl v. Brown*, 1 Wils. 302.

A verdict was taken for the plaintiff in Hilary term, 1832, by consent, subject to a reference: the arbitrator made an award in favour of the plaintiff after the expiration of Easter term; the defendant having died in the meantime; on motion made in the following Michaelmas term, the court allowed judgment to be entered *nunc pro tunc*, as of Trinity term, notwithstanding more than two terms had elapsed since the verdict was taken. *Miller v. Spurre*, 2 M. & Scott, 730.

An executor may, under the stat. 17 Car. 2, c. 8, s. 1, enter up judgment on a verdict obtained by his testator in an action for libel. *Palmer v. Cohen*, 2 B. & Adol. 966.

*Death after Judgment.*—A judgment may be entered up for a defendant as of the term when pronounced if he was then alive, though he may have died afterwards. *Norwich (Mayor) v. Berry*, 4 Burr. 2277; S. C. not S. P. 1 W. Black. 696.

A cognovit was given on the 8th Feb. in Hilary term, with a defeazance for payment on the 1st April ensuing, and defendant died in Hilary vacation, before 1st April:—Held, that a judgment entered up on the 10th April, in Hilary vacation, after defendant's death, was regular, as

relating to the first day of Hilary term. *Calvert v. Tomlin*, 5 Bing, 1; 2 M. & P. 1.

**Defendant in Execution.**—Where a defendant has been once charged in execution:—Held, that upon the death of the plaintiff, his executors were not bound to revive the judgment by sci. fa. or to charge the defendant in execution de novo. *King v. Millar*, and *Combrune v. —*, 1 Tidd's Prac. 370.

The Court of C. P. will discharge a defendant out of custody in execution after the plaintiff's death, if it appear that the next of kin do not intend to take out administration on service of the rule nisi on the next of kin. *Parkinson v. Horlock*, 2 N. R. 240.

So that court will discharge a defendant out of custody, who is in execution at the suit of a plaintiff some time since deceased, on whose part no will has been proved, nor any administration granted; and whose family, on notice of a motion for the above purpose, declines interfering. *Broughton v. Martin*, 1 B. & P. 176.

But they refused to discharge a defendant out of custody in execution at the suit of a plaintiff, although the application was not made until eighteen months after the death of the latter; it appearing that he had appointed executors who were still alive, and had not assented to the discharge. *Dunsford v. Gouldsmith*, 8 Moore, 145.

The plaintiff having charged the defendant in execution, died; the defendant's wife took out administration to the plaintiff; then the court ordered the defendant to be discharged out of custody, saying, that the plaintiff's attorney had no lien on the judgment for his costs. *Pyne v. Erie*, 8 T. R. 407.

Where administration had been taken out to the plaintiff's effects, the court refused to discharge a defendant out of custody in execution, after the death of the plaintiff, although the administratrix and his assignees (he having also become bankrupt) disclaimed all interest in the action, having merely sued as a trustee. *Fothergill v. Walton*, 1 M. & P. 743; 4 Bing. 711.

The administratrix being herself competent to discharge. *Id.*

### 2. By Bankruptcy.

Between interlocutory and final judgment, the plaintiff became a bankrupt and sued out execution in his own name, and the Court of K. B. refused to set aside the proceedings, as an action does not abate by the plaintiff's becoming a bankrupt. *Wagh v. Austen*, 3 T. R. 437.

But the proper course is for the assignees to proceed to final judgment in his name, and then sue out a sci. fa. to make themselves parties in order to have execution. *Hewitt v. Mantell*, 2 Wils. 372.

So where he becomes bankrupt pending a suit in error. *Kretzman v. Beyer* (in error), 1 T. R. 463.

The plaintiff, after judgment and a writ of error allowed, having become a bankrupt, his assignees cannot sue out a sci. fa. in their own

names, to compel an assignment till some judgment be given, and then it must be done immediately; but they should go on with the writ of error in the bankrupt's name till judgment. *Kretzman v. Beyer* (in error), 1 T. R. 463.

By the bankruptcy of the plaintiff pending an account, the suit is abated. *Williams v. Kinder*, 4 Ves. jun. 387.

Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *Caddick v. Mason*, 1 Simon, 501.

Proceedings shall not be stayed because the defendant had become bankrupt. *James v. Penrice*, Loft, 65.

Where a plaintiff became bankrupt after interlocutory judgment, and writ of inquiry awarded, which was executed in his own name, it was held good without suing out a sci. fa. at the suit of his assignees. *Bibbins v. Mantel*, 2 Wils. 358.

Where a plaintiff was discharged after verdict, under an insolvent act:—Held, by K. B., that his assignees might make use of his name in entering up judgment and taking out execution. *Abbis v. Barnard*, 2 Tidd's Prac. 967.

Where a plaintiff replied bankruptcy to part of the defendant's plea and demurred as to the rest, upon which there was a joinder in demurrer; the defendant could not avail himself of the bankruptcy to deprive plaintiff of his judgment on demurrer. *Davis v. Penton*, 9 D. & R. 369.

To an action of debt on an Irish judgment, the defendant pleaded that the judgment was entered up on a warrant of attorney given to the plaintiff to secure payment of a bond: that after the bond and warrant of attorney were given, and before the judgment was entered up, the plaintiff became bankrupt, and the debt in question was vested in his assignee, who had brought an action on the judgment before that commenced by the plaintiff, and that the same was still depending:—Held, that the plaintiff was the person by whom the judgment ought to have been entered up, though after his bankruptcy; that in so doing, and in bringing the action, he might be considered as a trustee for his creditors; and the pendency of the other action as here pleaded, was no defence. *Gwinness v. Carroll*, 1 B. & Adol. 459.

### 3. By Marriage of Feme Sole.

When a woman is sued as a feme sole, and between process and appearance marries:—Held, on error brought, that the writ did not abate. *Anon.* Loft, 27.

After interlocutory judgment against a feme upon a contract she marries; yet the plaintiff may proceed to judgment and execution against her, without joining the husband by scire facias; and a capias ad satisfaciendum against her following the judgment is, at all events, regular, though the plaintiff had notice of the marriage before. *Cooper v. Hunchin*, 4 East, 521; 1 Smith, 282.

Ejectment against a feme sole who married before trial, and verdict and judgment against her

by her original name:—Held, that it was regular to issue an *habere facias possessionem* and *fi. fa.* against her by the same name, though the *fi. fa.* was inoperative. *Doe d. Taggart v. Butcher*, 3 M. & S. 557.

And the Court refused to set aside the writ of execution, because the husband was not joined. *Id.*

ACT OF PARLIAMENT—See STATUTE.

ADMINISTRATOR—See EXECUTOR.

ADMIRALTY—See INFERIOR COURT.

ADMISSIONS—See EVIDENCE.

ADULTERY—See HUSBAND AND WIFE.

ADVERTISEMENTS—See BANKRUPT—  
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### 1. ON MOTIONS AND RULES.

#### 1. How intituled.

##### (a) Generally.

*Names of Parties.*—In affidavits to show cause against a rule, the christian as well as surnames of all parties, plaintiffs as well as defendants, must be inserted in the title. *Fores v. Diemar*, 7 T. R. 661; 2 East, 182: *S. P. Noel v. —*, 1 Smith, 457.

So an affidavit in support of a rule to set aside the service of a writ for irregularity, in an action against three persons, must be intituled with the names of all the defendants. *Anon.* 1 Chit. 728, n.

An affidavit intituled in the name of the plaintiff against "B. and another," as defendants, was held defective, as it should have described such defendants. *Doe d. Spencer v. Want*, 2 Moore, 722.

So affidavits intituled "A. B. and others against C. D." (without setting out the names of all the plaintiffs in the cause) cannot be read in showing cause against a rule; but the court will not make the rule absolute with costs upon such an objection. *Bullman v. Callow*, 1 Chit. 727.

The intituling of an affidavit by describing the plaintiff, as "gent. one, &c." the plaintiff not being an attorney, does not vitiate the affidavit, but the description may be rejected as surplusage. *Reeves v. Crisp*, 6 M. & S. 274.

Affidavits intituled in a cause, without giving the plaintiff the addition of "assignee," cannot be used in a cause where the plaintiff sues as assignee. *Wright v. Hunt*, 1 Dowl. P. C. 457.

Where in an affidavit the plaintiff in the title was styled "assignee," without further explanation, it was held bad. *Steyner v. Cottrell*, 3 Taunt. 377.

In a non-bailable action against two, one defendant may, before declaration, well style his affidavits "in a cause of A. against B., who is sued with C." *Mackenzie v. Martin*, 6 Taunt. 286.

If a plaintiff join several defendants in one common process, one upon whom it is regularly served applying before declaration to set it aside, may intitle his rule and affidavit in a cause of the plaintiff against himself only. *Dand v. Barnes*, 6 Taunt. 5; 1 Marsh. 403.

If affidavits which require a title be put in without, the court cannot take any notice of them though the counsel on the other side do not wish to take the objection. *Owen v. Hurd*, 2 T. R. 644.

*Name of Court.*—In C. P. a rule was discharged, because the affidavit on which the rule nisi was obtained was not intituled in any court, the words "in the" only being prefixed. *Osborn v. Tatum*, 1 B. & P. 271.

Affidavits not intituled in K. B., and sworn before a commissioner, &c., without stating him to be a commissioner of that court, cannot be read; but those sworn in court, or before a judge of the

court, though not intituled "In the King's Bench," may be read. *Rez v. Hare*, 13 East, 189; and see *Howard v. Brown*, 4 Bing. 393.

An affidavit on a motion was intituled in the "Common Place":—Held, sufficient. *Rolfe v. Burke*, 12 Moore, 298.

Now by a late rule, an affidavit sworn before a judge of any of the courts of K. B., C. P., or Exchequer, shall be received in the court to which such judge belongs, though not intituled of that court, but not in any other court, unless intituled of the court in which it is to be used. *Reg. Gen. K. B., C. P., and Excheq.* H. T. 2 W. 4, 1 Dowl. P. C. 184; 8 Bing. 288; 1 M. & Scott, 415; 3 B. & Adol. 375; 2 C. & J. 168; 2 Tyr. 341; 4 Bligh N. S. 593.

**Criminal Informations.**—All affidavits on motions for leave to file criminal informations must not be intituled; and if they are they cannot be read. *Rez v. Robinson*, 6 T. R. 642.

Nor need the affidavits produced on showing cause against a rule. *Rez v. Harrison*, 6 T. R. 60.

Seemle, that such affidavits might or might not be intituled. *Id.*

But all affidavits made after the rule is made absolute, must be intituled. *Rez v. Robinson*, 6 T. R. 642.

**Other Cases.**—In moving for a rule nisi for a certiorari the affidavit must not be intituled in any cause. *Ex parte Nokro*, 1 B. & C. 267.

Where a motion is made in a cause removed to K. B. by writ of error, the affidavit must be intituled in the cause in error, and not in the original cause. *Gandell v. Rogier*, 7 D. & R. 259; 4 B. & C. 562.

An affidavit to verify a plea pluis darrein continuance, which refers to the plea which was intituled in the cause, was held sufficient without being itself specially intituled. *Prince v. Nicholas*, 1 Marsh. 70; 5 Taunt. 323.

In entering up judgment on an old warrant of attorney, the affidavit may be properly intituled in a cause. *Sowerby v. Woodroffe*, 1 B. & A. 567; 1 Chit. 315 (n); and see 1 B. & A. 568, n. And see also WARRANT OF ATTORNEY, where all the cases are collected.

## 2. By whom made.

An affidavit of merits must appear to have been made either by the party himself, or his attorney or agent. *Morris v. Hunt*, 1 Chit. 97.

And it cannot be sworn to by a third person. *Rez v. Middlesex (Sheriff)*, 1 Chit. 732.

But it may be made by the managing clerk to the defendant's attorney, who may know more of the cause than the attorney himself. *Anon.* 1 Smith, 61.

Held also, in C. P. that any person other than the defendant making an affidavit of merits, must show in his affidavit that he is either the defendant's attorney or his managing clerk. *Neesom v. Whytock*, 3 Taunt. 403.

An affidavit of merits to set aside a judgment is

sufficient, if sworn by the agent of the country attorney, on information and belief, if the facts are uncontradicted. *Johnson v. Popplewell*, 2 Tyr. 715.

It is not a sufficient objection to an affidavit that the party who made it was convicted of perjury, unless such conviction was followed by judgment. *Lee v. Gansell*, Cowp. 3.

Nor is a conviction for conspiracy. *Park v. Strockley*, 4 D. & R. 144.

## 3. Contents.

**Certainty required.**—Where the meaning is plain, mere ungrammatical construction will not vitiate. *Anon. Loft*, 274.

Nor are clerical errors and bad spelling sufficient ground of rejection. *Bromley v. Foster*, 1 Chit. 562.

Such as "defendant" instead of "deponent," or "court" instead of "office," where the meaning is clear; otherwise, where the mistake leaves the meaning doubtful. *Anon.* 1 Chit. 562, n.

But an affidavit stating that deponent served a party with a "true," omitting the word "copy," of the declaration in ejectment, is bad. *Id.*

That an affidavit is so framed that perjury could not be so assigned thereon, is a defect not to be cured by waiver. *Watson v. Walker*, 1 M. & Scott, 437.

In the statement of a particular date in an affidavit, where that date is essential, it must be stated positively. *Willes v. James*, 1 Dowl. P. C. 498.

In the Exchequer, an affidavit of the service of a rule, by which it is not intended to bring the party into contempt, need not state that the original rule was shown at the time of service. *Farnstone v. Taylor*, 2 Y. & J. 30.

**Name and Addition of Deponent.**—The addition of every person making an affidavit shall be inserted therein. *Reg. Gen. K. B., C. P., and Ex.* H. T. 2 W. 4, 1 Dowl. P. C. 184; 8 Bing. 289; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 169; 2 Tyr. 341; 4 Bligh, N. S. 593.

It is not sufficient in an affidavit by the defendant in a cause, to describe him as the above named defendant, without any other addition. *Lawson v. Case*, 1 C. & M. 481.

It is not necessary that an affidavit made by the defendant in the cause, stating his abode and styling him defendant, should also contain the addition of his degree. *Anon.* 6 Taunt. 73.

An affidavit made in this country to verify the handwriting of a British vice-consul abroad, before whom an affidavit of debt was made, must contain the addition of the deponent. *Thurk v. Faber*, 1 Chit. 465, 721.

**Affidavit of Merits.**—An affidavit that the defendant is advised and believes he has a good defence to the action, will not satisfy the condition of a rule which requires him to swear to a good defence "on the merits." *Pringle v. Marsack*, 1 D. & R. 155.

An affidavit of merits must be a belief of good defence on the merits. *Westerley v. Kemp*, 1 Tyr. 261.

An affidavit by the defendant's attorney, that he had laid the defendant's case and evidence before counsel, who had advised that he had a good defence, is not a sufficient affidavit of merits. *Crosby v. Davies*, 1 Price, P. C. 61.

*Irrelevant and impertinent Matter.*—Where affidavits contain irrelevant matter, the court will direct the Master to ascertain what parts are material to bring the question in dispute before the court, and, in his taxation to allow costs to the parties making the affidavits for such parts only as are material, and to the opposite party the costs occasioned by the irrelevant matter. *Cassen v. Bond*, 2 Y. & J. 531.

If affidavits are made to run to a very impertinent and unnecessary length, the Court of Exchequer will make the party filing them pay a proportionate part of the costs. *Ex parte Henllan*, 7 Price, 594.

Affidavits containing general slanderous statements injurious to the character of bail, cannot be received. *Sanderson's Bail*, 1 Chit. 676.

#### 4. *Before whom, and where sworn.*

*Commissioners.*—No commission for taking affidavits in the Court of King's Bench can be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the Courts at Westminster; and no such commission can issue without an affidavit, made by the person intended to be named therein, that he is not, and doth not intend to become a practising conveyancer; and that he is an attorney or solicitor duly enrolled in one of the said courts, and hath taken out his certificate for the current year. *Reg. Gen. K. B. H. T. 3 & 4 Geo. 4, 2 D. & R. 438; 1 B. & C. 288.*

And attorneys and solicitors duly enrolled, and practising in any of the courts of Great Sessions in Wales, or in either of the counties palatine of Chester, Lancaster, or Durham, must be comprised within the above rule of Hilary term, 3 & 4 Geo. 4, in like manner as attorneys or solicitors of the courts of Westminster. *Reg. Gen. K. B. E. T. 4 Geo. 4, 2 D. & R. 870; 1 B. & C. 656.*

An affidavit of the acknowledgment of bail is properly sworn before a commissioner, for the purpose of taking bail. *Anon.* 2 Y. & J. 101.

*Party's own Attorney.*—No affidavit of the service of process shall be deemed sufficient, if made before the plaintiff's own attorney, or his clerk. *Reg. Gen. K. B. C. P. & Ex. H. T. 2 W. 4, 1 Dowl. P. C. 184; 8 Bing. 288; 1 M. & Scott, 415; 3 B. & Adol. 374; 2 C. & J. 168; 2 Tyr. 341; 4 Bligh, N. S. 593.*

An affidavit to ground a motion for a rule nisi cannot be sworn before the attorney for the party, or his partner; and a rule obtained on such an affidavit will be discharged with costs. *Bati v. Vaisey*, 1 Price, 116.

The court will in no case issue an attachment against a party at the suit of another, where the

affidavits on which the motion is founded are sworn before the agents of the prosecutor. *Rez v. Wallace*, 3 T. R. 403.

But an affidavit sworn before a commissioner employed as clerk to the attorney in a cause, in his character of clerk to the commissioners for the sale of the land-tax is good. *Goodtitle d. Pye v. Badtittle*, 8 T. R. 638.

An affidavit stating that the defendant had been discharged under an Insolvent Debtors' Act, cannot be sworn before his own attorney in the cause. *Jenkins v. Mason*, 3 Moore, 325.

If a rule be obtained on affidavits of a party, sworn before his own attorney in the cause, the Court of Common Pleas will discharge it with costs. *Hopkinson v. Buckley*, 8 Taunt. 74.

Affidavits of the service of declarations in ejectment may be sworn before the attorney in the cause. *Doc d. Cooper v. Roe*, 2 Y. & J. 284.

Where an agent in town, or an attorney in the country, is an attorney on the record, an affidavit sworn before the attorney in the country shall not be received, and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail. *Reg. Gen. K. B. C. P., & Ex. H. T. 2 W. 4, 1 Dowl. P. C. 184; 8 Bing. 289; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 169; 2 Tyr. 341; 4 Bligh, N. S. 593.*

Before this rule; if the agent in town was the attorney on the record, it was no objection to an affidavit of the party, that it is sworn before his own attorney in the country. *Read v. Cooper*, 5 Taunt. 89; 2 Rose, 127.

Before the late alteration in the Court of Exchequer, by which the court is thrown open to all attorneys, it was held that the rule, that affidavits should not be sworn before the attorneys of the parties, was not to be construed literally as applying only to the attorney whose name appeared on the record in that court, which must have been one of the four attorneys of the court, but included the immediate attorney or solicitor for the party. *Cooper v. Archer*, 12 Price, 149.

Where an affidavit has been sworn before the plaintiff's attorney, it is necessary to have an affidavit of that fact: the Court of Exchequer will not reject it merely because it appears on the face of it to have been sworn before a person of the same name as the plaintiff's attorney. *Hodgson v. Walker*, Whitw. 62.

Held also, that it formed no objection to an affidavit, that an attorney before whom it had been sworn in the country had been the legal adviser of one of the deponents, and had in London, told the party really interested in the cause in which the affidavit was sworn, that he intended to move the court in that particular cause; in which, however, he was not the attorney upon the record. *Williams v. Hockin*, 8 Taunt. 435.

*Sworn Abroad.*—The courts will take cognizance of affidavits sworn before foreign magistrates, if properly authenticated to them. *Dalmer v. Bernard*, 7 T. R. 251.

The courts, by the courtesy which subsists between the two countries, take judicial notice that so great an officer as the chief justice of a superior court in Ireland is competent to administer an oath, and therefore will be satisfied with a mere verification of his handwriting. *French v. Bellew*, 1 M. & S. 302.

Affidavits sworn before a justice of the peace in Scotland are admissible in a cause in K. B. if the handwriting of the justice be authenticated. *Turnbull v. Morton*, 1 Chit. 463, 721.

An affidavit made by a defendant in a suit in the equity side of the court of Exchequer Chamber, sworn before a magistrate in Scotland, permitted to be read. *Ellis v. Sinclair*, 3 Y. & J. 273: but see *Hyde v. Whitfield*, 19 Ves. jun. 344.

It is no objection to an affidavit sworn in Scotland, that it is taken before a justice of the peace, and not before a lord of session. *Watson v. Williams*, 1 Dowl. P. C. 607.

By stat. 3 & 4 W. 4, c. 42, s. 42, the Lord Chancellor or Lord Keeper, the superior Courts of Common Law and Equity at Westminster, and the several judges of the same, shall have the same power to grant commissions for taking affidavits in Scotland and Ireland as they had in the counties of England.

#### 5. Jurat.

*Time and Place of swearing.*—An affidavit must state in the jurat the day on which it was sworn. *Doe v. Roe*, 1 Chit. 228.

If the month be omitted in the jurat, in a proceeding against a prisoner in custody, it is defective, and cannot be amended. *Wood v. Stephens*, 3 Moore, 236. And see *Anon.* 1 Chit. 562, n.

In C. P. it is no objection that no place was mentioned in the jurat. *Symmers v. Wason*, 1 B. & P. 105.

Affidavits in answer to a rule for a mandamus sworn before a commissioner, must contain the place where sworn, otherwise they cannot be read. *Res v. W. R. of Yorkshire (Justices)*, 3 M. & S. 493.

In a criminal proceeding for perjury in an affidavit the jurat is not conclusive as to the place of swearing, and evidence as to the real place of swearing the affidavit may be given in contradiction to the jurat. *Res v. Emden*, 9 East, 437.

A palpable mistake in an affidavit, as the wrong year in the jurat, used in support of an application to the court, is not an insurmountable objection to the motion, as the court will permit the error to be amended by a supplemental affidavit. *Couper v. Archer*, 12 Price, 149.

But where such negligence occurs, they will visit it on the party to the consideration of the question of costs. *Id.*

Where there is a defect in the jurat on which to found a rule nisi, it cannot be used; nor will time be given, except in cases of bail. *Anon.* 2 Chit. 20.

An erasure over the jurat is not such a defect. *Atkinson v. Thompson*, 2 Chit. 19.

*Several Deponents.*—In every affidavit sworn in K. B. or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat; and no affidavit shall be read or made use of, in any matter depending in that court, in the jurat of which there shall be any interlineation or erasure. *Reg. Gen. K. B. M. T.* 37 Geo. 3, 7 T. R. 82: *S. P. Anon.* 2 Chit. 19.

So in the Exchequer the names of all the deponents must be written in the jurat, or the affidavit will not be received. *Reg. Gen. Exch. T.* 1 Geo. 4; 8 Price, 501.

And in that court, it must appear by the jurat, that all the deponents have been sworn. *Res v. London (Sheriffs)*, 1 Price, 338.

But the deponents need not be severally named in the jurat as having been sworn (as is required in K. B.), but it is sufficient if it express that it was sworn by all the deponents. *Anon.* 2 Price, 1.

*Illiterate Persons.*—Where any affidavit is taken by any commissioner of K. B., made by any person who, from his signature, appears to be illiterate, the commissioner shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand it; and also, that the said party wrote his signature in the presence of the commissioner. *Reg. Gen. K. B. E. T.* 31 Geo. 3, 4 T. R. 284.

So it must be certified in the jurat of affidavits made in the Exchequer by illiterate persons, that the deponent understood the affidavits, and signed them in the presence of the commissioner taking the same. *Reg. Gen. Exch. H. T.* 40 Geo. 3, 8 Price, 504.

And that the affidavit was read to and understood by the deponent, in the presence of the officer of the court, or person administering the oath. *Reg. Gen. Exch. T. T.* 1 Geo. 4, 8 Price, 501.

#### 6. How filed.

Affidavits which ought to have been filed a week before Hilary Term, may be read with leave of the court, on showing cause, on the second day of the term, though filed after the specified time. *Hoar v. Hill*, 1 Chit. 27.

So, where no particular time is prescribed for filing affidavits on which cause is shown, they may be sworn and filed at any time before showing cause, though after the day appointed by the rule. *Tilley v. Henry*, 1 Chit. 136.

Affidavits which were required by an enlarged rule to be filed a week before the commencement of the term, may, under circumstances, be used by leave of the court, although they were not filed within the time specified in such rule. *Harding v. Austin*, 8 Moore, 523.

Where on a motion to set aside an award, the affidavit of the arbitrator was not filed within the time limited by the court, they refused to allow its being read. *Clesby v. Peece*, 8 Moore, 524, n.

Upon an enlarged rule, the affidavits must be filed before showing cause, although it be not so

expressed in the rule of enlargement. *Barker v. Richardson*, 1 Y. & J. 362.

Affidavits to be used on a special application, in the Exchequer, must be filed one clear day before such application is made; and where notice of a motion is necessary, the filing of the affidavit must be mentioned at the foot of the notice. *Reg. Gen. Ex. H. T. 1 & 2 Geo. 4, 9 Price, 88.*

When an affidavit has been read and filed, it becomes a record of the court, and cannot be taken off the file. *Beal v. Langstaff*, 2 Wils. 371.

#### 7. How used.

[See *In re Gellebrand*, 1 D. & R. 121.]

Though affidavits have been used, and a motion made thereon, they may be again referred to in support of a fresh motion. *De Woolf v. —*, 2 Chit. 14.

But when there was a stamp on affidavits, it was held that in showing cause against a rule which had been previously heard before a judge at chambers, the same affidavits could not be used, unless they were re-sworn and re-stamped. *Chitty v. Bishop*, 4 Moore, 413. And see *Atkins v. Reynolds*, 2 Chit. 14.

Nor could an affidavit, having only one stamp, be used in more than one cause. *Anon.* 3 Taunt. 469.

An affidavit made after a rule to show cause granted, is not admissible. *Ditchett v. Tollett*, 3 Price, 257.

No office copy of an affidavit can be received or read in the Exchequer, unless it has been previously examined and signed by the attorney or clerk in court making the same, or his accredited agent. *Reg. Gen. Exch. E. T. 2 Geo. 4, 9 Price, 298.*

The court of Exchequer will not hear affidavits in reply on a rule to show cause. *Shaw v. Mansfield*, 7 Price, 709.

If that court open a rule which has been made absolute on the usual affidavit of service, in order to give the other party an opportunity of showing cause, they will not hear affidavits sworn after the day on which the rule had been made absolute. *Tripp v. Bellamy*, 5 Price, 384.

An affidavit, more than a year old, cannot be used on moving for a rule. *Burt v. Owen*, 1 Dowl. P. C. 691.

No objection can be made in showing cause to a rule in the Exchequer, arising out of an affidavit, which is not referred to in the rule nisi. *Naylor v. Eagar*, 2 Y. & J. 90.

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### I. AGENCY GENERALLY.

*Brokers and Factors.*—A person who, for brokerage and hire, negotiates and concludes bargains for stock, is a broker in point of law. *Jansen (Bt.) v. Green*, 4 Burr. 2103.

The character of broker differs materially from that of factor; the former is not trusted with the possession of the goods, nor ought he to sell in his own name; but the latter, from its being usual for him to make advances upon the goods, has a special property in, as well as a general lien upon them; and may sell in his own name; and his principal will be bound by all the consequences of such sale, of which the right of setting off a debt due from the factor is one. *Baring v. Corrie*, 2 B. & A. 137.

*London Brokers.*—It seems that a stock broker is liable to pay to the chamberlain of London, for the benefit of the corporation, the annual duty of 40s. directed by stat. 6 Anne, c. 16, s. 4, to be received by the chamberlain from every broker. *Rex v. London Court of Request Commissioners*, 7 East. 292.



A ship broker, or one who obtains on commission freight and passengers for vessels, is not a "broker" within the statutes regulating the admission of brokers for the city of London. *Gibbons v. Rule*, 12 Moore, 539; 4 Bing. 301.

A broker in the city of London may maintain an action on a contract, or sustain a proof for a debt arising out of transactions as a merchant, although such transactions are in contravention of the regulations under which he derives his office, and to the condition of the bond which he executes, and to the oath which he takes on his appointment under the statute. Not however if the debt or contract arises out of a transaction in which he has acted both as broker and principal, that being void upon principles of common law. *Ex parte Dyser*, 2 Rose, 349; 1 Mer. 155.

A sworn broker of the city of London is in the nature of a public agent; and, therefore, in an action against him for negligence in making a contract, the court will, on motion, compel him to produce his books for the purpose of enabling the plaintiff to inspect them and take a copy of the contract. *Browning v. Aylwin*, 9 D. & R. 801; 7 B. & C. 204.

In one case it was held that a London broker might refuse to allow his employer to inspect his contract book; and it is no breach of his bond, if he at the same time add, it shall be produced at the proper time, and does produce it afterwards before a court of aldermen. *London (Mayor) v. Brandon*, Holt, 438; 2 Stark. 14.—Ellenb. Rule to set aside a nonsuit refused.

Nor is it a breach of his bond to employ a person who is not a sworn broker. *Id.*

Nor if he mistake the quantity of goods he had bought, where he derived no advantage from such mis-statement, though it was the cause of considerable loss to his principal. *Id.*

A broker is authorized from a previous course of dealing between himself and his principal, on an approval of a purchase by the latter, to make out a contract note in his own name, without inserting that of his principal; and, under such circumstances, does not violate the bond and oath imposed on him by the regulations of the city of London, provided he make an entry in his book in the name of his principal. *Kemble v. Atkins*, 1 Moore, 6; 7 Taunt. 260; Holt, 427.

It is the duty of a sworn broker of the city of London to charge his principal only the cost price of articles purchased for him, in addition to his commission, and the principal having averred in an action of assumpsit, that the broker had charged him a greater price than the cost price which the plaintiff had paid: Held, that it was sufficient proof of such averment to produce a running unsettled account between the parties, by which it appeared that the principal had paid more than the amount of the overcharges, although on the whole account, and when the balance, at a subsequent period, was struck, the principal was indebted to the broker in a sum far exceeding such overcharges. *Procter v. Brain*, 2 M. & P. 284; 3 C. & P. 536.

Quære, whether in such an action it is competent for the broker to show, that in some of the transactions he acted as a principal, it being contrary to the duty and oath of a broker so to act. *Procter v. Brain*, 2 M. & P. 284; 3 C. & P. 536.

*Appointment of, and giving Authority.*—An agent need not be authorized in writing. *Coles v. Trecothick*, 9 Ves. jun. 250.

Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority. Per Best, in *Jones v. Wright* 5 Bing. 533; 2 M. & P. 120.

So, a subsequent ratification by a principal of a contract by an agent is equivalent to a previous authority. *Maclean v. Dunn*, 1 M. & P. 761; 4 Bing. 722.

Where, therefore, a broker made a contract in writing for the sale of goods, not being authorized by one of his principals at the time, but to which the latter afterwards assented:—Held, that the broker was an agent duly authorized to bind his principal under the statute of frauds. *Id.*

Where A. accepted bills for the accommodation of B, and B. deposited title deeds of A's with C, the holder of the bills, as security for their payment, a letter from A. to C, referring to the existence of the debt, and saying, "the security you hold is a great deal more than you hold acceptances for on my account, my real account is not more than half you hold, but you have full security for all and more":—Held, a sufficient acknowledgment of the security to the full amount of bills, though B. had no direct authority to pledge. *Ex parte Skinner*, 1 Deac. & Chit. 403.

Whatever the duty of an agent requires him to do in the business of his employers, must be presumed so to be done with their knowledge and direction. *Ex parte Machul*, 1 Rose, 447.

An agent has authority to settle for a loss where he has been authorized to underwrite a policy. *Richardson v. Anderson*, 1 Camp. 43, n.—Ellenborough.

A broker who is employed to sell goods for a person, and who agrees for the sale of them, at the same time giving both to the purchaser and his employer a sale-note, is to be considered as the agent of both parties. *Rucker v. Cammeyer*, 1 Esp. 105.—Kenyon.

## II.—DUTY OF AGENT.

### 1. To devote entire personal Attention.

An agent cannot employ himself for a third person when he has agreed to give up the whole of his personal services to his principal. *Thompson v. Havelock*, 1 Camp. 527—Ellenborough.

A traveller, about to set up business on his own account, may solicit orders from his master's customers, provided the orders he takes at the time are for his master. *Nichol v. Martyn*, 2 Esp. 732—Kenyon.

A broker cannot, without the assent of his prin-

principal, delegate his authority. *Henderson v. Barnwell*, 1 Y. & J. 387.

A factor has no right to send away goods to another person, when they have been consigned to him for sale at a particular place, though he is unable to sell them there. *Callin v. Bell*, 4 Camp. 183—Ellenborough.

A., employed by the defendant to transport goods to a foreign market, delegates the entire employment to the plaintiff, who performs it without the privity of the defendant:—Held, that there was no privity between them, and, therefore, that the plaintiff was not entitled to recover his charges, or those of his agents, from the defendant, although the latter had not paid the amount to A. *Schmaling v. Tomlinson*, 1 Marsh. 500; 6 Taunt. 147; and see *Cull v. Backhouse*, 6 Taunt. 148, n; and *Guy v. Gore*, 2 Marsh. 273.

So a defendant having contracted with a surveyor, who ordered goods from the plaintiff for the use of the defendant's house, was held not to be liable for them. *Bramah v. Abingdon (Lord)*, 15 East, 66.

### 2. To account.

If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to deliver the residue unsold on demand: but an action does not lie against him for not accounting, till after demand made of an account. *Topham v. Braddick*, 1 Taunt. 572.

If the declaration in an action to recover the price of goods sent for sale on commission, allege that the defendant sold but did not account to the plaintiff, he must prove that a sale actually took place; and it will not be presumed, even at a distance of twelve months after the delivery of the goods. *Elbourn v. Upjohn*, 1 C. & P. 572—Best.

The first duty of an agent is to be constantly ready with his accounts, and neglect in this is a ground for charging him with interest. *Pearse v. Green*, 1 J. & W. 135.

A steward is bound to account periodically, though not called on. *Ormond (Lady) v. Hutchinson*, 13 Ves. jun. 53, 92.

Where notice is given by a party to his agent, in a particular adventure, that another person is jointly interested with him in the adventure, this *prima facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure. *Killock v. Greg*, 4 Russ. 285.

But this obligation ceases to exist, if the transactions show that it was the intention of such other person, and of the party originally interested in the adventure, that the agents should account solely with the latter. *Id.*

A. had long employed B. as his steward, professional adviser, and general confidential agent; disputes having arisen between them, an agreement was entered into between B. and a clergyman acting on behalf of A., by which a gross sum was to be paid to B. in lieu of all his claims, but no accounts or vouchers were rendered or produced by A., nor was any bill of costs deliver-

ed; that agreement will not protect B. from rendering an account to his principal. *Jenkins v. Gould*, 3 Russ. 385.

If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him, that he offered to pay on account a gross sum, which, it turns out, would have covered all that was due from him. *Collyer v. Dudley*, 1 Turn. & Russ. 421.

Where an account between principal and agent was settled from loose papers, the agent having kept no regular books, after his death, liberty was given to surcharge and falsify upon allegation of errors since discovered. *Hardwick (Lord) v. Vernon*, 4 Ves. jun. 411.

### 3. To pay over monies.

An agent to receive particular monies is bound to pay the same over to his principal, notwithstanding the claims of third persons. *Nicholson v. Knowles*, 5 Madd. 47.

A book-keeper in Smithfield market must pay money he has received for the sale of some beasts to the vendor, and cannot retain it for the private debt of the salesman employed by the vendor. *Good v. Jones, Peake*, 177—Kenyon.

A. drew bills in favour of B. in India, upon the E. I. Co. in London, which the latter accepted: C., as the agent of B., indorsed the bills to D. and E., under the supposed authority of a power of attorney from B., which the E. I. Co. had inspected: D. and E. indorsed the bills to their bankers and agents, F. & Co., with instructions to present them for payment when due. F. & Co. indorsed the bills, presented them for payment when due, received the money, and paid it over to their principals, D. and E. The power of attorney from B. did not authorize C. to indorse the bills, and B. having died, his administrator recovered the amount of them from the E. I. Co., as the acceptors. The latter now brought assumpsit against F. & Co., upon an alleged undertaking by them that they were entitled to receive payment of the bills. The jury found, specially, that the plaintiffs paid the bills, not on the faith of the indorsement by the defendants, but on the faith of the power of attorney, and that the defendants received the money as agents, and paid it over to their principals before they knew that the first indorsement by C. was unauthorized: Held, that the action could not be maintained against these defendants. *E. I. Comp. v. Tritton*, 5 D. & R. 214; 3 B. & C. 280.

A. being a stranger, deposits, for a particular purpose, in the hands of B., a country-banker at J., the sum of 800*l.* in local bank notes; 635*l.* of which had been issued by C. at D.; B. transmits the whole of the notes immediately to C. and is credited with the amount in account by the latter, who re-issues the notes, and stops payment:—Held, that A. was entitled to recover the whole amount of the notes from B. as cash received by the latter to his use. *Gillard v. Wyse*, 7 D. & R. 523; 5 B. & C. 184; and see *Price v. Holbeck*, 2 Doug. 654.

Where the holder of a bill of exchange, who held it in trust for plaintiff, sued the drawer, and pending that suit became bankrupt, and his assignees afterwards brought an action against the drawer in the bankrupt's name; in which action, the sheriff having been guilty of an escape on mesne process, the assignees recovered against the sheriff, in an action for the escape, damages to the amount of the bill: Held, that the plaintiff might maintain money had and received against the assignees for the damages so recovered, allowing them the costs and expenses. *Disentients Lord Ellenborough. Randall v. Bell, 1 M. & S. 714.*

Assumpsit for money had and received will not lie against a mere money bearer, to recover the money he had received and paid over. *Coles v. Wright, 4 Taunt. 213; 2 Rose, 110.*

Where the plaintiff, in a declaration of assumpsit, stated that in consideration that he would employ the defendant (an annuity-broker) to invest and lay out the plaintiff's money in the purchase of an annuity, the defendant undertook to invest it on good and valid security; and assigned for breach, that he laid it out on a bad, invalid, and fraudulent security; and the defendant pleaded non assumpsit infra sex annos, and actio non accrevit infra sex annos, on which issue was joined, and it was proved that the consideration money was paid over to the grantor, and the annuity paid by the hands of the defendant to the plaintiff for six years afterwards, when the grantor became bankrupt and the security failed; subsequently to which the defendant's managing clerk promised that the plaintiff should be paid, which promise the defendant afterwards recognised: Held, that the plaintiff could not recover for money had and received, the money having been paid over to the grantor; nor on an account stated, as there was no existing antecedent debt between him and the defendant. *Whitehead v. Howard, 5 Moore, 105; 2 B. & A. 372.*

A., with a view to accommodate B., lent him a bill drawn by himself, upon, and accepted by C., who had effects of A. in his hands; B. indorsed it to D., who indorsed it over; the day before the bill became due, B. paid the amount to A., who, on hearing that C. had failed, gave B. a check for the amount of the bill, and sent him with it to D. to enable him to pay the bill when due; four days after that time, A. learning that payment had not been demanded, desired D. not to pay the bill, as no notice of non-payment had been given by the holder, and offered to indemnify him; notwithstanding this, D. afterwards paid the bill:—Held, first, that D. paid the bill in his own wrong; secondly, that A. was entitled to recover back the money paid into the hands of D. by B. in an action for money had and received. *Whitfield v. Savage, 2 B. & P. 277.*

If a person employed by shipowners as their agent effect a policy of insurance, and represent himself as the principal to the brokers, who cause such insurance to be effected:—Held, that if the brokers receive the amount of the loss from the underwriters and pay it over to the agent, they are not liable to the owners in an action for mo-

ney had and received, although part of the money was paid to the agent after they were informed of his having acted in that capacity. *Bell v. Jutting, 1 Moore, 155.*

Money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them. *Baynton v. Cattle, 1 M. & Rob. 265—Alderson.*

#### 4. Not to deal with Principal.

[See ATTORNEY—TRUSTEE for dealings by them.]

Where a person placed himself under the advice of a dealer in English and foreign funds, and the latter advised purchases and sales of stock, and it afterwards appeared that these purchases and sales were merely nominal transfers and re-transfers of the dealer's own stock, the difference being settled in account, it was held that the court of equity rightly interfered to compel an account between the parties, and to set aside the transactions that had taken place, on the ground that the dealer stood in a situation of advantage which equity will not allow to an agent in dealing with his principal. *Rothschild v. Brookman, 2 Dow & Clarke, 188; 5 Bligh, N. S. 165; 3 Simon, 153.*

An agent employed by a young man to sell a reversionary legacy shall not be permitted to be purchaser thereof himself at an under value: and nothing shall amount to a confirmation of such a transaction, until the vendor be fully apprized that he might be relieved against the original transaction if he chose to impeach it. *Crowe v. Ballard, 2 Cox, 253.*

If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees v. Nuttall, 1 Russ. & Mylne, 53.*

Bill to set aside the lease of a farm granted to a steward by his employer, dismissed with costs; although the lease was for a term longer than usual on the estates, and was granted at the solicitation of the steward, on an agreement made before the subsisting lease had expired, and at a rent lower than offered to the steward on behalf of the occupying tenant; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose by the employer, on a valuation made in the manner usual with that surveyor; and the offer of higher rent being known to the employer before he executed the lease. *Selsey (Lord) v. Roades, 2 Sim. & Stu. 41.*

### III.—POWER AND AUTHORITY OF AGENTS.

#### 1. Statute as to dealing with Agents.

Persons intrusted for the purpose of consignment or sale with goods, and who shall have shipped them in their own names, and persons in whose names goods shall be shipped by others, shall be deemed the true owners thereof, so far as to entitle the consignees to a lien thereon in respect of money or negotiable securities advanced or given by them to or for the use of the persons in whose names the goods are shipped,

wards pledged the gums for a valuable consideration to defendant, handing over to him the transfer order of plaintiffs, together with a transfer order from himself, and afterwards, and before the bills became due, became bankrupt:—Held, that plaintiffs were entitled to maintain trover against defendant for the gums. *Boyeon v. Coles*, 6 M. & S. 14.

Where A. and B., having agreed to purchase cottons on their joint account, directed their brokers to purchase the same, and purchases having been made, warrants or orders for delivery were made out in the names of the brokers, and the cottons were left in their custody as the brokers of A.; and immediately after the purchases, B. paid A. one half of the value; and after considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased; and A., after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which the whole of the warrants were deposited with C. by the brokers; and while they were so deposited, the latter received directions, both from A. and B., to make a division of the goods held on their joint account, which they did, by appropriating specific warrants to each party, and which division was approved of by both; and before the bills became due, the brokers were directed by A. to get one-half renewed, which C. agreed to do, and discounted fresh bills; and the brokers then left in the hands of C., as a security for the money thus advanced, the warrants belonging to B.; C., however, not then knowing that B. had any interest in them:—Held, that the second pledge was the pledge of a specific chattel belonging to B. which the brokers had no authority to make, and, consequently, that trover was maintainable against C. *Barton v. Williams*, 5 B. & A. 395; *McClell. & Y.* 406: *S. C.* in error nom. *Williams v. Barton*, 3 Bing. 139; 10 Moore, 596.

The defendants, as brokers for B. & Co. effected two purchases of seed, both of which were paid for by B. & Co., and left in the defendants' warehouses for the purpose of re-sale; the first was made on account of B. & Co., and the other for the plaintiffs, resident abroad, and by their express order; but the invoices of both were made out in the name of B. & Co., who did not inform the defendant that the latter purchase was not made on their account:—Held, that the defendants having made advances to B. & Co., could not retain possession of the seed against the plaintiffs, on the ground that a factor has no authority to pledge the goods of his principal. *Guichard v. Morgan*, 4 Moore, 36.

Held, that where a factor had pledged the goods of his principal, the latter might recover the value of them in trover against the pawnee, on tendering to the factor what was due to him, without any tender to the pawnee. *Daubigny v. Duval*, 5 T. R. 604.

So also, he might maintain trover after demand and refusal without tendering the duplicate. *Pest v. Baxter*, 1 Stark. 479—Ellenborough.

If bills indorsed in blank be deposited with a

banker to be received when due, and he raise money upon them by pledging them, trover will not lie on his bankruptcy. *Collins v. Martin* 1 B. & P. 648; 2 Esp. 620.

Afterwards held, that the pawnee for a valuable consideration, who claimed under the tortious act of the broker, had no right to retain the goods against the principal in trover for the amount of the lien which the broker had on the goods, for a balance due from the principal at the time of such pledge, the lien being personal and not transferable by such tortious act of the broker. *McCombie v. Davies*, 7 East, 5; 3 Smith, 3.

Where a foreign merchant consigned goods to his correspondent in London, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt:—Held, that the factor was liable to the foreign merchant in trover for the goods. *Duclos v. Ryland*, 5 Moore, 518, n. And see *Craven v. Ryder*, 2 Marsh, 127: 6 Taunt. 433; Holt, 100.

Where the consignee of goods from abroad authorized a factor to indorse the bills of lading for the purpose of sales, and the factor indorsed them to H. & Co. (who knew that the latter was a mere agent), with authority to them, first, to effect sales, and secondly, to reimburse themselves out of the proceeds for a sum of money which they advanced upon the credit of the goods; and before the authority of the factor (who immediately afterwards stopped payment) was countermanded, H. & Co. sold the goods by auction.—Held, that H. & Co. were not liable to the original consignee in trover for the goods. It seems, however, that they would be liable for money had and received to the use of the rightful owner of the goods. *Stierner v. Holden*, 6 D. & R. 17; 4 B. & C. 5; R. & M. 219.

Where foreign merchants consigned goods, on their own account and risk, to a commission agent in this country, for sale only, and in the letter of advice wrote, "We expect that you will send us some remittances on account of the proceeds consigned to you, though they be not yet sold, as is customary, in order to encourage us thereby to send you more frequent consignments," and the agent pledged the goods for advances to himself, he being in embarrassed circumstances:—Held, that the shipper's letter to the agent did not amount to an authority to pledge the goods. *Queiroz v. Trueman*, 5 D. & R. 192; 3 B. & C. 342.

When A., without the authority of B., pledges his property with C., and B. brings a joint action of detinue against A. and C., the jury in such a case, if they are satisfied that B. held out A. as a person authorized to pledge his property for the purpose of raising money, may find a verdict for both defendants. *Garth v. Howard*, 5 C. & P. 346—Tindal.

#### 4. As to Sale of Goods.

An agent cannot sell the goods of his principal without authority; but such authority to sell may be implied from circumstances. Thus, where a London agent was employed by his prin-

principal in the country to import goods from abroad, and send them to their destination, and by the bill of lading the goods were deliverable "to order or assigns," and indorsed in *blank* by the shipper, and the agent, being allowed to retain possession of the bill of lading for five months, sold the goods without any authority for that purpose:—Held, that it was a question for the jury whether the principal had not, by his conduct, enabled his agent to hold himself out to the world as a person having authority to sell, and thereby to convey title to the vendee. *Dyer v. Pearson*, 4 D. & R. 648; 3 B. & C. 38.

A purchaser of hemp lying at a wharf, had it, at the time of his purchase, transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp:—Held, that this gave the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So, if it had been transferred into the names of the principal or broker. *Pickering v. Busk*, 15 East, 38.

In order to avoid a sale made by a broker, it may be shown that, by the custom of that particular trade, the authority of the broker expired with the day on which it was given. *Dickinson v. Lilwall*, 4 Camp. 279; 1 Stark. 128—Ellenborough.

So, by the custom of London, where goods are sold by a broker to be paid for by bill, the vendor has a right to annul the contract within a reasonable time, if he is dissatisfied with the sufficiency of the purchaser. But the intimation of his dissent must be made as soon as he had an opportunity of making inquiry; and five days were considered too long. *Hodgson v. Davies*, 2 Camp. 533—Ellenborough.

Where a purchase is made by an agent, he is not a special agent, if he has any discretion to exceed the sum ordered to be given by his principal; and, if he have such a discretion, the principal is bound by his contracts, though they exceed the sum which he is ordered by his principal to give. *Hicks v. Hankin*, 4 Esp. 114—Heath.

Brokers in the usual habit of buying and paying for, and of selling and receiving the value for sugars on speculation, in their own names, and upon their own judgment, for their principal; sometimes, when the market was low, under an unlimited authority as to quantity and price; at other times under special instructions to buy; but guided from time to time by special instructions to sell, and limited in respect to price, and advised from time to time by their principal as to the probable rise or fall of the market; but keeping only a general account with their principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and re-sold; may bind him by a re-sale of a particular parcel of sugars before purchased and paid for in their own names, and lodged in their own warehouse, though sold under the price directed by their principal, for whom they received the money, but afterwards failed: the

general authority of the brokers to sell, so as to bind their principal in respect of the purchaser, being to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods. *Whitehead v. Tuckett*, 15 East, 400.

An agent authorized to sell goods, has, in the absence of advice to the contrary, an implied authority to receive the proceeds of such sale. *Capel v. Thornton*, 2 C. & P. 352—Tenterden.

If a person employed as the agent of another in the sale of any property, has notice that what he is about to sell is not his principal's, and he yet continues to sell, he is personally liable for the produce of the sale. *Hardacre v. Stewart*, 5 Esp. 103—Ellenborough.

If a factor sell goods as a principal, and the buyer has no notice of his being only a factor, the real principal is bound so far, that the buyer may, in an action against him for the price, set off a debt due to him from the factor. *George v. Claggett*, 2 Esp. 557—Kenyon.

And the court refused a new trial. 7 T. R. 359. *S. P. Rabone v. Williams*, 7 T. R. 360, n.

Otherwise, if, before they are all delivered, or any part of them paid for, the purchaser is informed that they belong to a third person. *Moore v. Clementson*, 2 Camp. 22—Ellenborough.

If goods are sold by a broker without disclosing his principal, the purchaser is justified in paying him in a different manner from that stipulated for by the terms of the contract. Aliter where the principal is disclosed at the time of sale. *Blackburn v. Scholes*, 2 Camp. 343—Ellenborough.

Where a broker who had sold goods for plaintiff to defendant, made an arrangement with plaintiff unknown to defendant, altering the time of payment:—Held, that the plaintiff had thereby taken the broker as his debtor, and had discharged the defendant. *Thornton v. Meux*, M. & M. 43—Abott.

The circumstance of persons selling goods being described in the catalogue of sale as sworn brokers, is not sufficient notice to the purchaser that they are only agents, to prevent him from dealing with them as principals. *Id.*

Goods sold by a broker for a principal not named, upon the terms as specified in the usual bought and sold notes, (delivered over to the respective parties by the broker) of "payment in one month, money," may be paid for by the buyer to the broker within the month, and that by bill of exchange accepted by the buyer, and discounted by him within the month, though having to run a longer time before it was due. But, where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, generally, which was larger than the amount of either demand, but less than the two together, and afterwards the broker stopped payment, such payment ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover

wards pledged the gums for a valuable consideration to defendant, handing over to him the transfer order of plaintiffs, together with a transfer order from himself, and afterwards, and before the bills became due, became bankrupt:—Held, that plaintiffs were entitled to maintain trover against defendant for the gums. *Boyeon v. Coles*, 6 M. & S. 14.

Where A. and B., having agreed to purchase cottons on their joint account, directed their brokers to purchase the same, and purchases having been made, warrants or orders for delivery were made out in the names of the brokers, and the cottons were left in their custody as the brokers of A.; and immediately after the purchases, B. paid A. one half of the value; and after considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased; and A., after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which the whole of the warrants were deposited with C. by the brokers; and while they were so deposited, the latter received directions, both from A. and B., to make a division of the goods held on their joint account, which they did, by appropriating specific warrants to each party, and which division was approved of by both; and before the bills became due, the brokers were directed by A. to get one-half renewed, which C. agreed to do, and discounted fresh bills; and the brokers then left in the hands of C., as a security for the money thus advanced, the warrants belonging to B.; C., however, not then knowing that B. had any interest in them:—Held, that the second pledge was the pledge of a specific chattel belonging to B. which the brokers had no authority to make, and, consequently, that trover was maintainable against C. *Barton v. Williams*, 5 B. & A. 395; *McClel. & Y. 406*: *S. C.* in error nom. *Williams v. Barton*, 3 Bing. 139; 10 Moore, 596.

The defendants, as brokers for B. & Co. effected two purchases of seed, both of which were paid for by B. & Co., and left in the defendants' warehouses for the purpose of re-sale; the first was made on account of B. & Co., and the other for the plaintiffs, resident abroad, and by their express order; but the invoices of both were made out in the name of B. & Co., who did not inform the defendant that the latter purchase was not made on their account:—Held, that the defendants having made advances to B. & Co., could not retain possession of the seed against the plaintiffs, on the ground that a factor has no authority to pledge the goods of his principal. *Guichard v. Morgan*, 4 Moore, 36.

Held, that where a factor had pledged the goods of his principal, the latter might recover the value of them in trover against the pawnee, on tendering to the factor what was due to him, without any tender to the pawnee. *Daubigny v. Duval*, 5 T. R. 604.

So also, he might maintain trover after demand and refusal without tendering the duplicate. *Pest v. Baxter*, 1 Stark. 479—Ellenborough.

If bills indorsed in blank be deposited with a

banker to be received when due, and he raise money upon them by pledging them, trover will not lie on his bankruptcy. *Collins v. Martin* 1 B. & P. 648; 2 Esp. 620.

Afterwards held, that the pawnee for a valuable consideration, who claimed under the tortious act of the broker, had no right to retain the goods against the principal in trover for the amount of the lien which the broker had on the goods, for a balance due from the principal at the time of such pledge, the lien being personal and not transferable by such tortious act of the broker. *McCombie v. Davies*, 7 East, 5; 3 Smith, 3.

Where a foreign merchant consigned goods to his correspondent in London, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt:—Held, that the factor was liable to the foreign merchant in trover for the goods. *Duclos v. Ryland*, 5 Moore, 518, n. And see *Craven v. Ryder*, 2 Marsh, 127: 6 Taunt. 433; Holt, 100.

Where the consignee of goods from abroad authorized a factor to indorse the bills of lading for the purpose of sales, and the factor indorsed them to H. & Co. (who knew that the latter was a mere agent), with authority to them, first, to effect sales, and secondly, to reimburse themselves out of the proceeds for a sum of money which they advanced upon the credit of the goods; and before the authority of the factor (who immediately afterwards stopped payment) was countermanded, H. & Co. sold the goods by auction.—Held, that H. & Co. were not liable to the original consignee in trover for the goods. It seems, however, that they would be liable for money had and received to the use of the rightful owner of the goods. *Stierneld v. Holden*, 6 D. & R. 17; 4 B. & C. 5; R. & M. 219.

Where foreign merchants consigned goods, on their own account and risk, to a commission agent in this country, for sale only, and in the letter of advice wrote, "We expect that you will send us some remittances on account of the proceeds consigned to you, though they be not yet sold, as is customary, in order to encourage us thereby to send you more frequent consignments," and the agent pledged the goods for advances to himself, he being in embarrassed circumstances:—Held, that the shipper's letter to the agent did not amount to an authority to pledge the goods. *Queiroz v. Trueman*, 5 D. & R. 192; 3 B. & C. 342.

When A., without the authority of B., pledges his property with C., and B. brings a joint action of detinue against A. and C., the jury in such a case, if they are satisfied that B. held out A. as a person authorized to pledge his property for the purpose of raising money, may find a verdict for both defendants. *Garth v. Howard*, 5 C. & P. 346—Tindal.

#### 4. As to Sale of Goods.

An agent cannot sell the goods of his principal without authority; but such authority to sell may be implied from circumstances. Thus, where a London agent was employed by his prin-

principal in the country to import goods from abroad, and send them to their destination, and by the bill of lading the goods were deliverable "to order or assigns," and indorsed in blank by the shipper, and the agent, being allowed to retain possession of the bill of lading for five months, sold the goods without any authority for that purpose:—Held, that it was a question for the jury whether the principal had not, by his conduct, enabled his agent to hold himself out to the world as a person having authority to sell, and thereby to convey title to the vendee. *Dyer v. Pearson*, 4 D. & R. 648; 3 B. & C. 38.

A purchaser of hemp lying at a wharf, had it, at the time of his purchase, transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp:—Held, that this gave the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So, if it had been transferred into the names of the principal or broker. *Pickering v. Busk*, 15 East, 38.

In order to avoid a sale made by a broker, it may be shown that, by the custom of that particular trade, the authority of the broker expired with the day on which it was given. *Dickinson v. Litwell*, 4 Camp. 279; 1 Stark. 128—Ellenborough.

So, by the custom of London, where goods are sold by a broker to be paid for by bill, the vendor has a right to annul the contract within a reasonable time, if he is dissatisfied with the sufficiency of the purchaser. But the intimation of his dissent must be made as soon as he had an opportunity of making inquiry; and five days were considered too long. *Hodgson v. Davies*. 2 Camp. 533—Ellenborough.

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If a person employed as the agent of another in the sale of any property, has notice that what he is about to sell is not his principal's, and he yet continues to sell, he is personally liable for the produce of the sale. *Hardacre v. Stewart*, 5 Esp. 103—Ellenborough.

If a factor sell goods as a principal, and the buyer has no notice of his being only a factor, the real principal is bound so far, that the buyer may, in an action against him for the price, set off a debt due to him from the factor. *George v. Claggett*, 2 Esp. 557—Kenyon.

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the difference from the buyer. *Favenc v. Bennett*, 11 East, 36.

If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal; but, if the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing; as particularly in the case of principals residing abroad. *Patterson v. Gandasequi*, 15 East, 62.

A., a foreign merchant, employs B. to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A.) make out the invoices to B., and take in payment his acceptances payable at six months:—Held, amongst other things, that there was no contract of sale as between A. and B. *Seymour v. Pychlau*, 1 B. & A. 14.

Parol evidence of a broker may be admitted, to show that a sale of goods was made to a third person, for whom the buyer acted as agent, although the bought note and invoice were made out in the name of the buyer. *Wilson v. Hart*, 1 Moore, 45.

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods: Held, that the seller might afterwards sue the principals for the price. *Thompson v. Davenport*, 9 B. & C. 78; 4 M. & R. 110.

The plaintiffs purchased, by order of T. & Co. of Ryder, to whom they were known as brokers, 110 bales of cotton. The contract was regularly entered on the plaintiffs' books as a purchase and sale by brokers, and brokerage charged to both parties. Bought and sold notes were delivered not disclosing the names of principals, but charging brokerage to both. T. & Co. and Ryder were not known to each other as concerned in the dealings. The plaintiffs paid Ryder for the cottons, and handed them over to T. & Co. with a bill of parcels in their own names:—Held, that the plaintiffs were principals in the purchase of Ryder, and the sale to T. & Co. *Kilby v. Wilson*, R. & M. 178—Abbott.

When an agent is authorised, from a previous course of dealing between himself and his principal to do so, he may, on an approval of a purchase by the latter, make out a contract note in his own name, without inserting that of his principal, provided he make an entry in his book in the name of his principal. *Kemble v. Atkins*, 1 Moore, 6; 7 Taunt. 260; Holt, 427.

A purchaser cannot object to a broker becoming an intermediate purchaser for the purpose of becoming responsible to the seller, when he had before consented to similar agreements. *Id.*

Where plaintiffs consigned goods to their factors, who, not having funds to pay the freight and

duties, agreed with the defendants that they should take charge of the consignment, pay the freight and duties, and sell the goods, and have one half the usual commission on such sale; and defendants accordingly paid the freight and duties, and received the goods, after which the factors became bankrupt, having before informed defendants that the goods were the plaintiffs', but defendants notwithstanding sold the goods:—Held, in trover by the plaintiffs, that the defendants had not a right to retain for the freight and duties, after deducting the balance due from the factors to the plaintiffs, at the time of the bankruptcy. *Solly v. Rathbone*, 2 M. & S. 298.

Where C. consigned goods to M. their broker, upon a *del credere* commission, for sale, and drew bills on him in advance, which M. accepted, but never paid, and afterwards, without the knowledge of C., placed the goods with H. another broker, upon a *del credere* commission, and upon an agreement to divide the commission with him, and obtained his acceptances for the amount, and H. sold the goods and afterwards became bankrupt, and his assignees received the proceeds of those sales, and the acceptances of H. were proved under his commission, and a dividend received upon them:—Held, that the assignees of H. were liable to the assignees of C., who had also become bankrupt, for the amount of the proceeds, in an action for money had and received. *Cockran v. Irlam*, 2 M. & S. 301, n.

#### 5. As to Securities.

[*Rights and authority of Bankers, see BANKERS.*]

An agent who has received from his principal bills indorsed "on account" of such principal, (by which means their negotiability is restrained,) cannot deposit them with his bankers as a security for advances: the special indorsement is a sufficient notice to the bankers that the bills are not the property of the party from whom they receive them, to enable him to pledge them. *Truett v. Barandon*, 1 Moore, 543; 8 Taunt. 100.

Defendant was held liable where he had received a bill to be discounted and promised to pay the amount to the plaintiff, but paid a debt of his own instead. *Oughton v. West*, 2 Stark. 321—Ellenborough.

Where a check was drawn upon a banker at Llanely, at the residence of the drawer, (a single house four miles from thence), on unstamped paper, but dated at Llanely, and delivered by the drawer to his farming bailiff, to give to the person in whose favour it was drawn; and he discounted it with a banker at Carmarthen, who did not present it before the drawer stopped payment, which took place five days afterwards:—Held, that the bailiff was not acting within the scope of his authority in discounting the check, so as to charge his principal. *Waters v. Brogden*, 1 Y. & J. 457.

Where a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, and afterwards absconded, but was taken before



he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds:—Held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor v. Plumer (Knt.)*, 5 M. & S. 562; 2 Rose, 415.

Where an attorney, acting under a special power to receive the money only, deposited certain victualling bills with the defendant, as a security for money borrowed from him; in an action of trover by the payee of the bills:—Held, that the plaintiff was entitled to recover. *Tonkin v. Fuller*, 3 Dougl. 300.

There is a distinction between goods in the hands of a factor, and bills in the hands of a banker; the latter, if indorsed, may be pledged or discounted, though against the faith of the remittance, and the remitter can be only a general creditor. *Ex parte Pease*, 19 Ves. jun. 39.

Bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold, and, on failure of the factor, must be returned to the principal, subject to such lien as the factor may have thereon. *Zinck v. Walker*, 2 W. Black. 1154.

#### 6. Under Power of Attorney.

[For Execution of Deeds, see DEEDS.]

A power of attorney must be pursued strictly; but it is to be so construed as to include all the necessary means of executing it with effect. *Howard v. Baillie*, 2 H. Black. 618.

Where one gave a power of attorney to another to demand and receive all monies due to him on any account whatsoever, and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, "and to do all other business:"—Held, that the latter words must be understood with reference to the former, as meaning all business appertaining thereto. *Hay v. Goldsmidt*, 2 Smith, 79.

Defendant who carried on business on his own account, and in partnership, gave a general power of attorney to his wife and partners to act for him and in his name, and to his use, and to indorse bills, and generally to act for him while abroad. He gave another power to his wife alone, to act for him and on his behalf, and to pay and accept such bills as should be drawn by his agents and correspondents as occasion should require. One of the partners drew a bill on defendant for money to supply the partnership concerns, defendant having received while abroad money on the partnership account, and the wife accepted the bill for her husband:—Held, 1st, that the partner could not be called defendant's agent, and therefore that the wife had not power to accept the bill; 2dly, that she had not power to accept a bill for partnership transactions, but only bills on his account; 3dly, that the general words in a power of attorney were not to be construed at large, but as giving general powers for carrying into effect the special purpose for which they were given: and therefore that an indorsee who

had not used due caution could not recover. *Attwood v. Munnings*, 1 M. & R. 66; 7 B. & C. 278.

A power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means, all monies, debts and dues whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal. *Murray v. East India Company*, 5 B. & A. 204.

And trover may be maintained for the bills indorsed by the agent, where the power of attorney was to receive all salary and money, with all the principal's authority to recover, compound, and discharge, and to give releases and appoint substitutes. *Hogg v. Snaith*, 1 Taunt. 347.

A general power of attorney granted to one partner does not give any authority to the others. *Edmiston v. Wright (Bt.)*, 1 Camp. 88—Ellenb.

One of two partners gave his son a power of attorney, "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit:"—Held, that this gave the son power to submit the account to arbitration. *Henley v. Soper*, 8 B. & C. 16; 2 M. & R. 153.

Where a power of attorney is given as part of a security for money, it is not revocable. *Walsh v. Whitcomb*, 2 Esp. 565—Kenyon.

A., being indebted to B., in order to discharge the debt, executed to B. a power of attorney, authorizing him to sell certain lands belonging to him, A.:—Held, that this being an authority with an interest, could not be revoked. *Gaussen v. Morton*, 10 B. & C. 731.

A power of attorney is revoked by the death of the party giving it, even though the party to whom it is given has an interest, or the act be not to be performed until after the death of the party. *Watson v. King*, 1 Stark. 121; 4 Camp. 272—Ellenb.

#### 7. Other Cases.

A special agent, under a limited authority, cannot bind his principal by any act beyond the scope of such limited authority. *Fenn v. Harrison*, 3 T. R. 757; 4 T. R. 177.

Where the holder of a bill of exchange desired A. to get it discounted, but positively refused to indorse it, and A. delivered it to B. for the same purpose, informing him to whom it belonged; and B. finding that he could not dispose of it without indorsing it, was prevailed upon to do so, by A.'s telling him that he would indemnify him; but the indorsee took it upon the credit of the names on the bill, without any knowledge of the real owner: although such original holder afterwards promised to pay the bill, yet such promise cannot support an action brought against him by the indorsee, it being nudum pactum; for, as A. was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority. *Id.*

It afterwards held, on a new trial, that the employers of A. the agent were bound by his act; and were liable to refund if the bill be afterwards dishonoured by the acceptor. 4 T. R. 177.

An agent employed generally to do an act is only authorized to do it in the usual way of business; therefore, as stock is usually sold for money only, a principal is not bound by the acts of a broker employed by him, who sells it upon credit without a special authority, though acting bona fide and with a view to the benefit of the principal. *Wiltshire v. Sims*, 1 Camp. 258.—Ellenborough.

If one of two trustees order a broker to sell stock standing in their joint names, and undertake to procure his co-trustee to join in the transfer, the broker is not warranted in making the sale, unless such co-trustees authorize or concur with the other in making the transfer. *Leyton v. Sneyd*, 2 Moore, 583.

A factor, who was a partner in a house abroad, to whom goods were consigned, made advances to the consignor to be paid out of the proceeds:—Held, that the consignees were not authorized to purchase bills for the account and risk of the consignor. *Lucas v. Groning*, 7 Taunt. 164; 2 Marsh. 460; 1 Stark. 391.

A. consigned and shipped goods to India for sale, and in his letter of instructions to his agent B. directed him to invest the proceeds in certain specified articles of merchandise, or in bills at the exchange of the day, and remit them to England. B., instead of complying with this order, invested the proceeds in a commodity not specified in his letter of instructions, and informed A. of the purchase, by letter, and transmitted a bill of lading for the goods, which reached A. on the 29th May, who notified to an agent of B., on the 7th August, his dissent from what had been done; the goods having in the mean time been lost at sea:—Held, that the laches of A. in delaying his notice of dissent so long, discharged B.'s liability; and that the jury were warranted in finding that A. had assented to the purchase made by B. *Prince v. Clark*, 2 D. & R. 266; 1 B. & C. 186.

A share in the London Institution, incorporated by charter, for the advancement of literature, &c., cannot be transferred until the proprietor shall, by writing under his hand, signify his desire so to do to the committee of managers, and mention therein the name, &c. and other description of the person to whom he is desirous the same should be transferred; which person is to be approved by the committee:—Held, that a note addressed to them in these words: "Having disposed of my share in the London Institution to [leaving a blank for the name], I beg leave to recommend him to be elected in my place, as a proprietor," &c. and signed by the proprietor, which note was left in the hands of an agent (the clerk of the society), for the purpose of selling the share, did not authorize such agent to fill up the blank himself with the name of the purchaser with whom he contracted for the price, against the rules of the society, which required the recommendation of the candidate to be vouched by the proprietor himself, inserting his name, &c., in the paper; and consequently the agent had no authority, before the transfer was so completed, to receive the money of the purchaser, and to insert his name in the blank, unknown to the proprietor.

And such purchaser, paying the money before the time of payment when the transfer from the proprietor was complete, pays it at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer, upon the interference of the proprietor: Held, that the purchaser could not recover the amount from such proprietor in an action for money had and received. *Parnter v. Gaitkell*, 13 East, 432.

A factor having an authority to sell for money, is not entitled to barter; therefore, where a factor, being ordered to sell, bartered the goods of his principal:—Held, that no property passed, and that the principal might maintain trover against the party with whom the goods were bartered, although the latter was ignorant that he had been dealing with a factor. *Guerreiro v. Peile*, 3 B. & A. 616.

A traveller who receives orders for goods from his employer's customer in the country, is authorized to receive payment for them in money, but not in other goods. *Howard v. Chapman*, 4 C. & P. 508—Tindal.

#### IV. RIGHTS OF AGENT AGAINST PRINCIPAL.

##### 1. Remuneration.

*Misconduct of Agent.*—An agent cannot recover commission, or even a compensation for his trouble, if he executes his duties in such a manner that no benefit results from them. *Hamond v. Holiday*, 1 C. & P. 384—Best.

Nor is he entitled to commission where he has been guilty of gross misconduct in selling goods. *White v. Chapman*, 1 Stark. 113—Ellenborough.

A broker purchases goods on commission at a month's credit, and pays duties on them, and sends them to the place of the purchaser's abode, consigned to his own order: the seller, being fearful of the purchaser's credit, procures the broker to delay the arrival of the goods till the month's credit is expired, and to render them to the buyer on payment of the price, whereupon they are refused:—Held, that the broker can neither recover the price, duties, or commission, in an action for money paid. *Hurst v. Holding*, 3 Taunt. 32.

Claims by the agent for expenses on account of the principal, which, from the conduct of the agent in having undertaken the business without authority or agreement, could not be ascertained, were disallowed. *Beaumont v. Boulbee*, 11 Ves. jun. 358.

A confidential agent in that character is bound to keep regular accounts; and, having neglected to do so, and to preserve vouchers against himself, though he had preserved those in his own favour, was, on the ground of gross neglect of duty, not allowed a charge in respect of bills of costs for business done as a solicitor. *White v. Lincoln (Lady)*, 8 Ves. jun. 363.

*Business ineffectual.*—A ship-broker employed to sell a ship, which, when put up for sale, was

bought in, is not entitled to a commission on the sale. *Master v. Atkins*, 1 Marsh. 76; 5 Taunt. 381.

A ship-broker who has procured a bargain for the hire of a vessel, in, by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise:—Held, that, when a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the ship-owner to recover the commission, or a compensation for his work and labour. *Read v. Rens*, 10 B. & C. 438.

Even where the contract is not completed by the act of the owner. *Broad v. Thomas*, 7 Bing. 99; 4 M. & P. 732; 4 C. & P. 338.

Where a broker is employed by a ship-owner to procure a charter-party, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover any thing in the shape of remuneration; nor is he, in such case, entitled to recover for any expenses which he may have been put to, unless such expenses are unusual, and have been incurred in consequence of the ship-owner's having urged him to extraordinary expedition in the matter. And semble, that, where the negotiation is not carried into effect, but there is no fault in the broker, he is not entitled to any thing, unless the charter-party is actually signed. *Dalton v. Irwin*, 4 C. & P. 269—Tindal.

*Del credere Commission.*—A commission del credere is an absolute engagement to the principal from a broker, and makes him liable in the first instance, though the principal may resort to the person trusted as a collateral security. *Grove v. Dubois*, 1 T. R. 112. See *Bize v. Dickason*, 1 T. R. 285.

*Indebitatus assumpsit* lies to recover del credere commissions for guaranteeing sums insured upon policies; such commissions being due upon entering into the contract of guarantee. *Caruthers v. Graham*, 14 East, 578.

If a declaration state that the defendant was indebted to the plaintiff, in respect of goods delivered by him to the defendant, to be sold and disposed of; and it appear in evidence, that the defendant received a del credere commission on guaranteeing the solvency of the purchasers:—Held, that such declaration was insufficient, as the commission was not therein stated. *Gall v. Camber*, 1 Moore, 279; 7 Taunt. 558.

The plaintiff declared in *indebitatus assumpsit*, that the defendant was indebted to him for commission due for his having guaranteed the payment of goods sold by him, as the factor of the defendant, to third persons, and at his request: Held good after verdict. *Solly v. Weiss* (in error), 2 Moore, 490.

An agent who received annuities for his principal, sent him several accounts, in which he gave credit, amongst others, for instalments of annuities, but which he stated he had not yet

received. He charged commission on them, as well as on the others which were received, and told his principal he might draw for the balance, which he did. In subsequent accounts no notice was taken of the instalments, which, in a previous account, were stated to be unpaid:—Held, sufficient evidence for a jury to infer a del credere commission, creating an agreement for the agent to be responsible to his principal for the annuities. *Shaw v. Woodcock*, 7 B. & C. 73; 9 D. & R. 889; and see *Shaw v. Picton*, 7 D. & R. 201; 4 B. & C. 715; and *Shaw v. Dartnell*, 9 D. & R. 54; 6 B. & C. 56.

*Other Cases.*—A broker chartering a ship to the Baltic is entitled to 5 per cent. commission, by usage of the trade. *Cohen v. Paget*, 4 Camp. 96—Ellenborough.

A broker charters ships, at a commission of 2½ per cent. on their outward freight, and the like on their homeward freight: if the charter-party makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined. *Winter v. Mair*, 3 Taunt. 531.

It is no answer to an action by a broker for commission for procuring freight, that the charter-party procured was such, that, if the charterer failed to obtain certain licenses, the voyage would be illegal. *Haines v. Busk*, 5 Taunt. 521; 1 Marsh. 191.

A ship broker is entitled to 5 per cent. on the gross freight of a ship, though payment of a part is contingent on the arrival of the vessel home. *Roberts v. Jackson*, 2 Stark. 225—Ellenborough.

A spirit broker is entitled to a commission of half a crown per puncheon, for putting a quantity of rum up for sale by public auction, although such sale turned out to be ineffectual. *Stewart v. Kahle*, 3 Stark. 161—Ellenborough.

By an usage of trade, a broker may be entitled to ½ per cent. commission from the purchaser as well as the seller. *Eicke v. Meyer*, 3 Camp. 412.—Ellenborough.

Where plaintiffs, being ordered to sell an estate, or to raise money upon it, and being unable to effect a sale, applied to A., by negotiation with whom money was obtained, but without any further interference on the part of the plaintiffs:—Held, that they could not recover more than 5s. per cent. commission for procuring this money. *Pryce v. Wilkinson*, 2 Bing. 470; 10 Moore, 177.

By agreement, T., an agent, was to have a commission on sales effected, or orders executed by him; the principal to be responsible for bad debts, and the agent to draw his commission monthly. By the custom of the trade, commission was not allowed on sales which produced bad debts:—Held, notwithstanding, that, under the terms of this agreement, T. was entitled to commission on bad debts. *Bower v. Jones*, 8 Bing. 65; 1 M. & Scott, 140.

The plaintiff, a surveyor, was retained by the defendant, to negotiate with the commissioners of woods and forests for the sale to them of certain premises of the defendant, for which he

was to receive a commission of 2l. per cent. "on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a jury was empanelled, by whom the value of the property was assessed at 4,000l. but, in consequence of a defect in the defendant's title, arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, the money was not paid to her, but was placed in the hands of the Accountant-General, to await the adjustment of the difference. The plaintiff was not previously aware by the existence of this charge:—Held, that he was, nevertheless, not entitled to his commission until the money awarded was actually received by the defendant. *Bull v. Price*, 5 M. & P. 2; 7 Bing. 237.

## 2. Lien.

A factor has a lien on his principal's goods for the general balance due to him. *Goden v. London Ass. Company*, 1 W. Black. 104.

But he has no lien on goods for a general balance, unless they come into his actual possession. *Kinloch v. Craig*, 3 T. R. 119, 783; 4 Bro. P. C. 47.

A factor who becomes surety for his principal, has a lien on the goods sold by him for his principal, to the amount of the sum for which he has so become surety. *Drinkwater v. Goodwin*, Cowp. 251.

An actual possession given to a factor by a carrier, by order of the shipper, after his (the shipper's) bankruptcy, is not such a possession as will give him a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of it, such an order rather operates to defeat his claim of lien, as being an act of ownership exercised by the bankrupt. *Nicholas v. Clent*, 3 Price, 547.

If a broker advance money, and give his acceptances on the credit of goods lodged in his hands, he has a lien on them, and may retain them until the owner gave him a full indemnity. *Pultney (Bart.) v. Keymer*, 3 Esp. 182—Eldon.

So he has a lien on such goods, and the purchase money, available against the crown, where the goods or money have been seized by the sheriff under an extent against the principal, for a debt due to the crown. *Rex v. Lee*, 6 Price, 369.

A broker purchasing goods for his principals, without their knowledge, adds to the terms of purchase which the principals had agreed to, a guarantee by himself of their bills: the goods were delivered to the broker, and the principals became bankrupts:—Held, that the broker had no lien on them for the money he had paid on his guarantee. *Gurney v. Sharp*, 4 Taunt. 242.

A principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which factor accepts: and then the principal dies, and his executors direct the captain of the ship to follow his former orders; who thereupon delivers the ship into the possession of the

factor, who sells the same:—Held, that the factor has a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. *Hammonds v. Barclay*, 2 East, 227: and see *Kinger v. Wilcox*, Amb. 252.

If goods are bought by an agent on his own credit, he may, before they come to the possession of the principal, stop them, to protect himself. *Hawkes v. Dunn*, 1 Tyr. 416; 1 Price, P. C. 24.

If a trader, before an act of bankruptcy, place a cargo of coals in the possession of a factor for sale, and he is in the course of disposing of them when the trader becomes bankrupt; the factor has a right to proceed with the sale, to receive the money, and to hold it in payment of his own balance. *Robson v. Kemp*, 4 Esp. 236—Ellenborough.

Where the owner of goods was indebted to a factor in a sum exceeding their value, and consigned them to him for sale; and the factor, being indebted to J. S. in more than their worth, sold them to him, and afterwards became bankrupt; and on a settlement of accounts between J. S. and the assignees of the factor, the former allowed credit to them for the price of the goods, and then proved the residue of his claim against the estate:—Held, that, as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees was a good answer to an action against the vendee for the price of the goods, brought either by, or on the account of the original owner. *Hudson v. Granger*, 5 B. & A. 27.

If A. deposit goods with B. for sale, and B. promise to pay the proceeds to A. when sold; B. has no lien on them (if not sold) for the balance of his general account arising upon other articles. *Walker v. Birch*, 6 T. R. 258.

On the 15th of October the defendants, as brokers of A., purchased goods of B. & Co. on his account, and agreed with them that such goods should remain on their premises one month, free of rent, and after that time that A. should pay rent until their removal. From 7th to the 11th of November the defendants shipped part of the goods by the order of A., who directed the remainder to be left at B. & Co.'s premises till further orders. Shortly after, B. & Co. requested the defendants to remove them, which they did not; but, on the 9th of December, without any direction of A., they removed them to their own premises, a docket having been previously struck against A. on the 6th, and a commission issued on the 10th: Held, that the possession continued in A., and that the defendants had no lien on the goods for a general balance due to them from A. as his brokers. *Taylor v. Robinson*, 2 Moore, 730.

A., a factor, having sold goods for B. in his own name to C.; the latter, without paying for these goods, sent another parcel of goods to A. to sell for him, never having employed A. as a factor before. C. then became bankrupt, and his assignees

claimed the goods sent by him to A., and which still remained unsold, tendering the charges upon those goods. A. refused to deliver them up, claiming a lien upon them for the price of the former goods sold by him to C., there being a balance then due from B. to himself:—Held, that the assignees were entitled to recover. *Houghton v. Matheson*, 3 B. & P. 485.

The right of lien being personal cannot be transferred by any tortious act of the broker. *McCombie v. Davies*, 7 East, 5; 3 Smith, 3.

An agreement by a broker that he will sell goods for his principal, and pay over the whole proceeds without setting off a debt then due to him from his principal, is not binding upon the broker so as to deprive him of his legal right of lien. *McGillivray v. Simson*, 9 D. & R. 35; 2 C. & P. 320.

### 3. Dispute Principal's Title.

Quære, whether a broker, who sells goods and receives the money for them on account of his principal, can controvert his title to the goods in an action brought against him by the principal, or his assignees, for the money. *Jones v. Dwyer*, 15 East, 21.

An agent cannot dispute the title of his principal; and, therefore, where a ship originally belonged to one of two part owners, had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight, and charged them with the premiums, &c., and, on a loss happening, received the money from the underwriters: Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged. *Dixon v. Hamond*, 2 B. & A. 310.

A contract, establishing between the contracting parties the relation of principal and agent, is made absolute in law by the latter's acting under it; and an insurance broker cannot, as an agent, dispute the claim of his only known principal, on the ground that other persons were interested in the subject-matter of the insurance: their claims would be a question between the assured and the persons so claiming to be interested. *Roberts v. Ogilby*, 9 Price, 269.

### 4. Payments on Account of Principal.

A direction to an agent to pay over the proceeds of a sale, is not revocable, if founded upon a valuable consideration. *Metcalfe v. Clough*, 2 M. & R. 178.

Where the plaintiff directed the defendants (his bankers) to hold a certain sum of money from his private account, at the disposal of J. S., and the bankers accepted the order, but the plaintiff countermanded it before any actual appropriation or payment made:—Held, that such order was revocable, and the defendants, having paid the money to J. S. after such countermand, were liable to the plaintiff in an action for money had

and received. *Gibson v. Minet*, 9 Moore, 31; 2 Bing. 7; 1 C. & P. 247; R. & M. 68.

Although where an agent has money in his hands belonging to his principal, who orders him to pay it over to a third person, but before payment the principal countermands such order, and the agent afterwards pays it over, he does so in his own wrong; yet, where advances were made, under an agreement, amounting to the appropriation of the proceeds of a specified cargo by a particular ship, which the agent remitted accordingly:—Held, that he was not responsible for such payment, although his principal had countermanded the order subsequently to the agreement under which the advances were made. *Fisher v. Miller*, 7 Moore, 527; 1 Bing. 150.

Plaintiff cannot recover money paid to redeem property seized, which he had improperly shipped by order of his partner, who was defendant's agent. *Edmiston v. Wright*, 1 Camp. 88—Ellenborough.

A. consigns goods to B., with directions to pay over the net proceeds to C. B. employs D. to dispose of them. In an action by C. to recover the proceeds from D., D. is entitled to make the same deductions for freight, &c., as B., who was the owner of the ship in which the goods were brought, might have made. *Blackburn v. Kymer*, 1 Marsh. 223; 5 Taunt. 584.

Where an agent has a general authority to receive and sell goods, and out of the proceeds to repay himself his advances, charges, and commission; the costs of an action, with a reference thereof, against a wrong-doer, who withholds the possession of the goods, bona fide incurred for the recovery of the goods, are legal charges upon the goods, and may be set off by the agent in an action brought against him by his principal for the balance of the proceeds of the goods. *Curtis v. Barclay*, 7 D. & R. 539; 5 B. & C. 141; S. C. not S. P. 2 C. & P. 185.

A broker, who contracts with others for the sale of stock at a future day, by the authority of his principal, who afterwards refuses to make good the bargain, cannot, by paying the difference to such third person, maintain an action on an implied assumpsit against his principal for the amount. *Child v. Morley*, 8 T. R. 610.

Quære, whether a broker who contracts a purchase for his principal, and afterwards makes good the contract, can recover the money he pays to complete it, of his principal, on any of the common money counts. *Joseph v. Pebrer*, 1 C. & P. 341—Littledale. 5 D. & R. 542; 3 B. & C. 639.

## V. LIABILITY OF AGENT TO PRINCIPAL.

### 1. On Sale of Goods.

An agent who sells goods on credit is not liable to his principal until he is paid by the vendee, unless the delay in payment was occasioned by his own neglect. *Varden v. Parker*, 2 Esp. 710—Buller.

And if he discloses the name of the vendee, he

is not liable for the price to his principal, unless he acts under a *del credere* commission. *Alsop v. Sylvester*, 1 C. & P. 107—Hullock.

A broker when he bought goods for his principal, agreed for half per cent. to indemnify him from any loss on the re-sale; it was held, that this undertaking was discharged when the principal had a fair opportunity of selling to advantage, but neglected it, though he was afterwards obliged to sell at a loss. *Curry v. Edensor*, 3 T. R. 524.

If a broker, being employed to sell goods, sell them for a bill at a given date, and draw on the buyer for the amount, he is answerable on the bill to his principal. *Le Feuvre v. Lloyd*, 1 Marsh. 318; 5 Taunt. 749.

An agent purchasing foreign bills for his principal, and indorsing them to him without qualification, is liable to the principal on his indorsement, however small be the commission which he gets upon the purchase. *Goupy v. Harden*, 2 Marsh. 454; 7 Taunt. 159; Holt, 342.

A factor takes a security, payable to himself, from a purchaser of goods, and gives his own security to his principal, without giving the name of the purchaser; the factor cannot compel his principal to refund the money paid him, on failure of the purchases. *Simpson v. Swan*, 3 Camp. 291.—Ellenborough.

Goods were consigned to two for sale by commission; upon a dissolution of partnership, the commission to sell was assumed by one:—Held, that, having sold, he was rightly sued for money had and received, which action could not have been maintained against both, although an action for not accounting would have laid against him. *Wells v. Ross*, 7 Taunt. 403.

Consignees abroad, on a *del credere* commission, specially indorse bills to one of their partners in London for the proceeds of goods, who had advanced money on the goods to the consignor: the consignees must bear the loss on the bills being dishonoured while in the partners' hands. *Lucas v. Groning*, 1 Stark. 391; 2 Marsh. 460, 7 Taunt. 164.

If a broker advance money, and give his acceptances on the credit of goods lodged in his hands, the owner cannot demand them without a full indemnity; and giving his counter-acceptances, or those of any other person, to the amount of those given by the trader, and becoming payable at the same time, is not a sufficient indemnity. *Pultney (Bart.) v. Keymer*, 3 Esp. 182—Eldon.

A bill for an account will lie by the principal against an agent employed to sell goods for him. *Mackenzie v. Johnston*, 4 Madd. 373.

## 2. Negligence.

A person is liable for negligence in procuring a policy of insurance, though he did it gratuitously. *Wilkinson v. Coverdale*, 1 Esp. 75—Kenyon.

A., a general merchant, undertakes voluntarily, without reward, to enter a parcel of goods to B., together with a parcel of his own of the same

sort, at the custom-house, for exportation; but makes the entry under a wrong denomination, whereby both parcels were seized. A. having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, is not liable to an action for the loss occasioned to B. *Skells v. Blackburne*, 1 H. Black. 158.

Merchants in London receive from a mere stranger abroad a bill of lading, in a letter, requesting them to effect an insurance; they decline doing so, but bona fide indorse the bill of lading to a friend of his, who fails:—Held, that the merchants were liable to the consignor for the amount. *Corlett v. Gordon*, 3 Camp. 472—Ellenborough.

An agent who acts upon the best advice he is able to get in the affairs of his principal, is not liable to damages arising from that act. *Miles v. Bernard*, Peake Add. Cas. 61—Kenyon. And see *Reece v. Rigby*, 4 B. & A. 202.

Case, not trover, lies against a broker who is authorized to sell goods for a certain price, but sells them at an inferior price. *Dufresne v. Hutchinson*, 3 Taunt. 117.

Trover does not lie against a person who takes out goods to India for the vendor under an agreement to sell them for what he could get, and retain what he could obtain above a certain price, but who left them to a third person to be disposed of, on quitting India. *Bromley v. Cawwell*, 2 B. & P. 438.

No action is maintainable. *Id.*

A., in Holland, commissioned B. in London to purchase and ship tobacco of the best quality. B. employed C. as his broker for that purpose, who accordingly made a purchase from D. On the arrival of the tobacco in Holland, it turned out to be of a very bad quality, when A. brought an action and recovered against B.:—Held, that B. was entitled to recover from C. the whole of the damages he had sustained in the action brought against him by A., although he had received and bought a note from C. in which the tobacco was not described as of the best quality. *Mainwaring v. Brandon*, 2 Moore, 125.

A party employing another to present a bill for acceptance is entitled to recover nominal damages against such agent if he fails to present it; although no real damage whatever is occasioned by the neglect, the bill and costs having been paid by other persons liable on it. *Van Wart v. Wollley, M. & M.* 520—Tenterden. See 8 B. & C. 439; 1 M. & R. 4.

An agent acting gratuitously was charged with a loss arising from the failure of his bankers, where he had paid in the monies to his own account. *Massey v. Banner*, 1 J. & W. 241; 3 Madd. 413. *S. P. Lipton v. White*, 15 Ves. jun. 432.

An agent so depositing money with a banker to his own account, cannot relieve himself from liability, by informing his principal of the payment, without a correct specification of the particulars. *Id.*

## Rights of Principal [AGENT AND PRINCIPAL] against Third Persons. 41

An agent who applies money remitted to him to his own use, is liable for interest; but not if he suffers it to lie dead in his hands. *Rogers v. Boehm*, 2 Esp. 704—Kenyon: and see *Chedworth v. Edwards*, 8 Ves. jun. 48.

### 3. Other Cases.

The clerk to a body of trustees, who executes his office by a deputy appointed by himself, is not responsible in damages for losses occasioned by the negligence or malversation of his deputy, if they were of such a nature that they only become prejudicial to the trustees through negligence on their own part. *Whitmore v. Wilks*, M. & M. 214—Tenterden.

Nor for money belonging to the trustees and actually received by the deputy, but which only came into his hands by reason of an irregular act of the trustees, which the deputy had prevailed on them to commit. *Id.*

But he is answerable for sums of money which the trustees had ordered him to receive, although not in his capacity of clerk, if those sums be actually paid to the deputy at the office, although the deputy had no particular authority to receive them, if the clerk had, at the time, reasonable ground to believe that the payment would actually be made to the deputy at the office. *Id.*

Rule for new trial granted. *Id.*

Where a person is employed to receive money for another, and he employs a third person to receive it for him, assumpsit for money had and received will not lie against the first, without evidence that the money came to the hands of such third person. *Matthews v. Haydon*, 2 Esp. 509—Kenyon.

Defendant is employed to procure payment of a bill, and remit the produce direct to plaintiff, but remits it to a third person, whereby it gets into the hands of plaintiff's creditors: defendant is not liable for money had and received. *Duncan v. Skipwith*, 2 Camp. 68—Ellenborough.

Defendant is not liable for a loss where he had collected some debts for plaintiff, and sent them by the post according to his direction. *Warwick v. Neake*, Peake, 67—Kenyon.

Where a servant was accustomed to receive debts for his master, and pay the money over without any written vouchers, the master must prove that the servant has not paid the money over, as well as that he has received it, in an action against him for money had and received. *Eames v. Birch*, 3 Camp. 10—Ellenborough.

## VI. RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.

The defendant drew a bill at Marseilles on B. in London, which he accepted, payable to the order of C., who indorsed it to the plaintiffs: being dishonoured, the plaintiffs commenced an action against the defendant, the bill being then held by them as the agents of C.: a former bill had been drawn by the defendant on D., which, at the time of its dishonour, was held by E., who took it up,

and, having struck out his indorsement, sent it to F., to be forwarded to G. & Co. at Marseilles, for the purpose of receiving the amount from the defendant. G. & Co., in breach of the trust reposed in them, indorsed it, being overdue at the time, to C., for a valuable consideration. On C.'s demanding payment from the defendant, he drew the bill in question as a substitution for the former, and delivered it to C.; and, before the latter bill became due, E. gave the defendant notice not to pay it:—Held, that he was not liable, as the plaintiffs held the bill as the agents of C., and that they could only recover, to be accountable to him, and that C. had no right to recover, as the produce of it belonged to E., who had given the defendant notice not to pay it. *Lee v. Zagury*, 1 Moore, 557.

A. ordered goods of B. & Co. to be shipped at Bristol, and, before the vessel sailed, he directed his agents in London to insure her. B. & Co. having shipped the goods, caused another insurance to be effected, they being ignorant of the former insurance by A. Neither of the policies were cancelled, but that effected by A. was void on the ground of concealment. In an action against an underwriter by B. & Co. on the policy effected by them:—Held, that they were entitled to recover, A.'s agent having directed it to be effected; and that the jury were warranted in finding that he had an implied authority so to do. *Berlow v. Leckie*, 4 Moore, 8.

Although an agent enters into an agreement for the purchase of an estate in his own name, and appears to act on his own account, yet, on the vendor's default in completing the purchase, the principal may maintain an action for the deposit in his own name. *Norfolk (Duke) v. Worthing*, 1 Camp. 337—Ellenborough.

Where an agent, without declaring his principal, purchases goods, the vendors, on discovering the principal, may sue him, though he has debited the agent, and though the principal has remitted money to his agent to discharge the debt. *Nelson v. Powell*, 3 Dougl. 410.

Where sugars were shipped from abroad, under a bill of lading, which expressed that they were on account of the plaintiffs, and were to be delivered to W. and their assigns, and W., who was the agent of the plaintiffs for the management of their property consigned from abroad, indorsed the bills of lading, together with other bills of lading, comprising the rest of the cargo, to the defendants, and drew bills upon them for the amount of the whole cargo, which the defendants accepted, and paid, and sold the sugars at two months' credit, at the expiration of which they carried the amount of the proceeds to the account of W., who, in the interval between the sale and the expiration of the credit, had become bankrupt:—Held, that the plaintiffs were entitled to recover the proceeds of such sale from the defendants. *Shipley v. Kymer*, 1 M. & S. 484.

By custom in the corn market, a buyer may pay the factor upon discount, within the two months which constitute the ordinary time of payment, either for his own accommodation, or that of the factor; and therefore, where a factor stopped pay-

ment after he had received the money for corn sold, but before the expiration of the two months: Held, that the principal could not sue the buyer, but must look to the factor. *Heish v. Carrington*, 5 C. & P. 471—Denman.

## VII. OBLIGATION OF PRINCIPAL TO THIRD PERSONS.

### 1. On Contracts of Agents.

Fraud will vitiate any transaction, though the principal do not personally take any part in the fraud, if the agent do: for, the principal is civilly responsible for the acts of his agent. *Doe d. Willis, v. Martin*, 4 T. R. 39.

A principal is bound by all the acts of his general agent; but, where he appoints an agent for a particular purpose, he is only bound to the extent of the authority given. *E. I. Comp. v. Hensley*, 1 Esp. 112—Kenyon: and see *Attwood v. Muntings*, 7 B. & C. 278; 1 M. & R. 66.

If a tradesman living in the country receive goods, ordered on his behalf by a person in London, and pay for them in several instances, he is liable for goods furnished on an order given by such person afterwards, though he did not receive them, such person having appropriated them to his own use. *Gillman v. Robinson*, 1 C. & P. 642; R. & M. 226—Best.

Therefore, where the defendant, a linen-draper in Yorkshire, has in several instances employed A. B. as his agent, to purchase on credit goods from the plaintiffs, linen-drapers, in London, and A. B., without the authority of the defendant, orders goods, in his name, to be sent by the usual conveyance, and intercepts them to his own use: Held, that the defendant is liable for such goods, having by the previous dealing authorized the plaintiffs to treat A. B. as his agent. *Todd v. Robinson*, R. & M. 217—Abbott.

A., a merchant, purchases goods of B., for the use of C., who is present and selects the goods, and stipulates with B. the price and other terms of the purchase. A. credits B. with the amount, and debits C. with the amount and a commission. B. debits A. in his books and invoices. B. cannot recover the price of the goods against C. *Addison v. Gandasequi*, 4 Taunt. 374.

If one take the security of the agent of the principal with whom he dealt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent, on the faith of such receipt, the principal is discharged, although the security fail. Otherwise, if the principal do not show that he was injured by means of such false voucher. *Wyatt v. Hertford (Marq.)*, 3 East, 147.

An agent for the Bank of Scotland, carrying on the business of a banker on his own account, took in money, and gave an unstamped receipt, not purporting on the face of it to be the security of the bank:—Held, that they were not bound by such receipt. *Bank of Scotland v. Watson*, 1 Dow, 40.

A return cargo belonging to the plaintiff was

consigned by the defendant to A. and B. to "be held at the orders of the latter," who had a lien on it; and the cargo was sold by them and their lien satisfied:—Held, that the plaintiff could not consider them as agents of the defendant, so as to entitle him to maintain money had and received against the defendant for the balance remaining in their hands. *Tennant v. Mackintosh*, 1 B. & A. 594.

Notice to an agent, in order to bind his principal, must be in the same transaction. *Mountford v. Scott*, 3 Madd. 34; 1 M. & R. 66.

Where cattle had been sold by the plaintiff to A., and it appeared that at the time of sale A. managed the defendant's farm; that he had always his money in hand, and that he had then to the credit of defendant's account more than the value of the cattle; that the defendant had never authorized him to buy on credit: that he had sometimes bought for the defendant and sometimes for himself; that the cattle had been paid for by bills drawn on A., which had been dishonoured when due, and afterwards renewed by the plaintiff:—Held, that it was sufficient to leave it to the jury to say whether the cattle had been sold on the credit of the defendant or of A., and it was not necessary that it should be left to them to say, whether the plaintiff, at the time of the sale was aware that A. was acting as the agent of the defendant. *Edwards v. Smith*, 12 Moore, 59.

A., a merchant at Liverpool, circulated catalogues of certain goods to be sold by auction, subject to the following condition, amongst others:—"Payment to be made on the delivery of bills of parcels, by good bills on London to the satisfaction of the sellers, not exceeding three months' date, to be made equal to cash in four months." B., a broker at Liverpool, sent a catalogue to C. a merchant in London, who in return gave him directions to buy certain lots which B. bought accordingly. Before the sale began, the auctioneer stated that payment by known buyers was to be on the usual credit, two and two months; B., as a known buyer, received the goods without giving bills, and forwarded them to C. in London, with an invoice, stating that payment was to be equal to cash at four months; and a few days afterwards B. drew on C. for the amount, at four months from the day of sale, which bill C. accepted and paid at maturity. Within two months from the sale B. failed, never having given bills to A. for the price of goods, and A., finding that C. was B.'s principal, sued him for the value:—Held, that he could not recover, as C. would naturally be induced by A.'s catalogue to suppose that B. had given bills for the goods at the time of the delivery, and therefore accepted B.'s draft under a mistake occasioned by A.: and, per Parke, J., the broker B. had not any authority from C. to make a contract for goods to be paid at two and two months, and consequently C. was not bound by it. *Horsfall v. Fauntleroy*, 10 B. & C. 755.

Defendants entered into an agreement with C. to carry on for them certain mining speculations in America; furnished him with instructions; a letter authorizing him to draw on them for



10,000*l.*, and a power of attorney of the most extensive description, "to take and work mines, to purchase tools and materials, to erect the necessary buildings, and to execute any deeds or instruments he might think necessary for the purpose." C., after he had raised 10,000*l.* under the letter of authority, obtained of plaintiff, in America, 1,500*l.* which he applied to the defendants' use, and, for the amount, drew bills on the defendants, which he indorsed to plaintiff. He did not show the letter of authority to the plaintiff; there was no indorsement on it of sums previously raised, and it did not appear that the plaintiff knew that any money had been raised before by C.; the defendants refused to accept the bills; Held, that plaintiff was entitled to recover the 1,500*l.* from the defendants, as money had and received to his use. *Witherington v. Herring*, 5 Bing. 442; 3 M. & P. 30.

## 2. For Misconduct of Agents.

An incorporated water-works company are liable in case, where workmen, employed by persons who contract with the company to lay down pipes in a public street, do the work in a negligent manner, whereby a person passing along the street receives an injury. *Matthews v. West- London Water-works Company*, 3 Camp. 403—Ellenborough.

So of a private person, *Bush v. Steinman*, 1 B. & P. 404.

Trustees of a turnpike road are not liable in damages for an injury occasioned by the negligence of contractors, or others employed under them, in the performance of public works on the road, unless they personally interfere in the management of the works. *Hamphreys v. Mears*, 1 M. & R. 187.

*Quere*, what degree of personal interference would suffice to render them so liable. *Id.*

It has been held that a steward, manager, or agent was not liable for damages done by the negligence of those employed by him in the service of his principal; for, the principal, or those actually employed, only are liable. *Stone v. Cartwright*, 6 T. R. 411.

Where an agent tendered the amount of a note for his principal, on condition of having the note given up, which could not be done from its being mislaid, and afterwards failed with the money in his hands: Held, that the principal was still liable on the note, but without interest from the time of the tender. *Dent v. Dunn*, 3 Camp. 296—Ellenborough: and see *Stewart v. Fry*, 1 Moore, 74; 7 Taunt. 339.

The plaintiffs and the defendant having each lodged their respective India bonds with the same bankers, who afterwards privily and without the defendant's authority, sold his bonds, and, upon his demand of them, delivered up to him the India bonds of the plaintiffs, to the same total amount, and payable to the same obligee, (being always the treasurer of the company, who indorses such bonds in blank before they are circulated,) but having different numbers, and for different separate sums, and therefore manifestly

distinguishable from his own bonds, though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these: Held, that the defendant, having sold the plaintiffs' bonds so received from his own agents, who had acted mala fide in passing them to him, was liable to answer over to the plaintiffs for the amount, in an action of assumpsit for money had and received to their use. *Glyn (Bart.) v. Baker*, 13 East, 509.

In trover for wool, which the plaintiffs alleged the defendants had obtained by fraud, it appeared that it had been purchased of the plaintiffs by one D., as agent for Messrs. W. & Co., and that they pledged it two days afterwards to the defendants for an advance made by them to W. & Co. through the intervention of D., who acted as the agent of the defendants as well as of W. & Co. The plaintiffs, in order to show that W. & Co. had obtained the wool without intending to pay for it, they being insolvent at the time of the purchase, and which D. was aware of, offered certain contracts in evidence, signed by D.; and his handwriting to them having been proved:—Held, that such contracts were admissible, without calling D. as a witness. And the jury having found that the transaction between D. and W. & Co. was fraudulent, but that the defendants were not cognizant of the fraud, and that D. was their agent as well as the agent of W. & Co., and the plaintiffs obtained a verdict, the court refused to grant a new trial, as the defendants were liable for the fraudulent acts and misconduct of their own agent. *Irving v. Motley*, 5 M. & P. 380.

## VIII. RIGHTS OF AGENT AGAINST THIRD PERSONS.

A plaintiff who has made a contract as agent for a third person, cannot sue as principal without giving notice to the defendant, previously to the commencement of the action, that he is the party actually interested. *Bickerton v. Burrell*, 5 M. & S. 383.

But held at Nisi Prius, that a broker who had advanced money on goods, might declare on a special contract respecting the sale in his own name; and that it was not a variance, though the sale-note mentioned the name of the principal. *Atkins v. Amber*, 2 Esp. 493—Eyre.

That the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of his principal, without any consideration, will enable such agent to maintain trover in his own name for the goods, is doubtful—semble that it will not. *Coxe v. Harding*, 4 East, 211; 1 Smith, 20.

A factor who sells goods in his own name, without a del credere commission, is a good petitioning creditor against the purchaser. *Sadler v. Leigh*, 4 Camp. 185—Ellenborough.

Unless the principal has considered the purchaser as his debtor, by taking steps to recover the debt directly from him. *Id.*

The plaintiffs, who were brokers, bought goods of the defendant, on account of H., and by his

authority. The purchase was made in their own names, but the vendor was told that there was an unnamed principal. The plaintiffs afterwards, under a general authority from H., contracted to sell the same goods, which the defendant had not yet delivered. H., on hearing of the latter contract, told the plaintiffs that he would have nothing to do with the goods, either as buyer or seller, and in this they acquiesced. The defendant then refused to deliver the goods, and the plaintiffs sued him for damages sustained by them in consequence:—Held, that the renunciation of the contract by H., and the plaintiffs' acquiescence in it, formed no objection to the right of the plaintiffs to recover. *Short v. Spackman*, 2 B. & Adol. 962.

#### IX. LIABILITY OF AGENT TO THIRD PERSONS.

It was laid down by Eyre, C. J., that if a person who describes himself as agent for another residing abroad, enter into a contract here, he is personally liable. *De Gailion v. L'Aigle* 1 B. & P. 368.

So, where an agent who described himself as the agent and consignee of a ship chartered for a specific voyage, signed an agreement in his own name, "witnessing that the said parties had agreed to vary the voyage," and it appeared that throughout the business he gave instructions and conducted himself as principal:—Held, that he was personally liable. *Kennedy v. Gouveia*, 3 D. & R. 503.

If a man describe himself in the beginning of an agreement to grant a lease, as making it on behalf of another, but in a subsequent part of it says that he will execute the lease, he is personally liable. *Norton v. Herron*, 1 C. & P. 643; R. & M. 229—Best.

Where A., an auctioneer, being employed to sell an estate belonging to B., entered into and signed an agreement with C. for the purchase, in his own name, as agent of B., and B. shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of A.'s having signed the same on my behalf:"—Held, that A. was not personally responsible. *Spittle v. Laverder*, 5 Moore, 270; 2 B. & B. 452.

An agent is not responsible if he names his principal as the person to be responsible. *Ex parte Hartop*, 12 Ves. jun. 352.

An agent to a country bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon London, drew it in his own name for the amount upon the firm in London, the two firms being the same:—Held, that the agent was personally liable as drawer, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him at such, and on account of the country bank, to which the agent paid over the money. *Leadbitter v. Farrow*, 5 M. & S. 345.

An agent in this country for merchants who are sellers of goods in Russia, who guarantees "that a shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that in default the consequences shall rest

with the sellers," makes himself personally responsible to the buyer. *Redhead v. Cater*, 1 Stark. 14—Ellenborough.

An agent who buys goods, and remits bills in payment which he does not indorse, but says he will see them paid, is liable to the seller. *Morris v. Stacey*, Holt, 153—Gibbs.

An action for money lies against an agent for money paid to him by mistake, although he has forwarded his account to his principal, and placed the sum to his credit. *Cox v. Prentice*, 2 M. & S. 344.

If money be paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, money had and received to the use of the person so paying it by mistake, will lie against the agent. The mere passing such money in account, or making rest, without any new credit given, fresh bills accepted, or further sums advanced for the principal in consequence of it, is not equivalent to the payment of it over. *Bulter v. Harrison*, Cowp. 563.

A receipt signed by an agent for his principals, is not evidence to support an action for money had and received against him, to recover the money back. *Edden v. Read*, 3 Camp. 339—Ellenborough.

To make it a defence to an agent that he has paid over money, it is necessary that the money should have been paid to the agent expressly for the use of the person to whom he has so paid it over. *Snowdon v. Davis*, 1 Taunt. 359.

A. having received money as agent for B. and others, in specific proportions for each, pays it over to D. as a banker in his own name, and having drawn out part of it, directs C. not to pay away the remainder, except by his order:—Held, that B. is bound to hold the money for A., and that therefore B. cannot recover the remainder of his share from C., though he had given C. notice that A.'s agency was at an end. *Pinto v. Santos*, 1 Marsh. 132; 5 Taunt. 447.

Where persons have received money for the express purpose of taking up a bill of exchange, two days after it became due, and, upon tendering it to the holders and demanding the bill, find that they have sent it back protested for non-acceptance to the person who indorsed it to them: Held, that such persons, having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when, upon the bills being re-procured and tendered to them, they refused to pay the money. *Stewart v. Fry*, 1 Moore, 74; 7 Taunt. 399: and see *Dent v. Dunn*, 3 Camp. 296.

J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client, (which he was authorized to do), and gave a receipt signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment

to B. B. afterwards refused to pay the money over to the client, and on assumpsit brought against him for money had and received :—Held, that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it, the master, on the other hand, being answerable to the client for the sum received by his clerk; and there was no privity of contract between the present plaintiff and the defendant. *Stephens v. Badcock*, 3 B. & Adol. 354.

Where a son had ostensibly appeared as the proprietor and conductor of the business in a trade, not an extensive one, and the father, to whom the business really belonged, was superannuated and incapable of conducting it :—Held, that the son was liable on contracts connected with the business. *Turrel v. Collet*, 1 Esp. 321—Kenyon.

But, where a party gives an order for another, and at the time tells the tradesman for whose use he orders the goods, he is not personally liable, unless the tradesman refuse to deliver them to the order of the person for whom they are directed, but will only give credit to the agent who ordered them. *Owen v. Goock*, 2 Esp. 567—Kenyon.

Where the defendant bought goods of the plaintiffs in the name and upon the credit of Smith & Co., but those purchases were made in reality on his own account, he was held to be liable. *Railton v. Hodgson*, 15 East, 67; *Peele v. Hodgson*, Id.

Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal: and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. *Rabone v. Williams*, 7 T. R. 360, n.—Mansfield.

Where a bill is drawn on an agent, and made payable out of a particular fund, and the agent says he will pay it when he gets money from the principal; this is binding on him; and if he gets money at any subsequent time, he is bound to pay the bill. *Stevens v. Hill*, 5 Esp. 247—Ellenborough.

In an action for goods sold and delivered, the question being whether the contract was made by the defendant as principal or as agent for third persons, who employed him to make purchases on their account; and it was left to the jury to say whether the defendant told the plaintiff that he was acting as an agent at the time of the purchase :—Held, that it was not a misdirection, as it was incumbent on the defendant to show, either that he told the plaintiff that he made the purchase on account of his principals, or that the plaintiff knew that he was merely acting as their agent. *Seaber v. Hewkes*, 5 M. & P. 549.

## AGREEMENT.

- I. WHAT—See CONTRACT.
- II. LEGALITY—See CONTRACT.
- III. AMOUNTING TO A LEASE—See LANDLORD AND TENANT.
- IV. OF SALE—See SALE.
- V. STAMPS ON—See REVENUE.

## AIDER BY VERDICT—See PLEADING.

## ALE HOUSES.

By *stat. 1 Will. 4. c. 64*, all householders assessed to the poor-rates, other than and except sheriffs' officers, or officers executing the legal process of courts of justice, may sell beer, ale, or porter, or cyder and perry, by retail, on obtaining an excise license merely; for which a duty of 2*l.* 2*s.* is paid yearly for the beer, ale, &c., and 1*l.* 1*s.* for cyder and perry. By this act, the license from justices, formerly required by 9 *Geo. 4. c. 61. s. 17*, is no longer necessary: but the recognizance required by *stat. 3 Geo. 4. c. 77. s. 1*, which had been repealed by 9 *Geo. 4. c. 61*, is revived.

Semble, license under the statute to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the license is granted. *Rex v. Minshull*, 1 Nev. & M. 277.

By the 26 *Geo. 3. c. 31. s. 4*, no ale license could be granted but on the 1st September, yearly, or within twenty-one days after. And by *s. 16*, ale-houses in cities and towns corporate were excepted; but by 3 *Geo. 4. c. 77. s. 7*, all general annual meetings for granting licences, as well in cities and towns corporate, as in all other places in England, must have been held in the month of September, yearly :—Held, that the effect of this clause was not to repeal the general provision of the former statute, but to extend its operation to cities and towns corporate only. *Rex v. Surrey (Justices)*, 5 D. & R. 308.

The court refused a mandamus to rehear an application at any other period of the year. *Id.*

A mandamus was refused where justices had refused the application for an ale-house license, and it was suggested that their refusal proceeded from a mistaken view of their jurisdiction. *Rex v. Farringdon Without (Justices)*, 4 D. & R. 735.

By charter, the mayor and some of the aldermen of London have jurisdiction in Southwark; but, as the charter contains no non-introumitant clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former. Where there were two sets of magistrates having a concurrent jurisdiction, and one appointed a meeting to grant ale licences, their jurisdiction attached so as to exclude the others appointing a subsequent meeting; but they might all meet together on the first day. But if, after such appointment, the other set of magistrates met on a subsequent day, and granted other licences, their proceeding was illegal, and the subject of an indictment. *Rex v. Seinsbury*, 4 T. R. 451; Nolan, 8.

Where the mayor of an antient borough, in which he was also a justice of the peace, took a fee of 4s. from a publican resident within the borough, for renewing his annual license, and though it appeared that for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to renew his license: Held, that such fee was illegal, and might be recovered back in assumpsit for money had and received, as the payment could not be considered as voluntary, so as to preclude the plaintiff from recovering in that form of action. *Morgan v. Palmer*, 4 D. & R. 283; 2 B. & C. 729.

It was held that a person who sold spirituous liquors by retail, without a licence from two justices of the peace, was liable to the penalties of the 5 Geo. 3, c. 46, though he had a licence from the commissioners of the excise to retail spirituous liquors, as the exception in the 26 Geo. 2, c. 28, that nothing in that act should extend to alter the time of granting licenses in cities and towns corporate, did not exempt such places from the operation of the other parts of that act; but magistrates in such districts might give the same notice of their meeting to grant licenses as justices for a county to give. *Rex v. Downs*, 3 T. R. 560.

The 48 Geo. 3, c. 143, did not in any way repeal, but confirmed the 35 Geo. 3, c. 113, as to the jurisdiction of the justices to grant ale licenses; in order, therefore, to constitute a due licensing, there must have been as well a licence from the magistrates as from the excise. *Rex v. Drake*, 6 M. & S. 116.

There was no appeal under 48 Geo. 3, c. 143, against a conviction for selling ale without an excise licence. *Rex v. Hanson*, 4 B. & A. 519.

A conviction for suffering tipping, held bad, because it did not state whether the persons tipping were strangers or inhabitants, it appearing to be made on the oath of one witness. *Rex v. Dove*, 3 B. & A. 596.

The statute 9 Geo. 4, c. 61, for regulating the granting of licences to innkeepers, &c., by s. 27, enacts "that any person who shall think himself aggrieved by any act of any justices in execution of that act, may appeal against such act to the quarter sessions," &c. :—Held, that the words "person who shall think himself aggrieved," means a person "immediately" aggrieved, as by refusal of a license to himself, by fine, &c., and not one who is consequentially aggrieved; and therefore, that, where magistrates had granted a license to a party to open a public house not before licensed, within a very short distance of a licensed public house, the occupier of the latter house could not appeal against such grant. *Rex v. Middlesex (Justices)*, 3 B. & Adol. 938.

Where a brewer delivers beer to be used in a particular public house, he cannot make any person, except the licensed keeper of the house, primarily liable for it, so as to maintain an action for goods sold and delivered to him. *Meux v. Humphries*, M. & M. 132; 3 C. & P. 79—Tenterden.

## ALIEN—See FOREIGNER.

### ALLOWANCE.

- I. OF BAIL—See BAIL.
- II. OF ERROR—See ERROR.
- III. TO PRISONERS—See PRISONER.
- IV. TO BANKRUPTS—See BANKRUPT.

## AMBASSADORS' SERVANTS—See ARREST.

### AMENDMENT.

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## I. WRITS AND RETURNS.

### 1. *Mesne Process*.

[See stat. 2 Will. 4, c. 39, amended by 3 & 4 Will. 4, c. 67, by which all process is at present regulated.]

*Teste and Return of Writ*.—The principle on which the courts act in cases of amendment is,

that there must be something to amend by. *Green v. Rennet*, 1 T. R. 782.

The court of C. P. would amend the irregularity of a writ, when there was not fifteen days between the teste and return. *Carty v. Ashley*, 2 W. Black. 918; 3 Wils. 454; *Bouchier v. Whitte*, 1 H. Black. 291; *Davis v. Owen*, 1 B. & P. 342; *Pophins v. Amory*, 5 M. & P. 319.

But a writ returnable on a dies non was void and could not be amended. *Kenworthy v. Pepsier*, 4 B. & A. 288.

Before a writ was returnable, it might be altered and re-sealed as to the return-day without being re-stamped, provided no term intervened between the teste and the day on which it was ultimately made returnable. *Durdon v. Hammond*, 2 D. & R. 211; 1 B. & C. 111.

A capias returnable on a day certain, instead of a general return, might be amended on payment of costs. *Walker v. Hsueky*, 1 Marsh. 399; 5 Taunt. 853.

But in another case the court held a testatum capias under the same circumstances irregular, and refused to amend it on account of the bail. *Immen v. Huish*, 2 N. R. 133. *S. P. Houlden v. Passon*, 4 M. & P. 126.

In another case the court refused to allow the writ to be amended, unless the plaintiff would consent to discharge the bail on the defendant's entering a common appearance. *Johnson v. Debell*, 1 M. & P. 28.

An attachment of privilege returnable after the *cinco* day, and before the *quarto die post*, instead of a day certain in full term, was allowed to be amended on terms. *Adams v. Luck*, 6 Moore, 113; 3 B. & B. 25.

A *præcipe* for an attachment of privilege was amended, by adding the days of issuing and return, upon payment of costs, to make the *præcipe* in accordance with a rule of court of 20 Geo. 2, which required it to set forth those particulars. *Stryme v. Lankford*, 1 Ld. Ken. 394.

Where a capias per continuance was tested on the same day as the original capias, the irregularity might be amended by issuing a new original capias to warrant it; though it bore teste before the cause of action accrued. *Davies v. Owen*, 1 B. & P. 342.

A bill of Middlesex, returnable on Monday next after the morrow of the Holy Trinity, was held irregular; but amendment was allowed. *Anon.* 1 Smith, 425.

A writ having a wrong return, was not aided by a correct day being mentioned in the notice to appear. *Anon.* 2 Chit. 356.

The teste of a writ, if irregular in naming a late chief baron, instead of the existing chief baron, may be amended, even after a rule to set it aside upon that ground; and upon the amendment being made, the rule was discharged. *Wakeling v. Watson*, 1 C. & J. 467; 1 Tyr. 377.

*Nemes of Parties.*—One obligee in a joint bond having sued out a capias against the obligor, and taken a recognizance of bail in his

own name only, afterwards sued out an original in the name of both obligors, and then applied to the court to amend both the capias and recognizance; the court granted the former, but refused the latter. *Tabrum v. Tenant*, 1 B. & P. 481.

A B. having been arrested on a capias sued out against him by the name of B. C., a bail bond was given, by which A. B. arrested by the name of B. C. became bound, conditioned for the appearance of A. B. arrested by the name of B. C.: the affidavit to hold to bail named the defendant properly A. B. The court amended the capias and return, and rejected an application by the bail to set aside the bail bond. *Stevenson v. Danvers*, 2 B. & P. 109.

So, a special capias which omitted the christian names of two of the defendants, was amended on payment of the costs of amendment, and application, although there was no document to amend by: *Rutherford v. Mein*, 2 Smith, 392.

A writ cannot be amended by adding the name of another person as plaintiff. *Adamson v. —*, 1 Chit. 369 (a).

If the defendant's name is stated to be John in the writ, and Joseph in the notice to appear, it may be amended. *Padgett v. Lee*, 2 Chit. 355.

A defendant having been served with a copy of process by the name of John, said that his name was Nicholas, and the person who served the copy was about to alter the name:—Held, that it could not be altered without re-sealing, and the service was set aside, but without costs. *Israel v. Middleton*, 1 Chit. 313.

The court of K. B. refused to allow the amendment of a writ under which a defendant had been arrested by a wrong name, after actions for false imprisonment had been brought. *Anon.* 1 Tidd's Prac. 160.

*Other Cases.*—A bill of Middlesex, filed of record as of the 24 Geo. 3, when it ought to have been of the 25th, might be amended agreeably to the truth. *Green v. Rennet*, 1 T. R. 782.

A special capias was amended, in order that an application might be made to the master of the rolls to procure a new original. *Carr v. Shaw*, 7 T. R. 299.

The copy of a writ cannot be amended after service. *Byfield v. Street*, 10 Bing. 227; *S. P. Sutherland v. Tubbs*, 1 Chit. 230, n.

Where the defendant was in custody under an extent, and a capias was issued against him at the suit of the plaintiff, and delivered to the sheriff, who returned, that "he had taken the defendant, whose body remained in prison under his custody:" the court of C. P. refused to allow the return to be amended by striking it out, and making another according to the fact. *Rex v. Worcestershire (Sheriff)*, 7 Moore, 552; 1 Bing. 156.

## 2. Writs of Execution.

### (a) Fi. fa.

[See Stat. 3 & 4 Will. 4, c. 67, s. 2, by which

writs of execution may be tested on the day they are issued, and returnable immediately after execution.]

A *fi. fa.* returnable on a day out of term, was allowed to be amended by the award of execution on the roll. *Davy v. Hollingsworth*, 2 Tidd's Prac. 1037.

So a *fi. fa.* returnable on a K. B. instead of a C. P. return-day, was amended from the same source. *Atkinson v. Newton*, 2 P. & P. 336.

So a *fi. fa.* directing the money to be returned "before us," instead of "before the king's justices at Westminster," but tested by the chief justice of C. P. was allowed to be amended on payment of costs. *Simon v. Gurney*, 1 Marsh. 237; 5 Taunt. 605.

So where a *fi. fa.* was sued out into a different county from that in which the venue was laid, and the party suing it afterwards took out a *fi. fa.* into the proper county, and got a return of nulla bona in order to warrant the *fi. fa.* which first issued, the court permitted the first writ to be amended, by inserting the return of nulla bona and the testatum clause, though the second writ was returnable several days before the judgment was signed. *Meyer v. Ring*, 1 H. Black. 541.

So in K. B. the court allowed a party to amend a similar *fi. fa.* on payment of costs, by suing out an original *fi. fa.*, and adding the testatum part. *Cowperthwaite v. Owen*, 3 T. R. 657.

But where the defendant died before the application, the court refused to amend a *fi. fa.* by inserting the testatum clause. *Phillips v. Turner*, 6 Bing. 237; 3 M. & P. 562.

The court refused to allow plaintiff to amend a *fi. fa.* where the defendant had become bankrupt before sale of the goods taken under it. *Hunt v. Parman*, 4 M. & S. 329.

#### (b) *Ca. sa.*

A *ca. sa.* may be amended in the name of the plaintiff or defendant, or court in which it is returnable. *Anon.* 1 Chit. 350, (a).

Even after it has been executed. *Hunt v. Kendrick*, 2 W. Black. 836.

A writ of execution to satisfy James the debt awarded to John, was amended after execution executed, upon payment of costs. *Mackie v. Smith*, 4 Taunt. 322.

So the court, after a rule obtained to show cause why the *tes. ca. sa.* should not be set aside, because not warranted by the judgment, permitted it to be amended agreeably to the judgment, and directed the sealer of the writs to seal an original *ca. sa.* to warrant it. *Shaw v. Maxwell*, 6 T. R. 450.

So, even at the time of showing cause, on payment of costs, and the defendant undertaking to bring no action, where the only alteration was in the sum recovered. *Stevenson v. Castle*, 1 Chit. 349.

So it may be amended by inserting a smaller sum where the defendant sustains no inconvenience thereby. *Anon.* 1 Chit. 350, (a).

A plaintiff having recovered judgments against two defendants in K. B., one of whom brought a writ of error in Cam. Scac. where the judgment was affirmed, and costs of the writ of error given, took both under a writ of execution for the whole sum, including the costs of the writ of error as well as the original sum recovered; the court permitted him to amend the writ as to the defendant who did not join in the writ of error, by altering it to the original sum recovered. *Laroche v. Wasbrough*, 2 T. R. 737.

After a motion to set aside proceedings for irregularity, in proceeding to execution in the name of two plaintiffs, one of whom had died before interlocutory judgment; the court permitted the surviving plaintiff to suggest the death on the roll, and amend the *ca. sa.* without paying costs. *Newnham v. Law*, 5 T. R. 577.

### 3. Other Writs.

*Of Inquiry.*—The tests of a writ of inquiry may be amended by the award on the roll. *Jackson v. Toulmin*, 4 East, 173.

And the return may also be amended by the award, even after the inquisition of damages has been taken; and consequently a defect in the return does not vitiate the proceedings, or affect the jurisdiction of the sheriff. *Pippet v. Heern*, 1 D. & R. 266; 5 B. & A. 634.

Where in an action on the statute of Edward VI. for treble value of tithes, the declaration contained a count for treble value, and other counts for tithes bargained and sold, and on an account stated; and the defendant suffered judgment by default; and the jury, on a writ of inquiry, assessed the plaintiff's damages at 17l. 4s. 9d. on the first count for the treble value, and 9l. for the single value on the other counts, but omitted to find costs: the Court of C. P. ordered the return of the inquisition to be amended, by the insertion of nominal damages as to the last counts, on which costs de incremento might be added. *Bale v. Hodgetts*, 7 Moore, 602; 1 Bing. 182.

*Habeas Corpus.*—The Court of K. B. refused leave to amend the return to a writ of habeas corpus. *Ex parte Eden*, 2 M. & S. 226.

*Mandamus.*—A mandamus cannot be amended after a return has been made to it. *Res v. Stafford* (Mayor, &c.), 4 T. R. 689.

Nor would the court allow the defendants in a traverse to amend the return to a mandamus by setting forth a different constitution, where the application was after verdict. *Res v. Grampound* (Mayor, &c.), 7 T. R. 699.

The court will not direct in what manner justices shall make their return to a mandamus; but, if the return made be insufficient to raise the question intended to be agitated, the court will, at the instance of the party interested, make a rule, giving the justices liberty to amend in the manner required, if they shall be so minded. *Res v. Marriott*, 1 D. & R. 166.

**Scire facias.**—Where a scire facias, founded on an inquisition, mis-recites the inquisition, and therefore fixes by such recital a day on which the debt had been found to be due differing from the true day named in the inquisition, the Court of Exchequer will give leave (on cause being shown) to amend the writ on payment of the costs, &c. even after the defendants have pleaded. *Rex v. Scott*, 4 Price, 181; *S. P. Regius v. Hoble*, 4 Price, 181, n.; *Regina v. Peters*, 4 Price, 182, n.

If an inquisition to find debts, executed in vacation, be returnable in the following term, and a writ of scire facias be issued thereon, tested as of the term preceding the vacation, the Court of Exchequer will set it aside for the repugnancy which must appear on the face of the record; nor will they allow it to be aided by inserting the true dates, by means of a memorandum on the record. *Rex v. Pearson*, 3 Price, 288. But see *Dodsworth v. Bowen*, 5 T. R. 325.

In sci. fa. on a judgment more than a year old, if the writ of sci. fa. which has been returned nihil, the award of execution, the ca. sa., and the warrant, are issued in a different christian name from the one stated in the judgment as that of the plaintiff, the court will allow the proceedings to be amended by substituting the one stated in the judgment, although the ca. sa. has been executed and returned. *Thorpe v. Hook*, 1 Dowl. P. C. 501.

## II. MATTERS RELATIVE TO BAIL AND APPEARANCE.—See also BAIL.

### 1. When allowed.

**Bail-piece.**—A misnomer in a bail-piece may be amended. *Anderson v. Neale*, 1 B. & P. 31.

If a defendant be arrested by the name of Elizabeth, and put in and justify bail in the name of Betsy, the bail-piece may be amended on payment of costs and a re-acknowledgment of the bail. *Croft v. Coggs*, 4 Moore, 65.

But the Court of C. P. will not amend a clerical error in the spelling of the plaintiff's name in the bail-piece, without the consent of the bail. *Hingham v. Dickie*, 5 Taunt. 814.

An appearance entered by plaintiff for defendant by a wrong name, may be amended after declaration. *Weston v. Packman*, 3 Wils. 49.

**Recognizance.**—Where the bail had misnamed the plaintiff, to whom they meant to be bound in the recognizance, the court of C. P. refused to amend the recognizance and proceedings, in an action thereon, after issue joined on noli tuel record. *Venn v. Warner*, 3 Taunt. 263. But see *Ames*, 1 Moore, 126.

But where the bail acknowledged in a cause in which the plaintiff was correctly named, but the officer, by mistake, stated his name incorrectly in the recognizance, the court allowed an amendment at the instance of the bail. *Halliday v. Fitzpatrick*, 4 Taunt. 875: *S. P. Tabrum v. Tenant*, 1 B. & P. 481.

Where an affidavit to hold to bail named five

defendants, and separate bailable process was issued against one, and a bail-piece taken, in which he alone was named; and afterwards serviceable process was issued against the other four, who were not named in the bailable process; and the declaration was against all the five; the court permitted the plaintiff to amend the recognizance of bail, by inserting the names of the four defendants who had been at first omitted. *Christie v. Walker*, 1 Bing. 206; 8 Moore, 33. And see 7 Moore, 301, 362, 599, 632; 1 Bing. 48, 68.

Where a recognizance of bail in the Court of Exchequer was taken for satisfying the condemnation, or rendering the defendant to the prison of the Fleet, that court refused to grant an application made on behalf of the bail, to amend the record of the recognizance, by inserting the words "on or before the 4th day of the next following term," which is the usual form. *Bottomley v. Medhurst*, M'Clel. 310, 399; 18 Price, 589.

Where a defendant was arrested on a bailable capias, which was issued into Durham, signed by the filacer of that county, but having no testatum clause, and put in bail as a upon a testatum; a declaration being afterwards delivered with a venue laid in Lincolnshire; and a recognizance was entered into in Middlesex, and a declaration on such recognizance afterwards delivered, to which the defendant pleaded:—Held, on a motion to amend the recognizance, that the defendant, by submitting to the arrest, and putting in and getting bail allowed, had waived the irregularity; and the court refused to interfere. *Hartley v. Hodson*, 1 Moore, 514, 430; 2 Moore 66; 8 Taunt. 171.

In scire facias against the bail, if there be a failure of the record through a misprison of the officer of the court, the court will permit the recognizance to be amended. *Mann v. Calow*, 1 Taunt. 221.

**Proceedings by sci. fa.**—A scire facias against bail in error may be amended in C. P. by the record of the recognizance. *Perkins v. Pettit*, 2 B. & P. 275.

But the court will not cure any irregularities of which the bail are entitled to take advantage. *Fulwood v. Annis*, 3 B. & P. 321.

And in K. B. two writs of scire facias against the principal on a judgment, and the declaration thereon, were amended conformably to the judgment roll. *Brasswell v. Jeco*, 9 East, 316.

The court refused to allow amendment of a declaration in a scire facias, against bail, who had failed to surrender their principal (then in custody) before the quarto die post of the second writ. *Stevenson v. Grant*, 2 N. R. 103.

## III. DECLARATIONS.

**Generally.**—A declaration may be amended at any time, so long as the proceedings remain on paper. *Havers v. Bunniester*, 1 Wils. 7. And see *Anber v. Barker*, 1 Wils. 149.

The court will give the plaintiff leave to do so in a civil action, even against a prisoner; but they will not permit him to add new counts to his de-

claration in such a case. *Owens v. Dubois*, 7 T. R. 698.

An amendment of the plaintiff's declaration does not necessarily entitle the defendant to plead *de novo*, but only where the amendment alters the state of the defendant's case. *Woodroffe v. Watson*, 6 Taunt. 400.

Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term, or of a different term. Reg. Gen. K. B., C. P., & Excheq., H. T. 2 W. 4, 1 Dowl. P. C. 188; 8 Bing. 294; 1 M. & Scott, 420; 3 B. & Adol. 379; 2 C. & J. 179; 2 Tyr. 344; 4 Bligh, N. S. 597.

**Changing Statement of Cause of Action.**—Where the plaintiff, under leave to amend, adds new counts which contain no new cause of action, but only vary the manner of statement in a count which was demurred to, the court of C. P. will not order them to be struck out. *Brown v. Crump*, 1 Marsh. 609; 6 Taunt. 300.

Where, in an action for breach of promise of marriage, the declaration contained three counts; the first of which was to marry on request; on a motion to amend by adding a new count, to marry on a particular day, the court of C. P. ordered the first count to be amended by striking out the promise to marry on request, and inserting a particular day, although the declaration had been filed more than two terms; and they directed the costs of such application to abide the event of the cause. *Horston v. Skilliter*, 6 Moore, 490.

In an action by assignees for the rescue of goods distrained for rent due to the bankrupt, the court allowed new counts to be added, stating the facts to have taken place in the time of the provisional assignee, though two terms had elapsed since the return of the writ, the cause of action being substantially the same. *Freen v. Cooper*, 2 Marsh. 59; 6 Taunt. 358.

Where, in an action of slander, for giving a servant a false character, a rule for a new trial was made absolute, and the plaintiff had leave to amend one of the counts of the declaration, in order that the words charged might be made to correspond with those proved at the first trial: the court allowed a new count to be added to enable the parties to try the merits at the second trial. *Wyatt v. Cocks*, 10 Moore, 504.

Where, in an action upon a bill of exchange, it appeared that the bill had been cancelled, and a new one substituted, which was not declared upon, and the defendant thereupon had a verdict, the court refused to allow the plaintiff to amend upon payment of costs, by adding counts upon the new bill. *Sweeting v. Halse*, 4 M. & R. 383.

Declaration amended by allowing plaintiffs to declare on the same cause of action, as surviving partners instead of administratrixes, when administration was not taken out before action brought, and the statute of limitations would have run against a new action. *Taylor v. Lyon*, 5 Bing. 333; 2 M. & P. 586.

In an action for disturbance of a right of ferry,

the declaration was allowed to be amended after the cause had been taken down to the assizes and the record withdrawn, by introducing new counts, in which the termini of the ferry were varied, and also the description of the persons liable to toll. *Morris v. Evans*, 1 Dowl. P. C. 657.

**Changing Form of Action.**—Where the plaintiff's had commenced an action of assumpsit for money had and received, to recover back differences paid on stock-jobbing contracts, and had filed a bill of discovery, to which the defendant pleaded that the discovery was given by the statute 7 Geo. 2, c. 8, s. 2, in debt only, the court permitted the plaintiffs to amend by changing assumpsit to debt, after six terms from the commencement of the action. *Billing v. Flight*, 2 Marsh. 124; 6 Taunt. 419.

So where no bill in equity had been filed for a discovery, the court permitted the plaintiffs to amend by converting their declaration from assumpsit to debt. *Billing v. Pooley*, 6 Taunt. 422; 2 Marsh. 125, n.

But the plaintiff having sued out process in debt, and declared in case, and the defendant having thereupon moved to cancel the bail bond, the court refused to amend the declaration by changing it from case to debt. *Lovett v. Kibblewhite*, 2 Marsh. 185; 6 Taunt. 483.

**Venue.**—The court will not amend a declaration, by changing the venue, unless the plaintiff showed substantial ground for it; therefore, where the plaintiff moved to amend, by changing the venue from Bedford to Middlesex, on the ground that the action depended on the construction of an act of parliament, the court, on the affidavit of the defendant that the cause of action arose in Bedfordshire, discharged the rule. *Ayres v. Buston*, 2 Marsh. 121; 6 Taunt. 408.

And where the plaintiff, an attorney, by the mistake of his agent, laid the venue in the country, instead of Middlesex, the court refused to amend by changing it to Middlesex. *Lewis v. Shelley*, 2 Marsh. 426; 7 Taunt. 146.

**Names of Parties.**—Where the name of the plaintiff was mistaken in the process and all the proceedings, the Court of Exchequer allowed the amendment of the declaration whilst every thing was on paper. *Gardner v. Walker*, 3 Anst. 935.

A variance between the name of the attorney in the warrant and in the declaration may be amended by altering the name in the warrant to that in the declaration, in a penal action, after error brought and the variances assigned for error. *Richards q. t. v. Brown*, 1 Dougl. 114.

In an action by the assignees of a bankrupt, the court allowed the declaration to be amended by adding the name of the official assignee as a plaintiff, on payment of costs. *Baker v. Neaver*, 1 C. & M. 112; 1 Dowl. P. C. 616.

**Title.**—An amendment allowed of the title of a declaration, according to the truth of the fact as to the time of the delivery thereof. *Symonds v. Parmenter*, 1 Wils. 256; *S. P. Wilkes v. Halifax*.



(Earl), 2 Wils. 256; *Stook v. Herbert*, 1 Wils. 242.

So, where the object was to make it accord with an averment therein, that other defendants named in the writ were then outlawed. *Coutauche v. Le Rues*, 1 East. 133.

The Nisi Prius rule was allowed to be amended by inserting a special title to a declaration, the defendant having appeared after he became of age, which was after the first day of term. *Boys v. Edmeads*, 2 Chit. 22.

After the delivery of the paper-book to the clerk of the papers, with a memorandum generally of Michaelmas term, corresponding with the declaration, neither party has a right to amend it by making a special memorandum of the day of the delivery of the declaration without an order to amend. *Clements v. Sterling*, 1 Chit. 336.

In an action against the marshal for an escape, the bill was intitled generally of Michaelmas term, and the escape was alleged to have taken place on the 15th Nov.; there was a special demurrer, for that the cause of action appeared to have accrued after the first day of the term to which the bill had relation: the court allowed the plaintiff to amend on payment of costs, although it appeared by affidavit that the prisoner had returned into the custody of the marshal before any application for liberty to amend was made. *Brasier v. Jones*, 6 B. & C. 196; 9 D. & R. 349.

**Other Cases.**—An executor was allowed to amend his declaration, by laying a promise to himself instead of to his testator. *Tenour v. Smith*, 1 Ld. Ken. 141.

The court refused to put off a trial, upon a motion at Nisi Prius, in order to enable the plaintiff to amend his declaration, by omitting the profert of a bond on which the action was brought: nor would they allow the amendment to be made at Nisi Prius, because it was matter of material allegation. *Paine v. Bustin*, 1 Stark. 74—Ellenborough.

Declaration on a writ of partition and the sheriff's return, amended by striking out an erroneous description of the quality of the estates conveyed to the different parties. *Baker v. Daniel*, 1 Marsh. 537; 6 Taunt. 193.

A suggestion in prohibition, amended after a nonsuit had been set aside. *Franklin v. Holmes*, 2 Tidd's Prac. 754.

So, where, on an issue on nul tiel record, there is a variance between the record and declaration, the court will permit an amendment on payment of costs. *Doubleday v. —*, 2 Chit. 27.

A declaration in debet and detinet against an executor was refused to be amended by striking out the debet and retaining the detinet only, after demurrer argued. *Anon. Lofti*, 46.

**When.**—Generally, a declaration cannot be amended after verdict. *Marriott v. Lister*, 2 Wils. 141, 147. And see *Lloyd v. Skutt*, 2 Tidd's Prac. 776; *Watson v. Richardson*, 1 Wils. 226.

An amendment may be made by increasing

the damages according to the truth of the case as found by the jury, the former verdict being at the same time set aside, and a new trial granted, to enable the defendant to make his defence to the demand so enlarged. *Tomlinson v. Blacksmith*, 7 T. R. 132.

The Court of Exchequer allowed a plaintiff to amend his declaration, after a new trial obtained, on the ground of a variance, upon the usual terms of paying the costs of the amendment and application only; the costs of the new trial to abide the event. *Hooper v. Mantel*, 13 Price, 695, 736; *McClel*, 388.

A declaration may be amended after a nonsuit, where a fresh action would otherwise be barred by the statute of limitations. *Dartnall v. Howard*, 2 Chit. 28.

But, generally, the court will not allow the plaintiff to amend, even on payment of the costs of the trial, but will leave him to his remedy, by bringing a fresh action. *Brown v. Knill*, 5 Moore, 164; 2 B. & B. 395.

The court will amend a clerical mistake in a declaration, upon which a defendant relies as matter of error, even pending the writ of error. *Moody v. Stracey*, 4 Taunt. 588.

In an action against executors in their own right, on a covenant for good title and quiet enjoyment, the court of C. P. refused to assist the plaintiff by allowing him to amend his declaration after special demurrer argued. *Noble v. King*, 1 H. Black. 34.

The court of C. P. allowed a plaintiff to amend his declaration on payment of costs after a judgment on demurrer against him, where there was also a sham plea of judgment recovered, and on nul tiel record being replied, the defendant had filed a demurrer for delay: the defendant to plead de novo. *Gannon v. Schmoll*, 5 Taunt. 344; 1 Marsh. 80.

#### IV. SUBSEQUENT PROCEEDINGS.

##### 1. Proceedings to issue.

Pleas in abatement are not amendable because dilatory and not to the merits. *Anon.* 1 Tidd's Prac. 690; *S. P. Atkinson v. —* (Gent.) 2 Chit. 5.

But the court will allow a plaintiff to withdraw a demurrer, and reply. *Id.*

So, the court will not order a defendant to amend a plea on which issue has been joined, on a doubt suggested, whether the plea meets the declaration; but will give the plaintiff leave to withdraw the similiter, and demur. *Attwood v. Bonacich*, 1 D. & R. 473.

Avowries in replevin may be amended on payment of costs. *Brown v. Sayce*, 4 Taunt. 320.

So, the court allowed several avowries in replevin to be amended by altering the name and description of the locus in quo, and stating the holding to have been for a year instead of half a year; and also by adding new avowries, varying the amount of the rent, although issue had been joined, and notice of trial given and countermanded, and more than two terms had elapsed

previously to the application for the amendment. *Prior v. Buckingham* (Duke of), 8 Moore. 584.

A replication was amended, by changing it from *de injuria* to *molliter manus impositus*, all the pleadings being in paper, and not entered of record. *Low v. Newland*, 1 Wils. 76.

A replication may be amended after verdict by inserting the similiter instead of &c. *Sayer v. Pocock*, Cowp. 407.

If to a rejoinder concluding with a verification, the plaintiff add the similiter, and take the record down to trial, and the defendant obtain a verdict, the court will not grant a new trial, but will amend the record. *Grundy v. Mell*, 1 N. R. 28.

Unless it be inconsistent with the justice of the case. *Reader v. Bloom*, 2 Bing. 384; 9 Moore, 741.

Where in an action of trespass the similiter was only entered to the general issue, and omitted to a replication *de injuria* to four special pleas, and the plaintiff obtained a general verdict, the court permitted the record to be amended, by the insertion of a similiter to those issues, and would not allow the verdict to be entered upon the general issue only. *Id.*

And even in a *qui tam* action the court will, after verdict, direct a similiter to be entered, although the objection founded upon the want of it was taken at the trial. *Wright q. t. v. Horton*, 1 Stark. 400; 6 M. & S. 50; 2 Chit. 25; Holt. 458.

And where the parties had gone down to trial upon a plea which had not been traversed, after verdict for the plaintiff, the plaintiff was permitted to amend, by adding a traverse, and the defendant's motion in arrest of judgment was discharged, upon payment of costs by the plaintiff of both motions. *Cooke v. Burke*, 5 Taunt. 164.

But where the defendant pleaded six several pleas, and the plaintiff did not reply to the last, but left it wholly unnoticed on the record, which he was aware of before the trial, and a verdict was found for the plaintiff for nominal damages, subject to an award of an arbitrator, who found for the plaintiff on the first and second issues, and for the defendant on the third, fourth, and fifth, without prejudice to the objection on the record: Held, that the plaintiff could not amend by adding a traverse and similiter to the sixth plea; and that the defendant was not entitled to arrest the judgment, as he might bring a writ of error. *Ferrers v. Weal*, 2 Moore, 215.

Where, in a plea by an executor of a former judgment recovered, by mistake a less sum is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the court will permit the defendant to amend the record by inserting the real sum in the plea, though the application be not made for such amendment till a considerable time (e. g. nearly three years) after the record has been made up; and they will in such case allow the plaintiff to reply per fraudem. *Skutt v. Woodward*, 1 H. Black. 238.

After issue, notice of trial, putting off the trial till a subsequent term, and a plea of bankruptcy,

puis darrien continuance, the court gave leave to amend the plea, without imposing the terms that the plaintiff should be at liberty to discontinue without costs, but imposing terms as to continuing the notice of trial, and taking short notice. *Lando v. Simpson*, 2 Smith, 659.

Where the nisi prius record has been altered, after it was passed by one of the parties without an order from the judge, the court will try the cause as it stands on the record, and will not amend it at nisi prius by striking out the alteration or the parts of the declaration in which the alteration was made. *Drummond v. Burt*, 1 M. & Rob. 136. And see *Whitehead v. Scott*, 1 M. & Rob. 137, n.

If the plaintiff, in making up the record, makes the time of plea pleaded appear posterior to the date of the subject matter pleaded, when it was not so in fact, the court will direct an amendment at plaintiff's costs if he resists. *Reynolds v. Beerling*, 4 Dougl. 181.

After verdict for plaintiff and rule made absolute for a new trial, defendant will not be allowed to amend the pleadings by withdrawing the general issue, and pleading a special justification, for the purpose of giving the defendant the right of beginning, and of the general reply at a second trial. *Chambers v. Bernasconi*, 1 C. & J. 459; 1 Tyr. 335.

In *assumpsit*, the issue was, whether the action had been commenced within six years, and a verdict was taken for the plaintiff, subject to the opinion of the court on a special case. It appeared by the case, that process had been sued out within six years, in an action corresponding with the present, and continued on the roll down to the first return of Trinity term, 1827, when the six years had elapsed; and that a *testatum special capias* was sued out in the present action, tested on the last return of the same term; but there was no continuance from the first to the last return. The question being, whether, on this state of facts, the latter process was sufficiently connected with the former to take the case out of the statute, the court, after two arguments of the special case, allowed the plaintiffs, on motion, to amend the roll by entering the required continuance. *Taylor v. Gregory*, 2 B. & Adol. 257.

## 2. At Nisi Prius.

*Enactments of Statute.*—By 9 Geo. 4, c. 15, it is enacted, That it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at Nisi Prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick upon Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to

the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared.

*This power of amendment is much extended by the stat. 3 & 4 Will. 4. c. 42, s. 23, which recites, That great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances [printed vacancies] as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record; and enacts, That it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ or document on which any trial may be pending before any such court or judge in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars, in the judgment of such court or judge, not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned, together with the record or writ; and thereupon such papers, rolls, and other records of the court from which such record or writ issued as it may be neces-*

sary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial, upon that ground: and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet.

*Sect. 4, provides, That instead of amending, the court, or judge, may direct the facts to be specially found by the jury.*

*What Cases within the Statute 9 Geo. 4.]—The statute 9 Geo. 4, c. 15, applies only to cases where some particular written instrument is proffered to be set out or recited in the pleading. *Hyder v. Malbon*, 3 C. & P. 594—Park.*

In replevin the defendant, in his avowry, stated that the distress was for rent in arrear, and that the plaintiff held the lands on certain terms; however, on the plaintiff's lease being put in, it appeared that he held on other and different terms:—Held, that this variance was not amendable under the statute. *Id.*

The statute invests the judge with a discretion, which cannot, it seems, be revised by the Court above. *Parker v. Ade*, 1 Dowl. P. C. 643; *S. C. nom. Parks v. Edge*, 1 C. & M. 429.

The judge will not allow an amendment under the statute when there is a variance which would not have accrued if common care had been used in the drawing of the declaration. *Jelf v. Oriel*, 4 C. & P. 22—Tenterden.

A record may be amended pending the trial, by correcting a variance between a written contract and the statement of the contract on the pleadings, although it do not appear by the record that the contract was in writing. *Lames v. Bishop*, 1 Nev. & M. 332.

Where a judgment is stated in the record as of one court, and it appears by the production of an examined copy to have been obtained in another, the judge at Nisi Prius may order the record to be amended. *Briant v. Eicke*, M. & M. 359—Tenterden.

Rule for new trial was, however, obtained. *Id.*

In a declaration on a bill of exchange, the date of the bill was stated to be the 26th March, it really was the 29th. The cause was undefended, and the judge allowed the variance to be amended under the statute, without the payment of costs. *Bentzing v. Scott*, 4 C. & P. 24—J. Parke.

Where, in a declaration on a bill, it was stated that the bill was drawn by S. S., payable to his order, and the bill, when produced in evidence, was payable to the order of J. C.:—Held, that the judge had rightly exercised his discretion in allowing the record to be amended. *Parks v.*

*Edge*, 1 C. & M. 429; *S. C. nom. Parker v. Ade*, 1 Dowl. P. C. 643.

In an action against a witness for not obeying a subpoena, the declaration, after reciting the writ of subpoena, stated that the plaintiffs caused the said writ "to be made known to, and shown to the defendant, and caused a copy to be left with the defendant of the said writ of subpoena." When the cause came on for trial, it appearing that the writ of subpoena contained the names of other witnesses besides the defendant, and the copy served upon him was, therefore, not a full copy of the writ, the judge caused the record to be amended thus:—"caused a copy to be left with the defendant of so much of the said writ of subpoena as related to the said defendant."—Held, that the amendment was warranted by the statute. *Mas-terman v. Judson*, 1 M. & Scott, 367; 8 Bing. 224.

In an action for a malicious arrest, the declaration contained an allegation that the defendants "did not prosecute the suit complained of, but made default, and their pledges were in mercy, &c.," and the proof was merely a discontinuance: Held, that the error could not be amended at Nisi Prius under the statute 9 Geo. 4, c. 15, not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof. *Webb v. Hill*, M. & M. 253; 3 C. & P. 485—Tenterden.

Before the statute, a judge at Nisi Prius would allow a trifling or verbal error, or omission in a record, to be amended on summons, or a word therein transposed. *Freeman v. Cockell*, 1 C. & P. 137—Park.

Even after the cause has been called on, by a rule of Court made instant, on the consent of both parties. *Murphy v. Marlow*, 1 Camp. 57—Ellenborough.

### 3. Verdicts.

The entry of a verdict may be amended according to the notes of the judge; but application for that purpose must be made before the judge, and not to the Court. *Scougill v. Campbell*, 1 Chit. 283; *S. P. Graham v. Bowham* 1 Chit. 284, n.

The Court will not alter a verdict, unless it appear on the face of it, that the alteration would be according to the intention of the jury. *Spencer v. Goter*, 1 H. Black. 78.

The postea may be amended by the judge's notes at any time, even after final judgment, and a writ of error brought. *Doe d. Church v. Perkins*, 3 T. R. 749; *S. P. Newcomb v. Green*, 1 Wils. 33.

Where a general verdict has been given on two counts, one of which is bad, and it appears by the judge's notes, that the jury calculated the damages on evidence applicable to the good count only, the Court of C. P. will amend the verdict, by entering it on that count, though evidence was given applicable to the bad count also. *Williams v. Breedon*, 1 B. & P. 329.

Where a verdict was taken by consent on two counts, the court, on the application of the plaintiff, amended the postea by entering the verdict on one (to which the evidence applied) although

the judge who presided declined to interfere. *Henley v. Lyme Regis (Mayor)*, 6 Bing. 100; 3 M. & P. 310.

The court will not amend the entry of a verdict according to the notes of an arbitrator, on the ground that they had no power to compel such notes to be brought before them. *Scougill v. Campbell*, 1 Chit. 283.

Where a general verdict was given on a declaration, some of the counts of which were bad, the court amended the postea, by entering up judgment on a single count, after argument in error, in *K. B. Richardson v. Mellish*, 3 Bing. 334; 11 Moore, 104; *S. C. nom. Mellish v. Richardson (in error)*, 1 B. & C. 819.

So held, where evidence had only been given on the good or consistent counts. *Eddowes v. Hopkins*, 1 Dougl. 376.

So, where there is a misjoinder of counts, one of which is partly in case and partly in trespass, and another entirely in trespass, the verdict, if taken generally, may be amended according to the evidence. *Harris v. Davis*, 1 Chit. 625.

Where the jury in an action of debt on the statute 2 & 3 Edw. 6, c. 13, which gives treble value for not setting out tithes, found damages which amounted only to the single value:—Held, that the court could not amend the postea by entering the verdict for the treble value. *Sanford v. Porter*, 2 Chit. 351. And see *Pedley v. Frampton*, 2 Chit. 155.

Where a declaration in trespass contained two counts, the first for assaulting the plaintiff, and destroying a scraper affixed to his house, and the second for destroying the scraper, and a general verdict was given, with damages, two shillings: Held, that the plaintiff was entitled to full costs; and the court of C. P. refused to allow the postea to be amended by entering a verdict for the defendant on the first count. *Reece v. Lee*, 7 Moore, 269.

The court will not, at a distance of time after the trial, amend the postea, by increasing the damages given by the jury, although all the jury-men join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived that the verdict they had given was calculated to give him such sum. *Jackson v. Williamson (Bart.)*, 2 T. R. 281.

The explanation should have been given at the trial. *Id.*

But, in one case, a verdict which was improperly delivered, by the mistake of the foreman, was set right, and the poster amended on the affidavits of the jury. *Cogan v. Edden*, 1 Burr. 283; 2 Ld. Ken. 24.

Where the jury find a greater sum than that laid in the declaration, scmb. that the verdict cannot be amended by making it equal. *Anon. Loft*, 146. And see *Pickwood v. Wright*, 1 H. Black. 643.

Where a verdict was given, and judgment entered, for a sum exceeding the damages laid, on error brought, the court of K. B. allowed the plaintiffs to amend the judgment and transcript

in a term subsequent to that in which the judgment was signed, by entering a remittitur for the excess. *Usher v. Dansey*, 4 M. & S. 94; 4 Camp. 97.

So, the court of C. P. permitted the plaintiff to enter a remittitur of the excess above the sum laid, on payment of the costs of the writ of error. *Pickness v. Wright*, 1 H. Black. 642.

#### 4. Judgments.

Where a verdict was found for the plaintiff on the general issue, and no notice taken of a second issue on the statute of limitations, on error brought on this point, the court allowed it to be amended by the judge's notes, on payment of costs. *Petrie v. Hanny*, 3 T. R. 659.

Where a plea was pleaded to the whole declaration, but the matter of the plea was in truth but an answer to part, and a verdict was obtained and judgment given for the plaintiff, and a writ of error brought, the court refused to allow the record to be amended by inserting judgment by nil dicit to the part unanswered, on the ground that such amendment was unnecessary. *Patterson v. Everard*, 2 Chit. 30.

The court of C. P. after error brought, and argument in the court of error, having amended a postea by entering the verdict for the plaintiff on the first count, and for the defendant on the others, amended the judgment roll remaining in that court by the amended postea, after the judgment had been reversed in K. B. *Mellish v. Richardson*, (in error), 1 B. & C. 819; S. C. nom. *Richardson v. Mellish*, 11 Moore, 104; 3 Bing. 334.

Semble, that the court of K. B. is bound to amend the record by the amended record of the court of C. P. *Id.*

After a nonsuit on a variance in an undefended action, the court allowed the record to be amended, and a new trial had. *Hulhead v. Abrahams*, 3 Taunt. 81.

But the court would not amend a record after the term in which it had been filed. *Anon.* M'Clel. 251.

Nor after a new trial granted. *Parker v. Ansell*, 2 W. Black. 920.

An amendment of the nisi prius record and jury process refused, when the trial took place after the day of nisi prius, because the case was coram non iudice, but a venire de novo was awarded. *Crowder v. Rooke*, 1 Wils. 144.

Where the defendant, in replevin, made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, without finding either the amount of the rent in arrear, or the value of the cattle distrained, and judgment was entered for the damages assessed, the court permitted the defendant to amend his judgment, and to enter a judgment pro retorno habendo, after a writ of error brought. *Rees v. Morgan*, 3 T. R. 349.

Where a defendant is entitled to treble costs by a judge's certificate, under a statute, and the

judgment is entered up for treble costs generally, without stating on what ground the defendant is entitled to them; this is a substantial defect, and the court will not amend the judgment by striking out the word "treble." *Dunbar v. Hitchcock*, 1 Marsh. 382; 5 Taunt. 820; 3 M. & S. 591.

A judgment will not be amended to the prejudice of an executor, after the term in which it was given. *Prince v. Nicholson*, 1 Marsh. 401; 6 Taunt. 45.

Where the clerk entered judgment "de bonis propriis," instead of "de bonis testatoris," on error brought, the court ordered the entry to be amended. *Green v. Bennet*, 1 T. R. 782.

Where an executor pleads plene administravit, and the plaintiff does not take issue on it, but takes a judgment of assets quando acciderint, and sues out a sci. fa. on such judgment, if the executor receive assets between the time of the plaintiff's suing out the writ in the first action and judgment, the court will permit the plaintiff to amend his judgment as to the time, by making it a judgment as of that term when he could at the soonest have entered it up; unless the defendant can show that in point of fact some injustice will be done by it in the particular case. *Mara v. Quin*, 6 T. R. 1.

But where an executor pleaded a false plea of judgment recovered against himself, on which judgment was entered up against him for the debt and damages de bonis testatoris et si non de bonis propriis, and words were afterwards interlined on the judgment roll, by which the judgment de bonis propriis was confined to the damages only; the court refused to amend, by striking out the words which had been interlined, where it did not appear by whom the interlineation had been made, and the judgment was of six years standing. *Burroughs v. Stephens*, 1 Marsh. 211; 5 Taunt. 554.

A rule to show cause at chambers, why a judgment which had been entered up by mistake on a warrant of attorney (for a less sum than that secured by it), should not be amended, will not be granted on the consent of an attorney who was employed by both parties, but there must be some other person authorized. *Anon.* 2 Chit. 24.

#### V. INCIDENTAL PROCEEDINGS.

##### 1. Proceedings in Error.

A variance in writs of error from the record is amendable in the court into which they are returnable. *Anon.* Loft, 272, 275; *Rex v. Williams*, 1 Ld. Ken. 470.

The court of K. B. will amend a writ of error from court of C. P. in case, by converting it to a writ of error in covenant. *Sampayo v. De Payba*, 5 Taunt. 82.

But if a writ of error be brought by a feme covert without joining her husband, the court will not allow an amendment in the writ, unless it appear by affidavit that the husband concurs. *Binns v. Pratt*, 1 Chit. 369.

A writ of error in the name of two defendants,

one only of whom had been found guilty of trespass, was amended by striking out the name of the other. *Verelst v. Rafael*, Cowp. 425.

The court will not admit the bail-piece in error to be amended by enlarging the penalty in order to defeat the execution. *Reed v. Cooper*, 5 Taunt. 320.

Where a plaintiff in error had sued out his writ of error in time to stay execution, but had made a mistake in the name of the defendant in error, upon which the latter issued execution, the court of K. B. granted a rule upon the sheriff to pay the money taken into court, and enlarged the rule, to enable the plaintiff in error to amend his writ. *Barnard q. t. v. Guy*, 2 Smith, 259.

After error brought, the court can only amend the record in respect of mispision of the clerk; and, therefore, the court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, and after judgment in his favour in the court of K. B., and error brought, to withdraw the same and plead de novo. *Green v. Miller*, 2 B. & Adol. 781.

The court will give leave to amend a record by inserting a special memorandum of the day when the plaintiff's bill was filed, after error brought, notwithstanding an objection by the defendant that the application was made too late. *Dickinson v. Plaisted*, 7 T. R. 474.

And the terms of such amendment are payment of costs, and liberty to the defendant to plead de novo, upon terms. *Minchin v. Cope*, 1 Chit. 45.

A bill may be filed to warrant a judgment after the want of a bill has been assigned for error. *French v. Cook* (in error), 1 Taunt. 126.

Where the clerk of the errors in C. P., in transcribing the record, had by mistake intituled it generally, instead of specially, and error was assigned thereon; after which he amended the transcript by inserting the special memorandum; the court would not restore the transcript to the state in which it stood at the time when the plaintiff in error assigned his error. *Randole v. Bailey*, (in error), 1 M. & S. 232; S. P. Anon. 1 Chit. 277, (a).

The court of K. B. will order an inferior court to amend its record according to the facts of the case as they occurred below, after an imperfect record had been annexed to a writ of error, brought in the former court upon the judgment. *Williams v. Bagot* (Lord) (in error), 4 D. & R. 315. And see *Daubers v. Pender*, (in error), 1 Wils. 337.

So, where a case came on for argument in the Exchequer Chamber on a writ of error, it was found that one of the errors assigned was grounded on a defect in setting forth the subject matter of the postea, which, although it might have been erroneous as it stood, was of such a nature as that an amendment would be allowed below as a matter of course; that court gave the party leave to amend the transcript, on payment of costs of the day; and an application to discharge such order, quia improvide emanavit, was refused. *De Tastet v. Rucker* (in error), 9 Price, 432; 6 Moore, 135; 3 B. & B. 65.

Where a verdict was given for a sum exceeding the damages, in the declaration, and judgment entered for the same, and writ of error upon the judgment, assigning that for cause; the court allowed the plaintiffs to amend the judgment and transcript in a term subsequent to that in which the judgment was signed, by entering a remittitur for the excess. *Usher v. Dansey*, 4 M. & S. 94; 4 Camp. 97.

The court of C. P. allowed a similar amendment on payment of costs of the writ of error. *Pickwood v. Wright*, 1 H. Black. 643.

In judgments by default the record is to be made up by the plaintiff; and if error be brought for not making proper entries for the defendant, judgment shall be staid until he can apply to amend below. *French v. Cornely*, 1 W. Black. 453.

But amendment by adding continuances cannot be made in a record transcribed without some other record to amend by, but the court will grant a certiorari to send for the continuances. *Rex v. Ponsonby* (in error), 1 Wils. 303.

Where the issues are entered informally, a court of error will adjourn the hearing of the case, to afford an opportunity for the party to apply to the court below to amend the record unless the counsel will consent to argue upon the presumption of such amendment. *Hawkey v. Borwick* (in error), 1 Y. & J. 376; S. C. not S. P. 4 Bing. 135.

After error from C. P. into K. B. and from K. B. into Dom. Proc., the court of K. B. allowed an amendment to be made in the record, by inserting the certificate of the judge who tried the cause, allowing plaintiff treble costs, which had been omitted by the clerk in entering judgment in C. P., also by inserting the true term in which the assignment of errors and joinder were made, instead of an entry by the clerk on the judgment roll of K. B., that they were made on an impossible day in another term, although both these errors were assigned for cause in Dom. Proc. *Dunbar v. Hitchcock*, 3 M. & S. 591; 1 Marsh. 382; 5 Taunt. 820.

## 2. Orders of Nisi Prius and Reference.

The court refused to amend an order of nisi prius according to the terms contained in a paper signed by the counsel at the trial; the intention of the parties appearing from their subsequent acts to have been in favour of the terms of such order. *Pearman v. Carter*, 2 Chit. 29.

If all matters in difference in the cause are agreed to be referred to an arbitrator, and the associate, by mistake, draws up the order of reference generally as to all matters in difference between the parties, it cannot be amended; but they must go down to another trial. *Rawtree v. King*, 5 Moore, 167.

The court will amend an order of reference at nisi prius, made a rule of court, by inserting such omitted matters as are incident to the substance of the agreement between the parties. *Evans v. Senor*, 5 Taunt. 662.

Explanatory words to an order of nisi prius

cannot be inserted, but may be made a separate rule. *Anon. Loftt*, 151.

The condition of a recognizance to abide the award of D., cannot be varied by a rule of court, substituting M. for D. *Rez v. Bingham*, 1 C. & J. 245; S. C. not S. P. 2 Tyr. 46.

### 3. Rules and Affidavits.

The court will not amend a rule for a new trial, by providing that the action shall not abate by the death of a party, where a surety has previously entered into a bond for payment of the damages and costs of the second trial. *Lopez v. De Tazet*, 8 Taunt. 712.

Affidavit in support of motion for costs of the day for not proceeding to trial, allowed to be amended. *Larken v. Bovill*, 2 Tyr. 746.

## VI. PECULIAR PROCEEDINGS.

### 1. Ejectment.

Amendment in ejectment may be made even in the time of the demise, to prevent being barred. *Doe d. Hardman v. Pilkinton*, 4 Burr. 2447.

Amendment allowed on payment of costs, in a declaration of ejectment, where the day of the demise was laid before the title accrued; even after the record was made up, and the cause set down for trial. *Doe d. Rumford v. Miller*, 1 Chit. 536; Ad. Eject. 199.

So, in the day of the demise in a declaration in ejectment on a forfeiture for dilapidations. *Anon.* 1 Chit. 536.

So, in a declaration in ejectment after judgment, and writ of error brought, by leaving out the word "tenements." *Anon.* 1 Chit. 537.

In ejectment the plaintiff declared for twenty messuages, twenty tenements, &c.; and after a verdict, and a writ of error brought in K. B., the court of C. P. allowed the record to be amended, by striking out the words "twenty tenements." *Doe d. Lawrie v. Dyeball*, 1 M. & R. 330; 8 B. & C. 70.

But refused by altering it to a day subsequent to the day of the delivery of the declaration. *Doe d. Foxlow v. Jefferies*, Ad. Eject. 200.

A plaintiff in ejectment was permitted to amend his declaration on payment of costs, by adding a new count on another demise, after three terms had elapsed, and the roll had been made up and carried in. *Doe d. Beaumont v. Armitage*, 1 D. & R. 173; 2 Chit. 302.

The plaintiff, in ejectment, has a right to an amendment of the record, upon payment of costs of the application against a defendant, who refuses to give up the possession. If the defendant consent to give up possession, the plaintiff must pay the whole costs up to the time of the application. *Doe d. Lewis v. Coles*, R. & M. 380—Best.

The term in a declaration of ejectment, if expired, may be enlarged, on payment of costs; though the cause be at issue, a special jury struck, and the parties gone down to the assizes before the mistake is discovered. *Roe d. Lee v. Ellis*, 2 W. Black, 940.

It is too late to amend the record, by increasing the term in ejectment, after the cause has been called on. *Doe d. Manning v. Hay*, 1 M. & Rob. 243—Parke.

Where an ejectment had been brought, and judgment recovered in 1798, and the term of the demise laid in the declaration had since expired, the court refused to grant a rule for enlarging the term and issuing a scire facias, the possession having changed, and the person who was the owner having since died. *Doe v. Rendell*, 1 Chit. 535.

Where judgment in ejectment was signed sixty years ago, when the Court of Chancery granted an injunction to stay execution, and nothing appeared to have been done in the cause since, the court of King's Bench refused to enlarge the term in the declaration, for the purpose of enabling a descendant of the original plaintiff to sue out a scire facias, in order to revive the judgment, and take out a writ of possession against the heir at law of the original defendant, unless it were quite clear that such amendment would work no injustice. *Bradney v. Hasselden*, 2 D. & R. 227; 1 B. & C. 121.

After judgment in ejectment from Ireland affirmed, the court amended the declaration by enlarging the term, though the record was remitted to Ireland. A writ of supersedeas was issued to the former mittimus, and a new writ of mittimus was awarded to the judge of K. B. in Ireland, inclosing the tenor of the record so amended. The whole on payment of costs by the party applying. *Vicars v. Heyden* (in error), Cowp. 841.

In certain cases the court will permit an amendment to be made in a notice at the bottom of a declaration in ejectment. *Doe d. Bass v. Roe*, 7 T. R. 469.

### 2. Penal Actions.

The omission of trespass, and insertion only of a plea of debt, in a bill of Middlesex, by a common informer, was amendable. *Cox q. t. v. Murray*, 1 W. Black. 462.

A declaration in a penal action may be amended. *Anon.* 1 Wils. 256.

But the court of C. P. will not alter the term of which such a declaration is intituled, to a previous term, in order to bring it within the time limited for the action, at the mere instance of the plaintiff, without a reason shown. *Woodroffe v. Williams*, 1 Marsh. 419; 6 Taunt. 19; S. P. *Anon.* 1 Chit. 45.

The court allowed a plaintiff to amend his declaration in a penal action, after the time limited for bringing another action, there having been no unnecessary delay in his proceedings. *Cross v. Kaye*, 6 T. R. 543.

And the amendment prayed for does not introduce any new substantive cause of action. *Maddock q. t. v. Hammet*, 7 T. R. 55.

But the court will not permit any amendments to be made in a penal action, where the plaintiff has been guilty of delay in carrying on the suit. *Ranking q. t. v. Marsh* (Knt.), 8 T. R. 30; S. P. *Steel v. Sowerby*, 6 T. R. 161.

And it was held an unreasonable delay where the action had been depending for four years. *Goff v. Popplewell*, 2 T. R. 707.

But an amendment was allowed, by correcting an error in the declaration in the description of the persons to whom part of the penalty was given, though the defendant had pleaded early enough for the plaintiff to have gone to trial at the assizes after an issuable term, and had neglected to do so, as well as delayed in making up the issue till a subsequent term. *Solomons v. Jenkins*, 2 Chit. 23.

A declaration in an action for usury was amended after the record was made up, carried down to trial, and withdrawn by plaintiff. *Mace q. t. v. Lovett*, 5 Burr. 2833.

Where a plaintiff in a qui tam action for usury, sued out his writ in September, 1828, and delivered a declaration in Trinity term, 1829, and at the summer assizes in that year withdrew the record, the court refused to allow him to amend the declaration. *Wood v. Grimwood*, 10 B. & C. 689.

A similar declaration was amended by altering the date of the note, all being in paper. *Bonfield, q. t. v. Milner*, 2 Burr. 1098.

Where a defendant was served with a copy of a latitat, in a penal action, by a wrong name, and a declaration was filed conditionally by the same name, to which he appeared and pleaded a misnomer:—Held, that a judge's order to amend the bill and declaration, by substituting the true name, was good, and that after such amendment there was no irregularity. *Mestaer v. Hertz*, 3 M. & S. 450.

A declaration for a penalty under the bribery act, was amended by altering the venue from the county at large to an inferior jurisdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the court, that the plaintiff was proceeding on the same fact for which the action was originally brought, when laid by mistake in the wrong county, though there was no affidavit that it was the same. *Petre v. Craft*, 4 East, 433.

So also in another case, though it appeared that there were distinct causes of action in the two different counties, upon an affidavit that the plaintiff proceeded on a mistake, in supposing that both causes of action could be proved in the county where the election was holden. *Dover v. Mestaer*, 5 East, 435; 1 Smith, 123.

In an action of debt, to recover penalties against a sheriff's officer for extortion, under the 32 Geo. 2, c. 28, the court of C. P. will not allow the declaration to be amended by inserting new counts on the 23 Hen. 6, c. 9. *Wright v. Ager*, 5 Moore, 330.

Nor is there any instance in which the court has given leave to amend, as to the parties to the suit in a qui tam action, after a demurrer. *Evans q. t. v. Stevens*, 4 T. R. 228.

A record may be amended, in a penal action, by inserting or correcting a similitur, though the objection was taken on the trial. *Wright q. t. v. Horton*, 6 M. & S. 50; 2 Chit. 25; 1 Stark. 400; Holt, 458.

So, in an action on the statute of usury, for taking more than legal interest on a loan of money "from the 15th of April to the 14th of July, 1802," the court will amend the verdict by the judge's notes, if the jury, by mistaking the date of an instrument, create a variance for which the evidence affords no foundation. *Manners q. t. v. Postan*, 3 B. & P. 343; 4 Esp. 240.

The record in a penal action, where the jury by mistake give damages, being carried by writ of error to the K. B., the plaintiff may enter a remittitur of the damages on the record, and the transcript may be made conformable thereto. *Hardy v. Cathcart*, 1 Marsh. 180; 5 Taunt. 11.

An information for killing game allowed to be amended. *Howell q. t. v. James*, 1 Wils. 163.

### 3. Real Actions.

By 3 & 4 Will. 4, c. 27, s. 36, all real and mixed actions, (except writ of right of dower, writ of dower under nihil habet, quare impedit, and ejectment,) are abolished after 31 Dec. 1834.

In one case it was said, that it is not allowed to amend the count in a writ of right, unless a favourable case be made out by affidavit. *Dumaday v. Hughes (Bart.)*, 3 B. & P. 453; 1 N. R. 66, c.

But it was afterwards held, that considering the nature of the proceeding, and how much it had always been discouraged, it would be the soundest exercise of their discretion not to allow of amendments in proceeding by writs of right. *Charlwood v. Morgan*, 1 N. R. 64.

And accordingly the court refused to allow the defendant to amend the mistake of a christian name in the count, though an affidavit accounting for the mistake was produced; or to discontinue the suit. *Id.*

So, they refused an amendment, by introducing an additional step in the descent, though it was sworn that the mistake had arisen from the defendant having been misinformed in the country, and that the defendant would be barred unless the amendment were allowed. *Baylis v. Manning*, 1 N. R. 233.

The defendant having omitted to set forth his pedigree upon the count in a writ of right, the court refused to allow him to amend even upon an affidavit of merits, and that the omission had been occasioned by the oversight of an experienced pleader at the bar. *Worley v. Blunt*, 9 Bing. 635; 2 M. & Scott, 799; 1 Dowl. P. C. 728.

An amendment is so little favoured in a writ of right, that, after an amendment had been made under a judge's order, the court discharged the order. *Tboth v. Boddington*, 8 Moore, 42; 1 Bing. 208.

Judgment having been signed in a writ of right, because a blank was left for the word "esplees" in the count, and because a country attorney's name was inserted instead of that of a London attorney, the court set aside the judgment, and allowed an amendment without costs. *Webb v. Lane*, 5 Bing. 285; 2 M. & P. 478.

An amendment of the disseisor's name was refused in a writ of entry sur disseisin en le post. *Hull v. Blake*, 4 Taunt. 572.



In *formodon* the plaintiff had leave to amend all his proceedings, on paying costs, and the costs of an ejectment. *Scott v. Perry*, 3 Wils. 206; 2 W. Black. 758.

The court allowed the demandant in a writ of *formodon* to withdraw a demurrer, and reply, on payment of costs, on an affidavit stating that his title had but recently accrued to him. *Cholmeley v. Paxton*, 10 Moore 248; 3 Bing. 207.

#### 4. *Quare Impedit.*

Leave given to amend a declaration in *quare impedit*, on payment of costs. *Reppington v. Tamworth School*, 2 Wils. 118.

Rule to amend a declaration in *quare impedit*, by adding a count, stating that certain persons took by descent, instead of by devise, was made absolute after a nonsuit, which had been set aside. *Gully v. Exeter (Bishop)*, 4 Bing. 525; 2 M. & P. 105.

#### 5. *Informations.*

Amendments upon informations are now so much a matter of course, that they are made on an application to a judge at chambers. *Rex v. Holland*, 4 T. R. 457; *S. P. Rex v. Wilkes*, 4 Burr. 2527.

The attorney-general may at any time amend a revenue information. *Att. Gen. v. Henderson*, 3 Anst. 714.

An information filed by the attorney-general against an East Indian delinquent, under 24 Geo. 3, c. 25, and 26 Geo. 3, c. 57, to which the defendant demurs, may be amended in K. B. upon the motion of the attorney-general. *Rex v. Holland*, 4 T. R. 457.

The court refused, on cause shown, to discharge a side bar rule, allowing the attorney-general to amend an information for penalties incurred under the excise laws, on payment of costs, as to ten new counts which had been added charging other offences laid on days long subsequent to those in the original information and to the filing of that proceeding, and the issuing of process thereon; and although the name of a succeeding attorney-general had been introduced; and although the defendant was served with process on the first information in Hilary vacation, returnable the first day of Easter term; and the side bar rule for amending was not obtained till the first day of the following Michaelmas term, nor the information so amended filed till the seal day after Michaelmas term. *Att. Gen. v. King*, 5 Price, 363.

#### 6. *Criminal Proceedings.*

The court will not allow a defective plea in abatement, to an indictment for a misdemeanour, to be amended. *Rex v. Cooke*, 4 D. & R. 592; 2 B. & C. 871.

After verdict of guilty upon an indictment on the stat. 9 Ann. c. 14, for an assault on account of money won at gaming, the return to the writ of certiorari, which had been issued at the instance of the defendant, was amended by inserting in the return of the caption the true time when, and

the names of the justices before whom, the quarter sessions at which the indictment was found was holden, and the names of the jurors by whom it was found. And the entry roll and record of nisi prius were also amended, as to the caption of the indictment (but not as to the names of the grand jurors), by making the same agree with the caption so amended. *Rex v. Hill Darley*, 4 East, 174.

A return to a certiorari, issued at the instance of the defendant, may be amended by inserting therein the commission of oyer and terminer, by virtue of which, and also the names of the justices who constituted the court before whom the indictment was found, on production of the commission and the minutes taken by the clerk in court. And also the caption of the indictment may be amended by inserting the names of the grand jurors. The latter is not necessary. *Rex v. Atkinson*, 4 East, 176, n. And see *Rex v. Aylett*, 4 East, 176, n.

And the entry roll in the Treasury, and the record of nisi prius, in the same cause may be amended, as to the caption of the indictment, by making it agree with the amended caption. *Id.*

The jury panel, in cases of treason, may be amended by correcting mistakes and inserting a description of the professions of the jurors. *Rex v. Hardy*, 1 East, P. C. 113.

### VII. FINES AND RECOVERIES.

#### 1. *Generally.*

By stat. 3 & 4 Will. 4, c. 74. fines and recoveries are abolished, and a more simple mode of assurance substituted. The enactments are noticed *post*, tit. FINES AND RECOVERIES.

By that stat. sects. 7 & 8, it is enacted, that if it shall be apparent from the deed declaring the uses of a fine, or making the tenant to the writ of entry or other writ, for suffering a recovery already levied or suffered, or hereafter to be levied or suffered, that there is in the indentures, record, or any of the proceedings of such fine, or in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the conusor or conusee of such fine, or of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such fine or recovery, then and in every such case, the fine, without any amendment of the indentures, record, or proceedings, or the recovery, without any amendment of the exemplification, record, or proceedings, in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission: Provided (sect. 9.) that nothing shall lessen or take away the jurisdiction of any court to amend any fine or recovery, or any proceeding therein, in cases not provided for by the act.

Where the original writ was insensible, the court would permit it to be amended. *Cook v. Miles*, 4 Taunt. 644.

So, clerical mistakes in a fine, which make it insensible, might be amended. *Gill v. Yates*, 4 Taunt. 708.

A fine, with a double operation, amended by striking out lands in reversion. *Moore v. Sharpe*, 5 Taunt. 631.

The term of a fine was not amendable. *Heath v. Wilmot*, 2 W. Black. 788.

Where the deed to lead the uses appeared to be colourable, and the fine was taken from a dying woman, the court refused to amend the return to a writ of covenant. *Lindsay v. Gray*, 2 W. Black. 1013.

No amendment allowed, where the recovery, as it stands, has land of the vouches to operate upon. *Acton v. Baldwin*, 2 W. Black. 874.

Where one purchaser under a recovery had obtained an amendment of the recovery, so worded, that by its collocation on the record, it destroyed, and rendered insensible the title of another purchaser under the recovery, the court, upon motion of the latter, rectified the mistake. *Lancaster*, dem.; *Wilmot*, ten.; *Boone*, vouches, 7 Taunt. 352; 1 Moore, 95.

If there be several palpable mistakes in a recovery, through the neglect of the attorney employed to perfect it, the court will order him to pay the costs of its amendment. So, in a fine, if one parish be inserted instead of two, by mere mistake of the attorney, the costs of the amendment must be paid by him. *Williamson*, dem.; *Meggison*, ten.; *Beaumont*, vouches, 4 Moore, 171.

The court would not compel a recovery suffered by an insolvent debtor to be amended. *Sanderson*, dem.; *Bessant*, ten.; *Partridge*, vouches, 8 Taunt. 105.

## 2. Names of Parties.

*Names of Parties in Fines.*—Formerly held, that no change of the christian name of the parties could be made by way of amendment. *Dixon v. Lawson*, 2 W. Black. 816.

Afterwards, the præcipe and concord of a fine were amended, by inserting the real christian names of the deforciant, instead of those which had been erroneously inserted. *Grey v. Wainwright*, 1 Marsh. 578.

And by altering the surname of one of the deforciant conformably to his signature in the covenant and dedimus. *Bye v. Haywood*, 1 Moore, 125.

On an affidavit explaining the mistake. *Dobson v. Dewar*, 1 B. & B. 15.

So, a fine was amended by the insertion of part of the conuser's christian name, to which he did not know he was entitled at the time the fine was passed. *Spencer*, conuser, 8 Taunt. 20.

So, also, they allowed the warranty of a fine to be amended, by altering it from a warranty by the husband and wife and the heirs of the husband, against themselves and the heirs of the wife, to a

warranty by the husband and wife and the heirs of the wife, against themselves and the heirs of the wife. *Hannaford v. Pearce*, 1 B. & B. 68.

Where an affidavit from husband and wife stated that they both, for the purpose of levying a fine, appeared at the bar, and the officer wrote both their names accordingly, but the name of the wife appeared to have been afterwards struck out of the præcipe, but not by the officer, the court refused to amend the caption by inserting the wife's name; and, as the fine was of very recent date, directed her to come up and re-acknowledge it. *King v. Steddel*, 8 Taunt. 87.

If a wrong christian name of one of the parties to a fine be inserted by mistake, and the right one written on an erasure in the deed to lead the uses, the court will require an affidavit, to show that such erasure was made, and the name written thereon, before the deed was executed, although the party had signed his right name at the foot of such deed. *De Warre v. Bryan*, 3 Moore, 241.

Where the wife of a deforciant was improperly described by the name of "Maria," instead of "Mary Ann," the court allowed the right name to be substituted in the writ of covenant, præcipe, and concord, on an affidavit stating that she was an illiterate woman, and that her real name had not been ascertained at the time the fine was levied. *Woolley v. Harrison*, 8 Moore, 449.

It is unnecessary to amend a fine by altering the christian name of the deforciant from "Ellen" to "Eleanor," where she had always been known by the former, although her real baptismal name was the latter. *Hezi v. Cockey*, 8 Moore, 15.

The court refused to amend a fine passed two years back, by altering the surnames of the deforciant, though it was sworn that a wrong name had been inserted by mistake. *Ex parte Malley*, 2 B. & P. 455.

Where, in levying two fines between the same parties, the one sur concessit, the other sur cognizance de droit, the parcels had by mistake been transposed, the court allowed the fines to be amended, so as to make them conformable with the deed to lead the uses. *Banbury v. Harper*, 3 M. & Scott, 101.

*Vouches in Recoveries.*—The christian name of the vouches may be altered in a fine by a deed to lead the uses. *Mayre v. Coulthard*, 2 W. Black. 1230.

As by inserting an omission in the christian name. *White*, dem.; *Gregory*, ten.; *Herne*, vouches, 8 Taunt. 27.

But if he sign a recovery with one part of his christian name only, the court will not permit it to be amended by adding the other part, such addition being unnecessary. *Bradley*, vouches, 3 Moore, 577.

So, a recovery cannot be amended by inserting an additional christian name of the vouches, if he has always been known by, and has signed the deed to make a tenant to the præcipe without such name. *Shaw*, dem.; *Spence*, ten.; *Hunt*, vouches, 2 Moore, 721.

Held formerly that the warrant of attorney in a

recovery might be amended by inserting an additional christian name of the vouchee. *O'Brien* vouchee, 4 Taunt. 196.

But the court will not now amend a warrant of attorney, because it is the act of the party. *Fax*, dem.; *Bembow*, ten.; *Gower (Earl)*, vouchee, 6 Taunt. 652; 2 Marsh. 328.

The court refused to amend a recovery by adding the name of one of the parties which had been omitted in the warrant of attorney. *Id.*

Where the warrant of attorney and deed to lead the uses were executed in a name by which the vouchee was commonly known, the court refused to amend the recovery by substituting a different name, by which, as he afterwards discovered, he had been baptized. *Addis v. Power*, 7 Bing. 455; 5 M. & P. 379.

Or strike out the voucher of a vouchee, whose acknowledgment was taken without a dedimus. *Rawlings*, dem.; *Price*, ten.; *Tom*, vouchee; 3 Taunt. 59.

Or strike out a minor vouchee. *Cheesman*, dem.; *Sykes*, ten.; *Denn*, vouchee, 7 Taunt. 697.

Nor will they amend by inserting the name of the husband of a vouchee who is a feme covert. *Parsons*, dem.; *Abbott*, ten.; *Knight*, vouchee, 1 Taunt. 478.

A præcipe at the head of a warrant of attorney directed to the vouchee, was allowed to be amended by substituting the name of the tenant. *Dawson*, dem.; *Stocker*, ten.; *Brooks*, vouchee, 8 Taunt. 226.

So, where the name of the vouchee was inserted by mistake in the præcipe, instead of that of the tenant, the court allowed it to be amended by substituting the name of the latter for that of the former. *Cox*, dem.; *Ince*, ten.; *Gill*, vouchee, 7 Moore, 257; 1 Bing. 22.

Where the vouchee's warrant of attorney, in a recovery, omitted in the body of the warrant to express against whom the plea of land was, wherein the attorney was made, but it appeared by the præcipe engrossed at the head of the warrant of attorney who the demandant was: the court held, that the authority must refer to the plea described by the præcipe, and permitted the recovery to pass. *Forster*, dem.; *Forster*, ten.; *Bolton*, vouchee, 6 Taunt. 373.

If the name of a tenant be inserted by mistake for that of the demandant, in the body of a warrant of attorney in a recovery, the court will not allow the warrant of attorney to be amended, or the recovery to pass, although the parties were rightly described in the præcipe at the head of such warrant. *Morrell*, dem.; *Alban*, ten.; *Hatchett*, vouchee, 4 Moore, 495; 1 B. & B. 92.

**Demandant and Tenant.**—The court will allow the christian names of the demandant to be transposed. *Shepherd*, dem.; *James*, ten.; *Boughton*, vouchee, 4 Taunt. 226.

So, also, the names of the demandant and tenant. *Roberts*, dem.; *Robinson*, ten., 2 Taunt. 222; *S. P. Hamilton*, dem.; *Farrer*, ten., 8 Bing. 11; 1 M. & Scott, 43; 1 Dowl. P. C. 235.

Without any affidavit of intention, or identity of the party or premises, *Bird*, dem.; *Quilter*, ten.; *Tindal*, vouchee, 8 Taunt. 556.

But not unless the documents relative to the recovery being suffered be produced. *Allen*, dem.; *Hexley*, ten.; *Massey*, vouchee, 6 Moore, 46.

The court will not alter a recovery by substituting one joint-tenant to the præcipe for his companion. *Buswell*, tenant, 4 Taunt. 101.

They will substitute the name of the attorney for the name of the vouchee, which had by mistake been inserted in the place of the attorney's name. *Shaw*, dem.; *Le Blanc*, ten.; *Ramsay*, vouchee, 4 Taunt. 98.

Or strike out the name of one of two demandants, who died pending the recovery. *Morris*, dem., 5 Taunt. 73.

The court allowed a writ of entry to be amended by altering the names of the parties, on an affidavit, that the recovery was intended to be suffered as prayed, and that all the parties were alive, and consented to the motion. *Edge*, dem.; *Taylor*, ten.; *Warren*, vouchee, 4 Moore, 514; 2 B. & B. 98.

### 3. Description of Locality of Land.

**County.**—A writ of covenant cannot be transferred from one county to another, nor can parishes comprised in wrong counties be transposed to the right counties; but additional parishes in the same county may be inserted, where it is seen, by a clear relation, that land in those parishes was intended to pass. *Gill v. Yeates*, 4 Taunt. 708. And see *Behoun v. Burton*, 2 Wils. 58.

A fine has been amended by substituting one county for another, where it appears that the lands, intended to pass, were situate in the same parish, which ran into both counties. *Stubbs v. Stephenson*, 1 Moore, 530.

But the court refused to amend a recovery by changing the county, the premises lying in a parish which ran into two counties, and lying wholly in the county omitted, and no part in the county mentioned. *Anon.* 3 Taunt. 418.

So, by altering Berks into Bucks, which was engrossed by mistake; the deed to lead the uses being correctly Bucks. *Douling*, dem.; *Selby*, vouchee, 4 Bing, 426.

So, the court refused to allow the original writ, and subsequent proceedings in a recovery to be amended by substituting therein "Lancashire," instead of "Berkshire," although it was sworn that the parties had no property in the latter county, and that the premises intended to be passed were wholly situate in the former. *Dolling*, dem.; *Rice*, ten.; *Euston*, vouchee, 1 M. & P. 178.

In one case, however, the original writ and other proceedings in a recovery were amended by inserting the "county of the town of S." for "county of S." *Rashleigh*, dem.; *Lee*, ten.; *Smith*, vouchee, 4 Taunt. 855.

A recovery may be amended by a more accurate description of the vill and county, from the deed to lead the uses. *Watson v. Cox*, 2 W.

Black. 1065. *And see* *Henzell v. Lodge* 2 W. Black. 747; 3 Wils. 154.

So, by inserting the words "the county of the" before those of "city of C." on an affidavit stating that the premises intended to pass were situate in the county of that city, and so described in the deed to lead the uses, but by mistake were described in the recovery as being in the city of C. *Hill*, vouchee, 6 Moore, 259, n.

So, by describing the premises to be situate "in the parish of A., in the city of B., and in the parish of C., in the county of the same city," according to the deed to lead the uses, although they were described in the exemplification of the recovery to be situate in "the parishes of A. and C., in the city of B." *Biggood*, dem.; *Brutton*, ten.; *Isee*, vouchee, 6 Moore, 259.

*More accurate Description of Parish.*—A recovery was amended by adding the greater comprising district to the district comprised. *Pinder*, dem.; *Meredith*, ten.; *Baker*, vouchee, 5 Taunt. 661.

Where premises were described to be situate at Malden, in the county of Essex, an amendment of a fine was allowed, by adding the words, "St. Peter's, in," before Malden, there being three parishes in that town. — *v. Pring*, 8 Moore, 163.

So, a fine of premises in "the town of Kingston-upon-Hull" was amended, by prefixing the words, "the lordship of Myton, in the county of." *Frost v. Hale*, 2 Marsh. 391.

So, the court permitted a fine and recovery to be amended by inserting the words, "upon Trent" after that of "Stoke," on affidavits stating that the property intended to be conveyed was situate in the parish of Stoke upon Trent, and that there was no parish in the county called "Stoke," but merely a hamlet of that name, in which the parties had no property. *Smith v. Brodrick*, 10 Moore, 109.

So, in a recovery, by altering the words "in the parish of C. and B., in the county of E." to the words "in the parishes of C. and S. in the county of E.;" on the ground that it had been discovered since the recovery was suffered, that B. was a hamlet in the parish of S., and that the vouchee intended to suffer a recovery of so much of his lands as were since discovered to lie within that parish. *Copland*, dem.; *Bigg*, ten.; *Thompson*, vouchee, 8 Taunt. 86.

Where two parishes were described in the exemplification by the names of L. and W. and in the deed to lead the uses as L. M. and W. M., the court allowed the recovery to be amended by inserting the additional names. *Selby*, dem.; *Smith*, dem.; *Barnard*, vouchee, 8 Taunt. 244.

So, where lands in two parishes were conveyed as lying in the parish of G., which was the true name of neither of them, nor of any parish, but was an addition equally applicable to both, the court permitted both parishes to be added in an old recovery. *Jacob*, dem.; *Devonshire (Duke of)*, vouchee, 4 Taunt. 737. *And see* 5 Taunt. 624.

A recovery "of all tithes arising out of the premises in S., and in the parish of S.," was amended

by striking out the words "the premises in S., and in;"—the deed containing all the tithes in S. *Domville*, dem.; *Kinderley*, ten.; *Coventry (Earl)*, vouchee, 2 Marsh. 264.

A fine was amended, in which tithes were described as arising out of a rectory, by describing them as arising out of a borough and parish, in conformity with the deed to lead the uses. *Collins v. Brown*, 4 Moore, 170.

*Correction of Mistake in Name of Parish.*—If a parish be misdescribed by name in a fine and deed to lead the uses, the former may be amended by substituting the right name, if the deed contain general words under which the premises in such parish may pass. *Anon.* 6 Moore, 520.

If the parish of A. be written on an erasure in the deed to lead the uses of a fine, the court will allow it to be substituted for B., on an affidavit that the latter parish was inserted by mistake, and that the parish of A. was written on the erasure before the deed was executed. *Clennell v. Storer*, 3 Moore, 22.

Where a deed to make a tenant to the præcipe comprised tithes in two parishes, but an amendment had been improperly introduced into the recovery, which confined its operation to one parish only, the court allowed the words of such amendment to be transposed, so as to give effect to the deed, and comprise both parishes. *Lancaster*, dem.; *Wilmot*, ten.; *Boone*, vouchee, 1 Moore, 95; 7 Taunt. 352.

So, by adding the name of a parish (the name having been improperly spelt); but the court would not permit the right name to be substituted for the wrong one, as it did not appear that there was no such parish as that mis-spelt in the recovery, or that the vouchee had no lands there. *Sykes*, dem.; *Knowles*, ten.; *Galway (Lord)*, vouchee, 8 Taunt. 262.

So, by altering the name of a parish mis-named in the deed making the tenant to the præcipe, as well as in the recovery, upon affidavit of the intention. *Flower v. Bainwright*, 5 Taunt. 303; *S. P. Banazeletti v. Kingmore*, 12 Moore, 159.

So two fines of different shares in the same lands, may be amended, by stating them to be situated in A., instead of "in the parish of A." there being no such parish, the deed to lead the uses of the former fine being correct, that of the latter containing the same mistake as the fines. *Shelly v. Miller*, and *Johnson v. Miller*, 1 Marsh. 519; 6 Taunt. 162.

So, a fine of lands in the parish of F. which is in fact no parish, but the popular name for a district containing two parishes, F. St. M. and F. St. N., was amended by the substitution of these two parishes by name. *Blake v. Saffery*, 5 Taunt. 624. *And see* 4 Taunt. 737.

But where a fine comprised only lands lying in the parishes of S. and S. within a larger district, the island of F., the deed so describing the lands, which were in truth in the parish of F. in the same district, the court refused to amend the fine by inserting also the parish of F. *Cotterel v. Franklin*, 6 Taunt. 285.

Where premises were described in a fine to be in the parish of A., whereas they were in fact in the parish of B., being in a certain street, part of which was in A. and part in B., and the deed to lead the uses stated the premises to be in that street in the parish of A.—The court, on an affidavit of the facts, allowed the fine to be amended, by altering the name of the parish from A. to B. *Hamber*, deforciant, 11 Moore, 485.

So, in a recovery, by substituting the hamlet of F. in the parish of A. for the parish of F. *Willis*, dem.; *Calvert*, ten.; *Bartholomew*, vouchee, 1 Moore, 131.

So, the township, of A. in the parish of F. for the parish of A. *Kinderley*, dem.; *Graham*, ten.; *Ogle*, vouchee, 11 Moore, 249.

But where a vouchee had, in his instructions to suffer a recovery, and in the deed to lead the uses prepared in pursuance thereto, misdescribed the parish in which certain closes were, though they were described in the deed with truth and certainty in four other circumstances, the court refused to substitute in the recovery the parish in which the lands lay, for the parish named in the deed and recovery. *Steele*, dem.; *Clennell*, ten.; *Benn*, vouchee, 6 Taunt. 145.

**Substitution of Parishes.**—A fine may be amended by erasing the name of one parish and substituting another in its stead, in order to make it conformable to the deed to lead the uses. *Lloyd v. Simmons*, 9 Moore, 740.

So, by describing the premises intended to be conveyed, to be situate in the parish of A. instead of the parish of B., where both were originally one parish, and afterwards separated into distinct parishes by act of parliament. *Kinderley v. Robinson*, 8 Moore, 334.

So, a recovery was amended by substituting a certain part of a parish which lay within a liberty, for the other part of the parish which lay within a borough. *Payne*, dem.; *Nathaniel*, ten.; *Hodges*, vouchee, 3 Taunt. 396.

So, by substituting the parish of A. for that of B., where the land was improperly described in the deed to lead the uses to be in the latter parish, on an affidavit which stated, that the property was actually in A.; that in a settlement in tail, made in 1776, it had been described correctly, as to the parish in which it was situate; and that the premises, ever since that period, had been enjoyed consistently with the deed. *Anon.* 2 Bing. 93.

So, by substituting the parish of A. for B., if the deed to lead the uses comprehend all the estates of the demandant, situate in the county where such parishes lie. *Greensway*, vouchee, 2 Moore, 237.

Even where the parish is not named in the deed, if the lands intended to pass are specified therein, as well as to the number of acres, as the names of the vendee and occupier at the time the recovery was suffered. —, dem.; *Woodyer*, ten.; *Nicholls*, vouchee, 9 Moore, 195.

**Insertion of Parish not named.**—The court will

not amend a recovery by inserting more parishes, unless it be irresistibly clear that the land in those parishes passed by the deed: although the intention to pass them be sworn to, and the construction of the deed, at the worst, is only doubtful. *Kinderley*, dem.; *Domville*, ten.; *Bamfylde*, vouchee, 4 Taunt. 738.

But where the deed clearly passes them, omitted parishes may be added. *Id.*

Upon affidavit, a recovery may be amended by adding the name of the parish in which part of the premises lie, if it is sworn that the parish is wholly within the same county; and by inserting the entirety of the premises not comprised in the deed, but comprised in the recovery, by the description of moieties only, if the conveying parties are all alive and consenting, and their intention be sworn to. *Kinderley*, dem.; *Domville*, ten.; *Bamfylde*, vouchee, 1 Taunt. 257.

But the court refused to permit a recovery to be amended by inserting a parish not named in the deed to make a tenant to the præcipe, although it appeared that the parish was named in the instructions given for preparing that deed, and that the lands were parcel of the estate of an ancestor, all whose estate was intended to pass. *Clutterbuck*, dem.; *Debary*, ten.; *Langton*, vouchee, 2 Taunt. 96.

The court permitted a recovery to be amended by inserting a new parish in the writ of entry, on affidavit of the original intent of the parties to include all their property within the county, and of the assent of all persons interested at the time of the amendment. *Wheeler*, dem.; *Hill*, ten.; *Heseltine*, vouchee, 2 B. & P. 560.

In one case, after seventy-five years. *Rolfe*, dem.; *Lacon*, ten.; *Anguish*, vouchee, 5 Taunt. 2.

If there be general words in the exemplification and deed to make the tenant to the præcipe, to warrant the insertion of such parish. *Anon.* 3 Moore, 326.

A fine was amended by inserting the name of a parish, in which part of the premises were, upon seeing that they were comprehended in the deed to lead the uses. *Gladwin v. Brown*, 2 Taunt. 1.

So, by inserting a parish not named in the deed to lead the uses, it being certain, from the deed specifying the quantity and occupiers, that the land was intended to pass, and being necessary to make up the quantities. *Lambe v. Reaston*, 5 Taunt. 207; 1 Marsh. 23: *S. P. Anon.* 1 M. & Scott, 239; 1 Dowl. P. C. 255.

So, by inserting a parish according to a deed to declare the uses, dated subsequently to the fine. *Rowlitt v. Orlebar*, 1 Marsh. 452; 6 Taunt. 73.

A recovery was amended by inserting the parish of C., although it was omitted in the deed to lead the uses; the premises being therein described as lying in the parishes of A. and B., or elsewhere in the county where the parish of C. was also situated. *Rogers*, dem.; *White*, ten.; *Lloyd*, vouchee, 9 Moore, 740.

Where, in the deed to lead the uses, the premises were described as a farm, in the parish of L., late in the occupation of J. H., and it was af-

terwards discovered that part of the farm was situate in the parish of A., which was not mentioned in the deed:—the Court refused to allow the recovery to be amended by describing the farm as being situate in both parishes, although it was sworn that the whole of the farm was in the occupation of J. H., that it was intended to pass, and that the premises had been since enjoyed consistently with the deed. *Elliott (Lord)*, vouchee, 8 Moore, 521; 1 Bing. 425.

So, they refused to amend by adding two parishes in unqualified terms after a large enumeration of lands, where the purpose of the amendment was only to include certain parcels of one out of many enumerated manors, which parcels were in the omitted parishes. *Charter*, dem.; *Shepherd*, ten.; *Gwynn*, vouchee, 7 Taunt. 177.

So, they refused to allow the name of a parish to be amended, on the ground that the property in the deed to lead the uses was described as a rectory, and such rectory might extend to more than one parish. —, dem.; *Orchard*, ten.; *Barnes*, vouchee, 3 Moore, 20.

Conveyance to make a tenant to the præcipe of the vouchee's manor of J. in the parish of B., and of all his manors and lands in B., or in any town or towns next or near adjoining thereto. Recovery of the manor of J., in the parish of B., amended by inserting six other parishes, upon affidavit that the manor of J. extended into those six parishes, that they were adjoining to B., and that the vouchee had exercised ownership over those parts before the sale and not since, and that they were intended to pass. *Colville*, dem.; *Denison*, ten.; *Acton*, vouchee, 4 Taunt. 749. And see *Rogers*, dem.: *White*, ten.; *Lloyd*, vouchee, 9 Moore, 740.

A recovery was amended by inserting the name of the parish of A., where the recovery was of lands in the parishes of B. and C.; and the deed to lead the uses contained the names of those parishes, or any adjoining town; A. being contiguous to B. and C. *Baxter*, dem.; *Baxter*, ten.; *Hawkins*, vouchee, 8 Taunt. 191.

So, by the insertion of a parish in which a certain close lay, the close being named in the deed declaring the uses, but the parish being no otherwise named in the deed than by reference to a map in the margin, on which the name of the close and parish were marked together. *Baxter*, dem.; *Baxter*, ten.; *Newman*, vouchee, 4 Taunt. 249.

A recovery was amended by inserting the parish of A. after that of B., in which the whole of the lands to be conveyed were described to be situated, part of the lands being situated in A., that part being particularly described in the deed, and no land answering to that description being in the parish of B.; though the parish of A. was not mentioned in the deed to make the tenant to the præcipe. *Sidney*, dem.; *Hulme*, ten.; *Austin*, vouchee, 1 Marsh. 532; 6 Taunt. 177.

So, a recovery of the "manor of A. and eight messuages in A." amended, by adding the names of parishes in which the premises were partly situated; those parishes being comprised in the manor of A. *Dowse*, dem.; *Lloyd*, ten.; *Reese*, vouchee, 2 Marsh. 330.

*Striking out Names of Parishes.*—A fine may be amended by striking out the names of the parishes in which the lands were erroneously described to be situated; those lands being extra-parochial. *Payne v. Garrick*, 1 Marsh. 468.

#### 4. Description of Quality of Land.

*Insertion of new Premises.*—A fine may be amended by insertion of newly erected works and buildings. *Gill v. Yeates*, 4 Taunt. 708.

And where the deed leading the uses no otherwise ascertained part of the premises omitted in the fine, than by referring to a devise which referred to a deed of partnership, which contained a covenant to purchase lands, which covenant had been performed, and lands had been purchased, the fine was permitted to be amended by the insertion of the lands so purchased thereunder. *Id.*

So a recovery was amended by inserting a messuage recently built upon part of the premises. *Shaw*, ten.; *Hawkins*, vouchee, 3 Taunt. 74.

But an ancient recovery will not be amended by inserting other premises, without proof of seisin of the vouchee of an estate tail therein at the time of the recovery, and intention that they should pass. *Dalton*, dem.; *Greg*, ten., 5 Taunt. 811.

A recovery was amended by inserting "a fee-farm rent." *Times*, dem.; *Meredith*, ten.; *Edwards*, vouchee, 5 Moore, 474.

Where certain farms had been enjoyed by the tenant in tail and his ancestors beyond memory, as tithe-free, but no legal reason for their discharge was known, the court permitted a recovery to be amended by insertion of the tithes. *Cullem*, dem.; *Ryder*, ten.; *Vernon*, vouchee, 7 Taunt. 341.

By a recovery suffered in 1759, premises were described as consisting of "a mill, lands, and hereditaments, in the parish of M." By a deed of bargain and sale, in 1771, "all the tithes and hereditaments, except in M., were conveyed;" which, it was stated, were comprised in the recovery of 1759, and were accordingly omitted in a subsequent one:—Held, that such tithes did not pass by the first recovery; but as it appeared that the tithes of all the vouchee's estates were intended to pass by the latter, except those which were supposed to have been included in the first, the court permitted the latter to be amended by inserting the "tithes in M." *Ward*, dem.; *Palmer*, ten.; *Coventry*, vouchee, 6 Moore, 224.

A recovery, suffered seventy years since, cannot be amended by inserting an advowson, although it was omitted by mistake, and has formed part of the estate since the recovery was suffered, without an affidavit, stating how the presentations had gone from that time to the application for the amendment. *Colclough*, dem.; *Praed*, ten.; *Savage*, vouchee, 7 Moore, 268.

But, in another case, a recovery, ninety-eight years old, was amended by inserting a manor and tithes, without affidavit of intention that they should pass, the intention being manifest from the deeds, and the possession having gone ac-

cordingly; though there was no other evidence of the existence of a manor than the mention of it in an old deed, and the appointment of a gamekeeper. *Trenyasse, dem.; Goulton, ten.; Rousby, vouchee, 3 Taunt. 408.*

The court permitted a recovery to be amended by inserting an advowson which had passed by the general word hereditaments, but refused to insert a curacy, because the right of nominating a perpetual curate was incident to, and parcel of, the rectory. *Horne, dem.; Lodge, ten.; Preston, vouchee, 3 Taunt. 462.*

So, by inserting the tithes of Wroxham, where possession had followed the deed ever since its date, and the tithes appeared to be intended to pass. *Collyer, dem.; Chesterfield (Lord), vouchee, 4 Taunt. 226.*

So, by inserting tithe of wool and lamb of a township, which passed by the general words "all other the tithes," though all the tithes of the vouchee's own lands, part of the township, had been specifically granted. *Ex parte Bullock, 5 Taunt. 748.*

So, by inserting the "great and rectorial tithes belonging to a manor," if they be contained in the deed to lead the uses, although the king's silver was not paid for such tithes at the time the recovery was suffered. *White, dem.; Bicknell, ten.; Papillon, vouchee, 2 Moore, 299.*

But where one of the deeds to lead the uses (viz. the lease) contained the word "tithes," but the other deed (viz. the release) omitted that word, the court refused to amend the writ of entry, by inserting the word "tithes," though the release had the words "and also all houses, ways, &c. hereditaments and appurtenances whatsoever, to the said messuages, lands, &c. belonging, or in any way appertaining." *Phillips v. Jones, 3 B. & P. 362.*

And they refused to allow the amendment of two recoveries, the one suffered in the reign of Will. & Mary, and the other in Geo. 1, by the insertion of the word "tithes;" it not appearing that the parties were in possession of such tithes at the time the recoveries were suffered; although the word "hereditaments" was contained in the deed to lead the uses. *Phillips, dem.; Nounne ten.; Leslie, vouchee, 4 Moore, 604; 2 B. & B. 105.*

Nor will the court amend a recovery by adding the tithes of the premises under the word hereditaments, where that word does not occur in the operative part of the deed. *Garle, dem.; Oram, ten.; Mason, vouchee, 2 Marsh. 194.*

On the 23d June, 12 Geo. 3, a recovery suffered on the 2d Oct. 11 Geo. 1, of the manor or deanery of Chester-le-Street, with its members and appurtenances, thirty messuages, &c. and four hundred acres of moor, was amended by inserting in the writ of entry and subsequent proceedings, after the words "quadraginta acres mores," the words "acotium advocacionem, presentationem, donationem, nominationem, liberam dispositionem, et jus patronatus ecclesie de Chester-le-Street, ac etiam advocacionem, &c. de curatione de Chester-le-street;" the word "hereditaments"

being contained in the deed to lead the uses, and the intention to pass the advowson with the rest of the premises appearing, although the amendment was contested. *Milbanke v. Joliffe, in C. P. at Durham, 2 B. & P. 580, n.*

The writ of entry and subsequent proceedings in a recovery, amended by inserting the words "all and all manner of tithes whatsoever yearly arising, &c. from and out of the said premises," on an affidavit, setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises; the word "hereditaments" being contained in the deed to lead the uses. *Douse, dem.; Lloyd, ten.; Reeve, vouchee, 2 B. & P. 578.*

An affidavit of presentation is necessary to admit the word "advowson" in an amendment. *Holmes v. Seton, 3 Bing. 176.*

A recovery of 17 Geo. 3, was amended by inserting the word "tithes," the deed to lead the uses having conveyed all the hereditaments, late of C. C., who had devised all his hereditaments at M. to the vouchee. *Corden, dem.; Hall, ten.; Colclough, vouchee, 2 N. R. 431.*

The court allowed a recovery suffered sixty years since to be amended, by the insertion of woodlands, in accordance with the deed to lead the uses. *Brackenburgh, dem.; ———, ten.; Tatton, vouchee, 12 Moore, 303.*

A part of the premises named in the deed to lead the uses had been omitted in the copy of the præcipe, which precedes the warrant of attorney: the court refused amendment. *Oddie, dem.; Foster, ten., 3 Bing. 446; 11 Moore, 340.*

*Alteration of Description.*—A recovery was amended by inserting the words "meadow and pasture," before "land;" although it was described as land generally in the deed to lead the uses. *Tucker, dem.; Fairbank, ten.; Bishop, vouchee, 7 Moore, 257; 1 Bing. 22.*

In a subsequent case it was held, that, as meadow and pasture, as well as arable land, would pass in a recovery under the word "land," the court would not amend by adding the word "meadow." *Cooke v. Yates, 4 Bing. 90; 12 Moore, 296.*

Amendment was allowed by inserting the word "marshy" before "land," on an affidavit stating how the premises had been occupied since the recovery was suffered. *Phillips, dem.; Field, ten.; Rolfe, vouchee; 5 Moore, 98.*

So, by removing the words "an inbound common," from a line in which they had been inadvertently inserted, to that in which they ought to have stood, they having no meaning without such alteration. *Willisford v. Fairbank, 8 Moore, 322; S. C. nom. Anon. 1 Bing. 317.*

So, by inserting a rent-charge which had long been treated as merged in the land by unity of possession. *Bratt, dem.; Smith, ten.; Honeywood, vouchee, 1 Taunt. 484.*

But amendment was refused, by striking out the aggregate sum of several rents, and inserting

the different rents or sums of which it was composed. *Domville*, dem.; *Kinderley*, ten.; *Coventry* (*Earl*), vouchee, 2 Marsh. 264.

So, by adding to the description, where the description is already sufficient to pass the lands. *Houman*, dem.; *Orchard*, ten.; *Barney*, vouchee, 8 Taunt. 583.

Where woodland was converted into arable, the court would not allow amendment by increasing the quantity of the latter, as the land would pass under either description. *Webber v. Grey*, 5 Moore, 94.

A fine of a rent-charge may be amended by substituting lands out of which it issued, for the premises out of which the fine erroneously described it to issue. *Cary v. Bedingfield*, 6 Taunt. 276.

The court refused to amend a recovery by striking out a "portion of tithes, and substituting "all the tithes" arising from the lands conveyed. *Ross*, dem.; *Willshen*, ten.; *Worge*, vouchee, 2 Marsh. 195; 6 Taunt. 489.

In a recovery, the property was described as a "moiety of the vicarage, &c." and in the deed to lead the uses as a "moiety of the advowson of the vicarage, &c.;" the court allowed the recovery to be amended by inserting the words "of the advowson" before "the vicarage." *King*, dem.; *Shepherd*, ten.; *Germain*, vouchee, 10 Moore, 251.

So, by inserting the word "advowson;" the word "rectory" being thought insufficient. *Manley v. Tattersall*, 4 Taunt. 257.

So, by substituting an advowson for a rectory, if it appear by the deed to lead the uses that the former was intended to pass. *Haller*, dem.; *Woolley*, ten.; *Palmer*, vouchee, 6 Moore, 53.

So, by substituting the words "advowson of the church," for the word "rectory." *Coore*, dem.; *Spragg*, ten.; *Blackburn*, vouchee, 8 Taunt. 333.

So, by inserting the words, "the advowson of," before those of "the rectory of the church of H." on an affidavit stating that there had been no vacancy since the recovery was suffered, and that the church was now full. *Chambers v. Blake*, 8 Moore, 586.

So, by substituting the words "perpetual advowsons" for those of "tithes to rectories belonging," &c. if the words "perpetual advowsons" are only inserted in the deed to lead the uses. *Williamson*, dem.; *Meggison*, ten.; *Beaumont*, vouchee, 4 Moore, 49.

So, a recovery, suffered in 1780, was allowed to be amended by the insertion of three-fifths of five messuages instead of one, to make it conform with the deed. *Hind*, dem.; *Radden*, ten.; *Hawkins*, vouchee, 1 Dowl. P. C. 269; 1 M. & Scott, 515.

So, in the case of a fine, by inserting the words "one-fourth part," in conformity with the deed to lead the uses. *Wilmot v. Clarke*, 8 Taunt. 335.

In the deed to lead the uses of a recovery, the

premises were described as a moiety or half-deal of messuage, and three hundred acres of meadow; in the recovery, the words "or half-deal" were omitted; the court allowed the recovery to be amended, by the insertion of those words after the word "moiety." *Manners*, vouchee, 5 M. & P. 378.

##### 5. Description of Quantity of Land.

The court will not allow an amendment by increasing the quantity of land, if the deed to lead the uses contains sufficient terms to show that it was intended to pass; nor is it necessary that the exact admeasurement should be inserted in such deed. *Maryatt*, dem.; *Elmore*, ten.; *Shard*, vouchee, 6 Moore, 50.

They refused to increase the number of acres, the deed of uses being general, and the intent only proved by affidavit. *Powell v. Peach*, 2 W. Black. 1202.

But, in another case, they allowed an amendment, by increasing the number of acres in one-third part of an estate, when correct fines had been levied of the other two-thirds. *Anon* 8 Taunt. 74.

So, they will allow amendment by inserting more acres of land, there being an excess of acres of wood and meadow, and too few of land. *Strong*, dem.; *Still*, ten.; *Drake*, vouchee, 4 Taunt. 155.

So, where, in the deed to lead the uses, the lands were described as 100 acres, more or less, and a recovery was suffered for 110, the court admitted it to be amended by increasing it to 120, on the ground that it would not augment such lands beyond the terms of the deed. *Gwynne*, dem.; *Heathcote*, ten.; *Camfield*, vouchee, 2 Moore, 163.

So, the court permitted, in a recovery of manors, an amendment by the insertion of messuages originally parcel of the manor, but severed by a settlement, and omitted to be named in the recovery; the vouchee being tenant in tail still alive, and the messuages intended to pass. *Carew*, vouchee, 1 Taunt. 355.

So, by increasing the quantities of specific closes, described in the deed as being of a less number than the true quantities. *Alexander*, dem.; *Bleasdale*, ten.; *Hanford*, vouchee, 4 Taunt. 734.

So, by increasing the number of 17 messuages, which had originally been all, but increased to 47 by having been subdivided. *Horne*, dem.; *Rossiter*, vouchee, 4 Taunt. 366.

But where a recovery, fifty years old, was found, by mistake, to comprise only 2 messuages and 20 acres of land, instead of 6 messuages and 300 acres of land, the blunder being wholly unexplained and unaccounted for: the court refused to permit an amendment by substituting the larger quantity; and said that they had already in many cases extended their indulgence quite far enough; but no case had gone so far; and if they permitted the amendment, the consequence would be to cast it on the court to find out, on imperfect evidence, the meaning of the parties, after sixty years had elapsed, and to supersede the necessity of using any degree of accuracy whatever in pre-



paring conveyances. *Collingwood*, dem.; *Wilmet*, ten.; *Huse*, vouchee, 1 B. & B. 83.

A mistake having been made in the concord, in the number of messuages to be conveyed, the writ of covenant was altered in conformity to it, but was afterwards restored to its original form. The court refused to amend the concord by the writ of covenant so altered, but left the party to his remedy by a new caption, or by re-acknowledging the concord. *Clutterbuck v. Brabant*, 1 Marsh. 406; 6 Taunt. 1.

So, where a fine was passed of 30 acres of land, 12 of meadow, and 25 of pasture, and, in the deed to lead the uses, the estate was described as consisting of 35 acres in the whole; the court refused to amend by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed. *Bertrem v. Towne*, 1 Marsh. 446; 6 Taunt. 58.

So, a fine cannot be amended by inserting more acres, where there was no other warrant for the amendment than the fact that the closes enumerated by name in the deed were therein stated respectively to contain, and did contain, acres, the aggregate whereof was more than the number of acres comprised in the fine. *Stone v. Ashby*, 5 Taunt. 616.

So, where a recovery of Easter, 3 Geo. 1, was passed of one hundred acres of land, thirty acres of meadow, fifty acres of pasture, and ten acres of wood; in the deed to lead the uses, the estate was described as containing one hundred and seventy acres, more or less; and also a mill and lands containing fourteen acres, more or less; and, in a prior deed, it was stated to contain two hundred acres, more or less. On a recent admeasurement, the estate appeared to contain two hundred and nine acres. The court refused an amendment to increase the quantity of land, according to the late survey, as it exceeded the quantity in the deed to lead the uses; and held, that, as the recovery was passed so long since, it was necessary to account for the modern as well as the ancient possession, and ascertain the successive possessors, and whether the estate had been divided or gone together since the recovery was passed. *Kenrick*, dem.; *Owen*, ten.; *Owen*, vouchee, 3 Moore, 70.

A. was tenant for life of two moieties of common field land, called Blackacre, with remainders to B. and C. in common in tail. A. was also tenant in fee of other common field land, called Whiteacre. The commissioners under an inclosure act allotted to A. Greenacre in lieu of Blackacre and Whiteacre conjointly, without distinguishing the portion allotted in right of each. A. devised all his land to D. in fee, and died. Covenant upon a conveyance by B. and C. to D. of all the land allotted to A. in right of Blackacre, and a recovery suffered of the entirety of certain acres, fewer than were comprised in Greenacre. *Burrough, J.*, held, that all the estate of the tenants in tail was comprised in that recovery, and the court refused to amend it by the insertion of more acres. *Barlow*, dem.; *Macdougall*, ten.; *Barlow*, vouchee, 1 B. & B. 69.

Where, in a deed to make a tenant to the præcipe, lands were described as a farm generally,

without particularising their quality or quantity, and in the recovery the parcels were set out as amounting to 50 acres; but on a late admeasurement they had been found to comprise 70; the court allowed the quantity to be increased to that number, the terms of the deed being large enough to comprise all the lands of which the farm consisted at the time the recovery was suffered; and as the lands in question formed part of the farm, the additional twenty acres would not increase it beyond the terms of the deed. *Battisall*, dem.; *Turner*, ten.; *Cann*, vouchee; 9 Moore, 591.

The court will not amend a recovery by inserting more parcels, unless the true number of messuages, tofts, &c., be distinctly and precisely sworn to. *Vanderzee*, dem.; *Ince*, ten.; *Lawson*, vouchee, 5 Taunt. 632.

#### 6. Writ of Entry and other Proceedings.

The court would amend a mistake in the writ of entry in a common recovery. *Cross*, dem.; *Grey*, ten.; *Pead*, vouchee, 1 B. & P. 137.

So, they would allow the return to a writ of entry to be amended by adapting it to the time of taking the acknowledgment. *Hind*, dem.; *Milne*, ten.; 5 Taunt. 259.

So, the return-day of the writ returnable in Michaelmas term was amended, and the recovery allowed to pass as of Hilary term following. *Bruin*, dem.; *Blizard*, ten.; *Miller*, vouchee, 8 Taunt. 197.

A writ of entry was returnable, and appearance entered thereon in Michaelmas term. The count was intituled of Hilary term, and was delivered on the 10th February. The court set aside the count for irregularity, and refused to allow it to be amended. *Rawles*, dem.; *Lawrence*, ten.; 11 Moore, 338.

Although the court will not enlarge the return of a writ of summons. *Gibbons v. Stevenson*, 2 W. Black. 1223.

Even for the purpose of making a term intervene between the teste and the return. *Barnard v. Woodcock*, 2 W. Black, 1201.

Yet they will alter the return by inserting a subsequent return-day, if there are several vouchees residing in different counties, and one of them could not sign it until a day after it was first made returnable. *Bramwell*, dem.; *Winter*, ten.; *Osborne*, vouchee, 7 Moore, 269.

Recovery amended by abridging the returns under 24 Geo. 2, c. 48, s. 8, 9, where there were not four returns between the return of the first writ of summons, and the death of the second vouchee, who was tenant for life, and though the commissioners for taking the warrant of attorney of the first vouchee had omitted to indorse the usual return. *Hill*, dem.; *Raymond*, ten.; *Law*, vouchee, 4 Bing. 425.

The caption of the warrant of attorney in a recovery may be amended, as it is not an integral part of the instrument. *James*, dem.; *Williams*, ten.; *James*, vouchee, 1 Moore, 130; 7 Taunt. 434.

Where in the warrant of attorney, instead of the usual words, "to gain or lose in a plea of land," those of "in a plea of trespass" had been inserted by mistake, it was allowed to be amended by substituting "land" for "trespass." *Palmer, dem.; Meredith, ten.; Eddington, vouchee, 8 Moore, 339; 1 Bing. 343.*

A recovery amended in the return of the writ of seisin. *Watson v. Lockley, 2 Wils. 2.*

The writ of *dedimus potestatem* for a recovery must not be directed to and returned by the demandant. But the recovery may be amended *in fieri*, by substituting a new commissioner for the demandant, and retaking the acknowledgment. *Rawle, dem.; Pyke, ten.; Miller, vouchee, 5 Taunt. 747.*

### 7. Time and Mode of Application.

No motion can be made at the bar of C. P. on the last day of any term, touching the amendment of any fine or recovery, or any of the proceedings therein. *Reg. Gen. H. T. 60 Geo. 3, 4 Moore, 320; 2 B. & B. 122; 5 Taunt. 856; S. P. Faz, dem.; Benbow, ten.; Gower (Earl), vouchee, 2 Marsh. 328; 6 Taunt. 652; 1 Moore, 96.*

It was ordered by the court that in future, on a motion to amend a fine or recovery, an affidavit must be produced, stating that the possession has followed the execution of such instrument. *Biggood, dem.; Brutton, ten.; Jee, vouch., 6 Moore, 259.*

And in the case of fines, connecting the fine with the deed produced to warrant the amendment. *Fewcett v. Lowe, 6 Taunt. 432.*

In a recovery the court permitted an amendment, upon an affidavit by the demandant (who was not born at the date of the recovery) of the facts, and of his belief that tithes were intended to pass, and that they were included in the deed. *Collyer, dem.; Chesterfield (Lord), vouchee, 4 Taunt. 226.*

But an unqualified affidavit, that the possession had gone with the title for a period long before the knowledge of the deponent, not stating the grounds of his belief, is not sufficient. *Noble, dem., 7 Taunt. 697.*

The court will not allow a recovery to be amended by inserting the words "advowson and tithes," although the deed to lead the uses contains the general word hereditaments, without an affidavit, stating how the presentations have gone from the time of suffering the recovery, and by whom the last was made, and whether prior to or since the recovery. *Holmes, dem.; Seton, ten.; Foreman, vouchee, 10 Moore, 585; 3 Bing. 176.*

In applying to amend a recovery, it is not necessary to shew the title to the court further back than a seisin in tail of the vouchee. *Simcox, dem.; Wakeford, ten.; Marshall, vouchee, 4 Taunt. 155.*

The court will not grant leave to amend a recovery on affidavit only; it must appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment. *Pearson,*

*dem.; Pearson, ten.; Brougham, vouchee, 1 H. Black. 73.*

The material part of the deed which is to authorize the court to amend a fine or recovery, must be read aloud in the court by one of the serjeants at law, or by the officer of the court, but not by the attorney for the amendment. *Hurst, dem.; Foster, ten.; 5 Taunt. 379; S. P. Harrie v. Davis, 1 Chit. 625.*

Where the deed to make the tenant to the precept is lost, a recovery is not to be amended by an attested copy of that deed, nor by an office copy of the inrolment of a deed; but it may be amended by the inrolment itself being brought into court. *Dawney, dem.; Newsome, ten.; Deane (Lord), vouchee, 4 Taunt. 798; S. P. King, dem.; Shepherd, ten.; Germain, vouchee, 10 Moore, 251.*

In one case a fine was amended by a lost deed to lead the uses, upon inspection of the draft, and of a certified copy of the memorial of the deed (the land being in a register county,) and on affidavit that the deed contained the matter for amendment, and of the intent. *Frost v. Hale, 7 Taunt. 79.*

The heir of the conusor may be heard, to oppose a fine being amended to his disherison. *Lambe v. Reaston, 5 Taunt. 207; 1 Marsh. 23.*

Remainder-man in tail may be heard to show cause against the amendment of a recovery. *Lancaster, dem.; Wilnot, ten.; Boone, vouchee, 7 Taunt. 352.*

The officer of the court of Great Session having omitted to enter of record a recovery duly suffered at bar, in 1804, the court of C. P. ordered it to be done *nunc pro tunc*, under sect. 27 of 1 Will. 4, c. 70, which gives that court the like power to amend a recovery of the court of Great Session, as if it had been suffered in C. P. *Evans, dem.; Griffith, ten.; Jones, vouchee, 9 Bing. 311; 2 M. & Scott, 383.*

### VIII. TERMS OF AMENDMENT.

All rules to amend are upon payment of costs. *Anon. Lofft, 155.*

The terms of amending a record by inserting a special memorandum of the day of filing the bill, after error brought, are payment of costs and allowing the defendant to plead *de novo* on terms. *Minchin v. Cope, 1 Chit. 45; S. P. Dickenson v. Plaisted, 7 T. R. 474.*

Held in C. P. that the motion to amend a writ, must be made before showing cause on the motion to set it aside, or the costs of the latter motion will be given. *Anon. 1 Chit. 350 (a.)*

A plaintiff having been nonsuited at Nisi Prius on the ground of a variance between the contract set out and that proved, the court granted a new trial, with leave to amend the declaration generally on payment of costs, with liberty to the defendant to plead *de novo* or demur. *Williams v. Pratt, 5 B. & A. 896.*

Where a plaintiff replied a bad replication to a sham plea of set-off, the court of K. B. allowed him to amend without payment of costs. *Solemons v. Lyon, 1 East, 369.*

After a party has once amended on a demurrer, the court will not give him leave to amend again on a second demurrer. *Kinder v. Paris*, 2 H. Black. 561.

After a demurrer seriously argued, the court would not permit the plaintiff, in an action against the sheriff, to amend. *Cooke v. Birt*, 5 Taunt. 765; 1 Marsh. 333.

And where a plea was held bad on argument on a special demurrer, the court of C. P. refused amendment, although it was stated that the matter of the plea was a bona fide statement. *Went v. Reece*, 7 Moore, 244; 1 Bing. 18.

But a plea in bar, by one sued in a wrong name, which was held bad on demurrer, was allowed to be amended. *Jackson v. Ford*, 3 Wils. 413.

So, leave was given to amend pleas in bar, in replevin, after argument. *Mattravers v. Fosset*, 3 Wils. 235.

If a defendant obtain leave to amend his pleadings on payment of costs, it does not seem necessary under the words "usual terms," that he should be prepared to go to trial at the ensuing sittings after the then term. *Edmonds v. Walter*, 2 Chit. 292.

After trial and verdict for the plaintiff, the defendant was allowed to amend his pleas, and have a new trial, on payment of costs. *Storer v. Gordon*, 2 Chit. 27.

Under the rule of Michaelmas 1654, s. 17, a party has a right to amend after plea in abatement on payment of costs, but the court, or a judge, have a discretion to allow him to amend without costs. *Wall v. Lyon*, 9 Bing. 411; 2 M. & Scott, 579; 1 Dowl. P. C. 715.

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## ANATOMY.

[By Statute 2 & 3 Will. 4, c. 75, *Schools of Anatomy* are regulated.]

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## I. INSTRUMENT OF CREATION.

### 1. *Validity generally.*

By statutes 17 Geo. 3, c. 26, s. 6, and 53 Geo. 3, c. 141, s. 8, all contracts for annuities with infants are utterly void.

An annuity can only be where the principal is irrecoverably gone, and is to be satisfied by periodical payments; therefore, a bond conditioned for the payment of a sum to the executors of the obligee, and interest in the mean time to him, is not an annuity bond. *Winter v. Mousley*, 2 B. & A. 802.

Devisees in tail male granted an annuity for 21 years, if they should so long live, to the remainder-man, and in case of his death, to his children, or, if he had none, to his wife. The remainder-man, his wife and child, died during the term:—Held, in debt, by the administrator of the remainder-man and his child, that the deed was not an absolute grant of an annuity for 21 years, but was determinable by the death of the remainder-man, his child and wife; and, therefore, that the plaintiff could not recover the arrears of the annuity in respect of either of his intestates. *Barford v. Stuckey*, 5 D. & R. 118; 8 Moore, 89; 5 Moore, 23; 1 B. & B. 333; 1 Bing. 225.

An instrument reciting that it had been agreed to sell an annuity, secured upon property in possession of the grantor, but containing no words of present grant, cannot be sued upon in a court of law, even though it were enrolled. *In re Locke*, 2 D. & R. 603.

It is no objection to one of the deeds securing an annuity, that it assigns "the salary of the grantor of so much per annum," without saying what salary it is. *Watts v. Millard*, 5 T. R. 598.

The several covenant of a grantor of an annuity is not avoided by the infancy of another who grants in the same deed. *Haw v. Ogle*, 4 Taunt. 10.

A covenant in an annuity deed made prior to the stat. 46 Geo. 3, c. 65, s. 115, (which stat. has a retrospective operation,) whereby the grantor of the annuity covenanted to pay the same on the days and times, &c. without any deduction whatever out of the same, or any part thereof, for or in respect of the then present or any then future property tax, is void in respect of its obligation on the grantor not to deduct the property tax, but not in respect of the payment of the annuity, subject to such deduction. *Readshaw v. Balders*, 4 Taunt. 57.

A deed granting an annuity within the time included by relation back in that act, reciting the agreement for the purchase at a certain price of a certain annuity, free from the property or income tax, and covenanting for the payment of it without any deduction in respect of the property or income tax, or other parliamentary taxes, &c. is not void in toto, but only to the extent of such disallowance. *Howe v. Synges*, 15 East, 440.

The obligor of a bond without penalty, conditioned for the payment to A. M. during her life of 20*l.* a year, bequeathed to his wife 30*l.* a year for her life, and devised to defendant all his freehold messuages, &c. in trust, to educate his son until twenty-one, and to account for profits at that time; provided that if his wife should be living when his son attained full age, the devisee should retain and hold in trust such of his estates as would secure to his wife the said 30*l.* a year. Testator's wife died during his lifetime, and testator afterwards died, leaving his son surviving, who afterwards died under age:—Held, that the estate of the devisee ceased on the death of testator's son; and that the devisee was not liable to A. M. for any arrears of her annuity which had accrued due since his death, although the rents and profits exceeded the annuity. *Morrant v. Gough*, 1 M. & R. 41; 7 B. & C. 206.

Provide that an annuity should cease if a lady should associate, continue to keep company with, or cohabit, or criminally correspond with J. F.: all intercourse whatever, though the most innocent, is within the terms of the deed. *Dormer (Id.) v. Knight*, 1 Taunt. 417.

T., seized for life, granted an annuity to W., and, to secure the annuity, in consideration of money, "granted, bargained, sold, and demised" to F. certain premises for a term of years, upon trust, in case the annuity should be in arrear, to raise the annuity by distress, or by sale or mortgage of the premises: afterwards T. granted another annuity to H., with a power of distress upon the same premises. H. distrained and avowed the taking for arrears of the annuity under his deed: the tenant set up the demise to

F., but did not show under whom, he the tenant, was in possession, or that F. had entered upon the premises, or had elected to treat the demise as operating by the statute of uses:—Held, that the demise to F. operated as at common law, and without an entry was no bar to the distress by H. *Miller v. Green*, 2 C. & J. 142; 8 Bing. 92.

Deed reciting an agreement for sale of a life interest in stock, a memorial being registered under the annuity act, and there being a covenant to pay any deficiency beyond the produce to the extent of the annual sum specified, and a proportionable share in case of death between the days of payment: this is an annuity, not a sale. *Hood v. Burlton*, 2 Ves. jun. 29; 4 Bro. C. C. 421.

## 2. Consideration for.

*What a good Consideration.*—Money lent and paid at different times for the education and advancement of the defendant, is a good consideration for the grant of an annuity, and is sufficiently expressed, in the deeds for securing the annuity, under the description of "money lent and advanced, and also paid, laid out, and expended, to and for the maintenance, education, and advancement in the world of the defendant." *Kelfe v. Ambrose*, 7 T. R. 551.

A covenant by the husband to secure his wife an annuity during her life, in case she should survive him, is a sufficient consideration to support a grant of an annuity from the wife's father. *Ex parte Draycott*, 2 Glyn. & J. 283.

*Statement of Consideration in Deed.*—By 17 Geo. 3, c. 26, s. 3, in every deed, instrument, or other assurance, for granting annuities or rent-charges, the consideration and names of parties advancing it must have been set out fully. This statute was repealed by 53 Geo. 3, c. 141, which, although it does not contain a provision to this effect, requires that the names of the parties beneficially interested must be stated in cases where they are not the parties to whom the annuity is granted.

Under 17 Geo. 3, c. 26. it was not sufficient if the mode of payment of the consideration was not truly stated. *Glosse v. Mount*, 7 T. R. 390; and see 1 B. & P. 63, n.

If the consideration be paid by an agent, it must have been so stated in the deed; it was not sufficient to state that it was paid by the principal. *Dalmer v. Barnard*, 7 T. R. 248.

But if the consideration of an annuity be paid to the agent of the grantor, the name of such agent need not be inserted in the annuity deed. *Crawford v. Phillips*, 2 N. R. 141; 9 Ves. jun. 215.

Although where it was paid by the clerk of the bankers of the grantee:—Held, that the name of such clerk ought to be stated in the deed. *Ashes v. Mackreth*, 1 N. R. 214.

If a bond, and warrant of attorney to confess judgment, be given to secure an annuity, the

warrant of attorney need not express the consideration, if the bond do. *Hodges v. Money*, 4 T. R. 500.

If a bond to secure an annuity contain a recital of the payment of the consideration, and the annuity has been paid for several years, the actual payment of the consideration will be presumed though there be no receipt indorsed, and though the subscribing witness have no recollection of the subject. *Haslam v. Diggles*, 1 C. & P. 398—Best.

The court of C. P. set aside the securities for an annuity after a lapse of six years, for two of which it had been paid, on the ground that the consideration money did not belong to W., as stated in the securities, but to C.; and that the name of the person on whose behalf the money was paid was not truly set forth in the receipt thereon, C. being alive, and having claimed the consideration money and the annuity as his own. *Williams v. Heckin*, 8 Taunt. 435.

### 3. Actions on.

Debt will lie for an annuity granted by the defendant to the plaintiff in consideration of faithful services for life. *Hope v. Coleman*, 2 Wils. 221.

Debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that the grantor had a freehold in the premises out of which it was payable; as it must be inferred that he had such an interest where nothing appears to the contrary. *Kelly v. Clubbe*, 6 Moore, 335; 3 B. & B. 130.

Debt does not lie at the common law, nor by statute 8 Ann. c. 14, for the arrears of an annuity or yearly rent devised payable out of lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout, so long as the estate of freehold continues. *Webb v. Jiggs*, 4 M. & S. 113.

Bonds for the payment of annuities, or of money by instalments, are within the equity of the statute 3 Anne, c. 16, s. 13. *Wilkinson v. Jordan*, 1 Tidd's Prac. 588.

If an instalment of an annuity secured by bond be not paid on the day, the bond is forfeited, and the penalty is the debt in law. *Judd v. Evans*, 6 T. R. 399.

In an action on an annuity bond, a plea stating that a memorial of the bond had been inrolled, and, after reciting the memorial, that it was not a good and sufficient memorial according to the form of the statute, without stating in what particulars it was defective, or alleging that no other memorial had been inrolled, is bad on special demurrer. *Simmons v. Hunt*, 1 Marsh. 155.

Debt on bond conditioned for payment of an annuity of 17*l.* quarterly, during the life of Lady G.; pleas, payment of the annuity at the days, and payment of the arrears after the days in the condition; replication, that the defendant did not pay the annuity or the arrears in manner and form as defendant alleged, but on the con-

trary, plaintiff suggested that during the life of Lady G., 87*l.* 10*s.* for two quarterly payments became due and was still in arrear, and concluded to the country: on demurrer, the court of C. P. seemed to think the replication bad, and gave the defendant leave to amend on payment of costs. *De la Rue v. Stewart*, 2 N. R. 362.

Where, to debt on an annuity bond, defendant pleaded no such memorial as the statute requires, to which plaintiff replied, that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; and the defendant rejoined, that the consideration was untruly alleged by the memorial to have been paid to both obligors, for that one of them did not receive any part of it: rejoinder held bad, first, because it was a departure from the plea; secondly, because the fact alleged respecting the memorial did not contradict the replication; for the consideration might have been paid to the other obligor on account of himself and the co-obligor, or to a stranger for them both. *Praed v. Cumberland (Duchess)*, 4 T. R. 585. Affirmed in Cam. Scac. 2 H. Black. 280.

In a cognizance justifying the taking of goods for arrears of an annuity, the plaintiff pleaded that a memorial of every deed, bond, instrument, and assurance, whereby the annuity was secured, was not duly inrolled. The defendant replied, that a memorial of every deed, &c., whereby the annuity was secured, was within twenty days of the execution thereof inrolled, setting out the memorial verbatim, and concluding with a verification by record:—Held, on demurrer, that the conclusion was proper. *Richardson v. Tomkies*, 2 M. & Scott, 56; 9 Bing. 51.

In ejectment upon the assignment of a term to secure an annuity, a proper memorial of the annuity deeds will be presumed, till the contrary be shown. *Doe d. Griffin v. Mason*, 3 Camp. 7—Ellenborough.

## II. INROLMENT.

### 1. Necessity for Inrolment.

#### (a) Statutes.

By 17 Geo. 3, c. 26, s. 1, a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge should be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, must, within twenty days of the execution of such deed, bond, instrument, or other assurance, have been inrolled in Chancery, otherwise the instrument was to be null and void.

By sect. 2, before any judgment should be entered upon any warrant of attorney for recovering or securing the payment of any annuity or rent-charge then already granted, and before execution sued out, or action brought on such judgment, a like memorial must have been inrolled.

Sect. 6, provided that the act was not to extend to annuities or rent-charges given by will or marriage settlement, or for the advancement of chil-

dren; nor to annuities or rent-charges secured upon lands of equal or greater annual value, whereof the grantor was seised in fee simple or in fee tail in possession, or secured by the actual transfer of stock, the dividends whereof were of equal or greater value; nor to voluntary annuities granted without regard to pecuniary consideration; nor to annuities or rent-charges granted by corporations, or under any authority or trust enacted by act of parliament; nor to annuities not exceeding 10*l*., unless there be more than one from the same grantor to or in trust for the same grantee.

[This statute was repealed by 53 Geo. 3. c. 141, and other enactments substituted, but as it is still applicable to all annuities granted prior to the 14th July 1813, it is necessary to be stated as well as the cases determined upon it. By the statute 53 Geo. 3. c. 141, s. 2, every such instrument as above specified must be inrolled within thirty days after execution, otherwise it is null and void to all intents and purposes. The statute also contains an exception of particular annuities, precisely similar to the one contained in the 17 Geo. 3. c. 26, except that the annuities secured on landed property are extended to freehold or copyhold or customary lands, whether in Great Britain, Ireland, or in the colonies; and such annuities of which the grantor had no notice, are not to be considered with respect to the value: the statute also uses the words "money's worth" as well as "pecuniary consideration," in excepting voluntary annuities; and does not except annuities under 10*l*.

#### (b) As regards Nature of Instrument.

*What are Assurancear equiring Inrolment.*—The documents required to be inrolled by 17 Geo. 3. c. 26, are those to which the grantor is a party, or which are entered into by a third person at his instance and request, or on his behalf; therefore, where a third person, unconnected with the grantor, guaranteed, in consideration of a certain commission, the payment of an annuity to the grantee:—Held, that such guarantee need not be inrolled. *Sandilands v. Marsh*, 2 B. & A. 673.

A bond given by a third person, to secure the payment of an annuity, must be registered under the annuity act, as well as the deeds made by the grantor himself. *Rosher v. Hurdie*, 5 T. R. 678.

Deeds to secure annuities are within the annuity act as well as deeds granting them. *Hood v. Burlton*, 2 Ves. jun. 29; 4 Bro. C. C. 421; *S. P. Bolton (Duke) v. Williams*, 4 Bro. C. C. 297; 2 Ves. jun. 154.

The statute, however, does not require any thing further than a memorial of every deed given for securing an annuity. *Richardson v. Tomkies*, 2 M. & Scott, 56; 1 Bing. 51.

An agreement to grant an annuity is not within the annuity act. *Nield v. Smith*, 14 Ves. jun. 491.

So, a memorial of a contract to give good and sufficient landed security for payment of an annuity, as a consideration for the conveyance of a

real estate, need not be inrolled. *Jackson v. Lever*, 3 Bro. C. C. 605.

Quære, whether a fine, if levied before the memorial is inrolled, is an assurance, within the meaning of the annuity act, 17 Geo. 3. c. 26, required to be memorialized. *Bradford v. Barland*, 14 East, 453.

It is not necessary that the admittance on surrender of copyholds be memorialized; although the surrenderees were admitted immediately on the surrender. *Doe d. Naylor v. Stephens*, 1 Price, 38.

Where a memorial of an annuity omitted to register certain bonds, whereby the grantor, for whose life the annuity was granted, bound himself to pay the grantee a certain sum if he went abroad in a military capacity during three several years following the grant of the annuity:—Held, that the annuity was thereby vacated; and the court set aside the warrant of attorney, and judgment, given amongst other instruments for securing the annuity. *Chawner v. Whaley*, 3 East, 500.

A policy of assurance on the life of the grantor of an annuity, assigned as a further security for the annuity, need not be mentioned in the memorial, not being a pecuniary consideration within the meaning of the statute 53 Geo. 3. c. 141. *Faircloth v. Gurney*, 2 M. & Scott, 822; 9 Bing. 456, 622; 1 Dowl. P. C. 724.

*Assignment of Annuities.*—An annuity bond was assigned to secure another annuity of less amount: the court of C. P. held that the second annuitant was not bound to inrol a memorial of the first bond. *Henderson v. Glencairn (Countess)*, 2 Taunt. 235.

So, also, where there is a memorial inrolled of all the original securities, it is not necessary that there should be also one of the assignment of an annuity. *Dixon v. Birch*, 2 H. Black. 307. And see *Bromley v. Greathead*, 2 H. Black. 307, n. But see *Bolton (Duke) v. Williams*, 2 Ves. jun. 139; 4 Bro. C. C. 297.

*Instruments of further Charge.*—An annuity being duly registered according to the statute 17 Geo. 3. c. 26:—Held, it was not necessary that an equitable mortgage taken as a further security at a subsequent period should be registered. *Ex parte Price*, Buck, 22; 3 Madd. 132.

Where A. granted an annuity secured by bond and warrant of attorney, and two years after deposited a lease as a further security for the payment of the annuity:—Held, that the subsequent security need not be inrolled. *Id.*

An annuity granted by A. to B., and which was regularly registered, was redeemed by virtue of a clause of redemption in the deeds, when the deeds were delivered up to the grantor uncanceled; and he and the attorney for the grantee agreed, that if, at any future time, the former should wish to borrow money on the same terms, those deeds should be given as a security: on a

subsequent application by the grantor, the attorney advanced the same money on having the same deeds delivered to him; but because this re-grant of the annuity was not registered, the court set aside the annuity, and ordered the deeds to be cancelled, &c. *Hammond v. Foster*, 5 T. R. 635.

A., by two several deeds, granted to B. two annuities charged on certain estates of which A. was tenant for life, and further secured by warrant of attorney, and an insurance on the life of A., and memorials of these annuities were duly inrolled. Afterwards, by deed, A. granted another annuity to B. charged upon the same estates, and also upon another estate to which A. was likewise entitled, and effected a further insurance on his life. By this deed A. also charged the two former annuities upon the last-mentioned estate. And he conveyed his interest in all the estates to a trustee in trust for securing the three annuities. The three annuities were further secured by a covenant in this deed, on the part of the grantor, to authorize and permit his deputy in an office held by him to pay a yearly sum towards the annuities; and by a covenant for payment of extra premiums of insurance. A memorial of the grant of the last-mentioned annuity was inrolled, but no further or additional memorial was inrolled as to the two first-mentioned annuities, with regard to the charge of them on the additional estate, and the additional securities for them contained in the last-mentioned deed; nor in the memorial inrolled of the third annuity was any notice taken of the additional securities for the two first annuities:—Held, that it was not necessary under the annuity act to inrol any memorial of the further or collateral securities for the two first annuities. *Aston, v. Guinnell*, 3 Y. & J. 136.

**Other Cases.**—Where tenant for life conveyed estates to trustees for ninety-nine years, if he should so long live, in trust to raise money by the grant of annuities for his life; and afterwards he and the trustees granted an annuity to one by deed, reciting the former conveyance to the trustees; it is not necessary to inrol a memorial of the trust-deed. *O'Callaghan v. Ingilby*, (Bart.), 9 East, 135.

Where judgment had been entered up on a warrant of attorney to secure an annuity, it was set aside because there was no memorial, though it was omitted at the request of the grantor; and the court refused to take the warrant of attorney off the file. *Anon.* 2 Chit. 34.

By 3 Geo. 4. c. 92, s. 2, reciting, that doubts had arisen whether, under the 53 Geo. 3, c. 141, the omission to inrol any one of the assurances does not vitiate the whole transaction, notwithstanding the inrolment of another instrument, it is enacted, that every instrument granting an annuity, of which a memorial shall be inrolled, notwithstanding the omission to inrol any other instrument for securing such annuity, shall be valid: provided, &c. 3, that no additional validity is given in such case to the instrument.

(c.) *As regards the Consideration.*

**Pecuniary Consideration under stat. 17 Geo. 3, c. 26.**—The annuity act, 17 Geo. 3, c. 26, as appears from the whole purview of it, is confined throughout to annuities granted upon pecuniary consideration, though the first clause, in the terms of it, requires a memorial of every annuity bond, &c. to be inrolled: it is not enough therefore, for the defendant to plead generally to an action on a bond conditioned for the payment of an annuity, the consideration whereof does not appear upon the face of the bond or condition set forth upon oyer, that it was sealed and delivered after the passing of the act, and that no memorial of it was inrolled, without showing that the consideration was pecuniary; but such general plea is bad on demurrer. *Horn v. Horn*, 7 East, 529; 3 Smith, 522.

Under that statute the consideration must be something paid in order to render registration necessary. *Crespigny v. Wittenoom*, 4 T. R. 790.

The following are cases under 17 Geo. 3, c. 26, in which it was held, that no memorial was necessary, the consideration not being a pecuniary consideration within the statute:—

Grantee's giving up business to grantor. *Crespigny v. Wittenoom*, 4 T. R. 790.

Grantee's resigning situation as master of an academy. *Hutton v. Lewis*, 5 T. R. 639.

Even though there was also an agreement to assign furniture at an appraised value, and to lend money at interest. *Id.*

Grantee (a mother) selling her business and advancing the proceeds with other money to grantor (her son), to set him up in business, it not appearing that the annuity was stipulated for at the time of the advance. *Hick v. Keats* (in error), 6 D. & R. 68; 4 B. & C. 69; 5 Moore, 629.

Grantee's resigning her lands and freehold premises to grantor, though part of the consideration was book-debts and stock in trade. *Doe d. Johnston v. Phillips*, 1 Taunt. 356.

**Freehold Consideration under 17 Geo. 3, c. 26.]**

—An annuity, secured on lands in fee of equal annual value, need not be registered under the statute, though the annuity was also secured upon leasehold property. *Ex parte Michell*, 2 East, 137.

A., who was tenant for life, with remainder to trustees, &c. remainder to his first and other sons in tail, remainder to himself in fee, suffered, together with B., his only son, a recovery, and declared the uses to such person, and for such estate, &c., as they should jointly appoint; they jointly granted an annuity, and appointed and granted the lands to C. for a term of years in trust for the grantee:—Held, that this case came within the exception of the act. *Halsey v. Hales* (Bart.) 7 T. R. 194.

An equity of redemption is within the exception in that act. *Tucker v. Thurston*, 17 Ves. jun. 131.

So, an annuity, granted by one who was mort-

gagor in fee in possession of lands on which it was secured, of greater annual value than the interest of the mortgage, is within the exception, as a grant of an annuity by one who was seized in fee simple; the seisin in fee there excepted, extending, by parity of reason, to equitable as well as legal estates. *Amhurst v. Skynner*, 12 East, 263.

So, of one who was seized in fee tail of a similar equity of redemption. *Cumming v. Twysden*, 12 East, 272, n.; *S. P. Shrapnel v. Vernon*, 2 Bro. C. C. 268.

A surety, who charges his estate in fee simple, of which he was seized in possession at the time of granting an annuity, with the payment of it, and which estate is of greater annual value than the annuity, is a grantor within the meaning of the exception. *Darwin v. Lincoln*, 5 B. & A. 444.

*Pecuniary Consideration, or Money's Worth, under 53 Geo. 3, c. 141.*—The statute 53 Geo. 3, c. 141, applies only to annuities granted for pecuniary consideration; therefore, where by the trusts of a marriage settlement, a father agreed to settle 10,000*l.* upon his daughter, in trust, to pay the interest to the husband during his life, and the father died without having paid the principal money to the trustees; and the husband having agreed with the executors to accept 5,000*l.* and an annuity of 125*l.* for life, in lieu of the 10,000*l.*—Held, that such annuity did not require inrolment. *Blake v. Attersoil*, 4 D. & R. 549; 2 B. & C. 875.

Nor does a bond require inrolment under that statute, which recites in the condition, that the plaintiff was entitled to an interest in certain veins of coal for his life, and that he, by indentures of even date therewith, had assigned such interest to the defendants, who, in consideration thereof, had agreed to pay him an annuity for his life, and for the payment of which the bond was conditioned. *James v. James*, 5 Moore, 479; 2 B. & B. 702; *S. P. Harrison v. Smitheringale*, 5 Moore, 481.

Where there is a fair and bona fide sale of an interest in land, and the consideration in part or in whole is an annuity to be paid to the vendor, the consideration for granting such annuity is not a pecuniary consideration, or money's worth, within the meaning of the statute. *Id.*

An annuity of 10*l.* was granted by a son to his parent, in consideration of their giving up to him a farm they had occupied, and the stock on it worth 300*l.*—Held, that the annuity need not be inrolled. *Tetley v. Tetley*, 4 Bing. 214; 12 Moore, 441.

A. being indebted to B., it was agreed between them, that, in lieu of payment, A. should, by bond, secure the payment of an annuity to B.'s widow, after his decease, during the joint lives of A. and the widow. B. died in 1825, and in 1828 A. executed an annuity deed, pursuant to the agreement.—Held, that the deed did not require inrolment. *Frost v. Frost*, 3 B. & Adol. 612, n.

*Freehold Consideration under 53 Geo. 3, c. 141.*—

—By the annuity act, 53 Geo. 3, c. 141, s. 10, no inrolment is necessary where the annuity is charged on freehold or copyhold lands equal to it in value, over and above any other annuity charged and secured on such lands. Such "other annuity," to be within the meaning of the act, must be directly and specifically charged on the lands, not merely secured in a manner which may, by possibility, affect them, as by judgment entered up on a warrant of attorney. *Walford v. Marchant*, 2 B. & Adol. 315.

*Transfer of Stock under both Statutes.*—Annuities secured by the transfer of stock are excepted by both statutes, and require no inrolment; but this only extends to those cases where an actual transfer of the stock is made for the purpose of securing the annuity: therefore, if A., who is entitled for life to the dividends in certain stock standing in the names of trustees, grant an annuity to B., payable out of the dividends, and empower those trustees to pay B., the annuity must be registered. *Hudson v. Skinner*, 6 T. R. 596; *S. P. Duff v. Atkinson*, 8 Ves. jun. 577.

The want of a memorial is no objection, if it be not shown, by the party seeking to set aside the annuity, that the transfer was only a colour for an advance of money, to be raised by sale of the stock. *Cumberland v. Kelley*, 3 B. & Adol. 802.

A bona fide sale of dividends of stock is not within the act 17 Geo. 3, c. 26. *Browne v. Lake*, 14 Ves. jun. 302.

So an annuity, granted in consideration of a reversionary interest in stock, need not be inrolled. *Brown v. Douthwaite*, 1 Madd. 446.

But an assignment of 150*l.*, part of the dividends of a sum of stock, of which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.*, is a grant of an annuity to that amount, and must be inrolled. *Charrette v. Vause*, 1 Sim. 153.

An annuity secured on dividends of stock, standing in trust, among other things, for the grantor for life, is not within the exception in the acts. *Dupuis v. Edwards*, 18 Ves. jun. 358.

So is a grant of a certain sum out of dividends, to which a feme covert is entitled to her separate use, and must therefore be inrolled. *Hood v. Burlton*, 4 Bro. C. C. 121; 2 Ves. jun. 29.

## 2. Time and Manner of Inrolment.

The first section of the 17 Geo. 3, c. 26, requiring deeds, &c., to be inrolled within 20 days of the execution, &c., means within 20 days exclusive of the day of execution. *Ex parte Fallen*, 5 T. R. 283.

A memorial inrolled within 30 days after execution of the deed by the grantee, under 53 Geo. 3, c. 141, is good, though inrolled before execution by the grantor. *Flight v. Buckridge*, 3 Bing. 215; 11 Moore, 28; *S. C. (in error)*, 9 D. & R. 113; 6 B. & C. 49.

It is not necessary that an annuity deed should



be executed by all the parties to it, before the memorial is enrolled, pursuant to that statute. *Id.*

A trustee under an annuity deed executes after the memorial has been enrolled; a memorial of his subsequent execution need not be enrolled. *Dee d. Delagay v. Holloway*, 1 Stark. 431—*Ellenborough*.

If a correct memorial of an annuity deed be incorrectly enrolled for a time, and after some years the officer of the enrolment office discover and rectify the error before any proceedings had to vacate the annuity, the court, finding the enrolment right when they call for it, will not inquire when the entry was made. *Garrick v. Williams*, 3 Taunt. 540.

But it is a high misprision in an officer to alter the enrolment without the sanction of the court of Chancery. *Id.*

Quere, whether it be sufficient for the grantee of an annuity to carry a memorial to the enrolment office and pay for it, without insisting himself on seeing it enrolled, and comparing the enrolment with the original memorial. *Id.*

By 53 Geo. 3, c. 141, s. 5, copies of instruments securing annuities may be obtained at the enrolment office, and the delivery of them enforced by a summons before a judge, to whom power is given to make orders for production.

### 3. What must be stated in the Memorial.

#### (a) Statutes.

The 17 Geo. 3, c. 26, required the memorials to state the day of the month and year when the deed, bond, instrument, or other assurance, bore date, the names of all the parties, and for whom any of them were trustees, and the names of all the witnesses; the annual sum to be paid, and the names of the persons for whose life or lives the annuity was granted, and the consideration of granting the same. s. 1.

The 53 Geo. 3, c. 141, repealing that statute, requires a memorial of the date of every deed, bond, instrument, or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives the annuity shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration for granting the same, and the annual sum to be paid; and gives a form in which these circumstances, with such alterations as may be required, must be stated. s. 2.

The 3 Geo. 4, c. 92, reciting that doubts have arisen as to the construction of the last statute, enacts, that no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses.

And by the 7 Geo. 4, c. 75, reciting still further doubts, it is enacted and declared, that by the 53 Geo. 3, c. 141, no further or other name or names of the subscribing witnesses to instruments, whereby annuities are granted, is or are required

in the memorial thereof, besides the names of all such witnesses, as they shall appear signed to their attestations respectively of the execution of such instruments.

#### (b) As to Witnesses.

Under statute 17 Geo. 3, c. 26.]—By statute 17 Geo. 3, c. 26, the memorial ought to state the names of the witnesses to the respective instruments by which the annuity is secured; stating that all the instruments were attested by A., B., and C., or one of them, was considered not sufficient. *Hart v. Lovelace*, 6 T. R. 471.

It was not necessary that the memorial should contain the Christian names of the attesting witnesses at full length; and the memorial was sufficient if it stated them as they appeared signed to the attestation of the deed. *Phillips v. Const*, 3 Russ. 267; *S. C. nom. Const v. Phillips*, 4 D. & R. 344.

In this case the court of K. B. refused to set aside the annuity granted nearly twenty years since. *Id.*

Where the memorial stated, that "the bond, warrant of attorney, &c., given to secure the annuity, were witnessed by four persons," it meant that each of them was so witnessed; and when it appeared by the answer on oath of the assignee of the grantee, that three of the instruments were attested by two persons only, the court, on application, though at the distance of near 20 years, and after the principal parties and witnesses to the transaction were dead, set aside the warrant of attorney. *Ex parte Makreth (Knt.)*, 2 East, 563.

At the time of executing an annuity deed, one R. W., the agent of J. C., the grantee, entered into an agreement for redemption, beginning thus:—"Memorandum—I undertake and agree," &c.; and concluding, "Witness my hand, R. W., agent for J. C.:" the memorial stated that J. C. entered into an agreement by R. W., his agent, and that it was witnessed by R. W.:—Held, that the memorial was sufficient. *Cator v. Hoste*, 2 B. & P. 557.

So it was sufficient to state that the securities were executed "in the presence of T. C. of" &c., without expressing that he subscribed his name as an attesting witness. *Wallis v. Lade*, 4 Taunt. 761.

Where the memorial of a deed between A., B., and C., stated that it was executed by A. and C. in the presence of E. and F., it was no objection that B. also executed it in the presence of the same parties; for it was sufficient if the memorial stated all the subscribing witnesses, without specifying what signatures they respectively attested. *Orton v. Knight*, 3 B. & P. 153.

An omission in the memorial of the names of witnesses to the execution by the trustees of a grant of freehold estates, to secure an annuity, was held no objection, provided the deed was in fact executed by the trustees, and in the presence of the witnesses who attested the execution of the several cestui que trust, and such execution and attestation appeared accordingly on referring

to the deed. *Doe d. Naylor v. Stephens*, 1 Price, 38.

Where the witnesses to the indenture and to the warrant of attorney were the same persons, it was sufficient to state them as witnesses to the former instrument, without repeating their names as witnesses to the warrant of attorney. *Brown v. Rose*, 1 Marsh, 478; 6 Taunt. 124.

And even though the omission had been fatal to the warrant of attorney, the other parts of the assurance would not have been affected by it. *Id.* And see 3 Geo. 4, c. 92, s. 2.

It was not necessary to state in the memorial the names of the attorneys who were authorized to enter up judgment on the warrant of attorney. *Id.*

Under 53 Geo. 3, c. 141.—By the 53 Geo. 3, c. 141, the memorial must contain the description and places of residence of the witnesses to the annuity deed. *Darwin v. Lincoln*, 5 B. & A. 444.

And, therefore, where the subscribing witness to a warrant of attorney, given as a collateral security to secure an annuity, was described in the memorial as "C. R. clerk to W. A. of Gt. M.-St. in the county of M.;" it was held, that the memorial in this respect was not a compliance with the second section of the statute, as C. R. did not reside, but only attended at the office at Gt. M.-St. at the time, and the warrant of attorney was set aside. *Smith v. Pritchard*, 1 D. & R. 374; 5 B. & A. 717.

So where the memorial described one of the subscribing witnesses to the warrant of attorney by the initial of his christian name, instead of setting it out at length:—Held, not to be a compliance with the statute; and the court ordered the warrant of attorney for securing such annuity to be set aside. *Cheek v. Jefferies*, 3 D. & R. 185; 2 B. & C. 1; *S. P. Metcalfe v. Strathmore (Earl)*, 7 D. & R. 773; *S. C. nom. Metcalfe v. Bowes*, 5 B. & C. 258.

The statute requires all the names of the witnesses to be set out with such certainty that they may be found, if required, to give evidence of the due execution of the instruments. *Id.*

But, although by the schedule of that statute, it is required, that the witnesses shall be described in the memorial of an annuity as E. F. of —, and G. H. of —; where the witnesses to the deeds for securing the payment of an annuity were attorney's clerks:—Held, that they were properly described as "E. F. and G. H., clerks to J. G. of C.-street, in the county of M.," being the place where the latter carried on his business as an attorney; and that it was not necessary to describe them as of their residence or place of abode. *St John v. Champneys (Bart.)*, 7 Moore, 383; 1 Bing. 77. And see *stat. 3 Geo. 4, c. 92*.

Where the memorial described one of the subscribing witnesses as "G. M. Dance, of Cursitor-street, in the county of Middlesex, attorney at law," without setting out his christian names at full length, in compliance with the statute:

Held, a fatal objection in ejectment for the premises on which the annuity was secured. *Doe d. Fox v. Bromley*, 6 D. & R. 292.

If the witnesses to the deed are accurately described in the memorial, it is sufficient, though they did not see the parties execute. *Flight v. Buckridge*, 3 Bing. 215; 11 Moore, 28; *S. C. (in error)* 6 B. & 49; 9 D. & R. 113.

If the names of all the witnesses to the deed are inserted in the memorial, that is sufficient, without specifying the parties by whom the deed was executed in their presence. *Id.*

#### (c) Description of Instrument generally.

An indenture releasing one annuity, and granting another, is well described in the memorial as "a grant of annuity," within the 53 Geo. 3, c. 141, s. 2. *Crouther v. Wentworth*, 9 D. & R. 286; 6 B. & C. 306.

An annuity deed is properly described in the memorial as a "grant of an annuity," though it also contains an assignment of stock as a security. *Browne v. Lee*, 6 B. & C. 689; 9 D. & R. 701.

Where the memorial described the instrument by which it was secured as "an assignment of certain hereditaments," and it appeared that the instrument was in fact an under-lease:—Held, that, in popular language, such instrument was sufficiently described. *Butler v. Capel*, 3 D. & R. 485; 2 B. & C. 251. And see *Wyatt v. Bandell*, 19 Ves. jun. 435.

Under the head "Nature of the Instrument," in the memorial, an annuity deed was described as an "assignment of dividends, and annuity deed to secure the same:—Held, that this was not so incorrect as to invalidate the memorial. *Cane v. Lovelace*, 2 B. & Adol. 767.

A memorial, under 17 Geo. 3, c. 26, of a bond, stating that A. & B. severally became bound, is not sufficient in law, if the bond be joint as well as several. *Willey v. Cawthorne*, 1 East, 398.

If it merely recite a bond as binding the obligor only, it is not cured by reciting the condition to be for payment by the heirs of the obligor. *Purling v. Parkhurst*, 2 Taunt. 237.

The first part of a memorial stating a bond, by which certain persons became bound to the grantee, may be explained by a subsequent part setting forth another bond, in which the first is recited as a joint and several bond; such recital not being inconsistent with the preceding allegation, but only explaining what was before left short in the description of the first bond. *Cove v. Giblett*, 3 East, 461. And see 4 East, 85; 4 Esp. 231.

Nor is it an objection that it does not state that the grantor had bound his heirs, &c. according to the deeds. *Jackson v. Milsentown (Lord)*, 1 Marsh. 533; 6 Taunt. 189; *S. P.* 4 Taunt. 346. But see *Horwood v. Underhill*, *contra*, 10 East, 123; 3 M. & S. 82; 4 Taunt. 346; 10 Ves. jun. 209.

It is no objection that it states the deeds to have been executed on or about such a day, when in fact they were executed on that day. *Id*

So, if the consideration be alleged in the deed to have been paid on a particular day, on which day it was paid to the common agent of both parties, who were at a distance from each other, and by him paid over in a few days afterwards to the grantor on his executing the deed: this is a sufficient allegation of the time of payment. *Craufurd v. Phillips*, 2 N. R. 141; 9 Ves. jun. 215.

(d) *Warrant of Attorney.*

Where a warrant of attorney has been given to confess a judgment, to secure an annuity, together with other securities, the memorial must state the warrant of attorney, as well as the other securities. *Davidson v. Foley (Lord)*, 2 H. Black. 12; Bro. C. C. 598; *S. P. Hopkins v. Waller*, 4 T. R. 463.

In this respect there is no difference, whether the annuity were granted before or after the passing of the annuity act, 17 Geo. 3, c. 26. *Id*.

But a judgment on a warrant of attorney, given together with a bond to secure an annuity, need not be inserted in the memorial, though it be entered up before the memorial is registered. *Sherron v. Oxlade*, 4 T. R. 824; *S. P. Richardson v. Tomkies*, 2 M. & Scott, 56; 9 Bing. 51.

But if the only security had been a judgment actually entered up, perhaps it would have been within the act. *Id*. And see *Ranger v. Chesterfield (Earl)*, 5 M. & S. 2.

In the memorial of a warrant of attorney to confess judgment as a collateral security for an annuity, it is unnecessary to state for what penal sum it authorizes a confession of judgment. *Barber v. Gamson*, 4 B. & A. 281.

If, in the deed securing an annuity, it be declared that the judgment, to be obtained under a warrant of attorney given at the same time, shall be only a collateral security for the regular payment of the annuity, and that no execution shall issue thereon till default made in the payment for 14 days; and the memorial does not notice the above declaration, and in setting forth the warrant of attorney, only states, generally, that "such warrant of attorney was executed for the better securing the payment of the annuity, as in the above stated deed is particularly mentioned," the court will set aside the annuity for such defect. *Cunningham v. Mackenzie*, 2 B. & P. 598.

Where an annuity was secured by bond and warrant of attorney, and by an indenture charging lands, which stated the annuity to be granted in consideration of 1050*l.* paid by the grantee to the grantor, on which was indorsed a receipt for the money from the grantee by payment of T. H. his agent; and the indenture also contained a proviso, that execution should not be taken out upon the warrant of attorney until forty days after the day limited for the payment of the annuity; and the memorial set forth the bond with its date, and the indenture as bearing even date therewith, but omitted any mention of the pro-

viso:—Held, that the memorial sufficiently contained the date of the indenture, and need not have set forth the proviso; and that the receipt, coupled with the indenture, sufficiently described the person by whom the consideration was paid. *Doe d. Mason v. Phillips*, 5 M. & S. 369.

A memorial need not state the defeasance of a warrant of attorney, in the recital of that instrument, if it be explicitly set out in the recital of the deed. *Jackson v. Milsentown (Lord)*, 1 Marsh. 533; 6 Taunt. 189.

But when a bond and warrant of attorney, given to secure an annuity, are no otherwise noticed in the memorial than by way of recital in the annuity deed, which is set out; it is not a sufficient compliance with the 17 Geo. 3, c. 26. *Van Braam v. Isaacs*, 1 B. & P. 451.

(e) *Clause of Redemption.*

The memorial of an annuity granted subsequently to the statute 53 Geo. 3, c. 141, need not state that the annuity was redeemable by the grantor; nor does the schedule in that statute require the name of the party, in whose favour the warrant of attorney is given, to be set out. *Yems v. Smith*, 3 B. & A. 206.

Previously to that statute, a clause of redemption, contained in the body of an annuity deed, must have been inserted in the memorial. *Appleby v. Smith*, 3 Anst. 365; *S. P. Greaves v. Bainbridge*, 3 Anst. 870, n; *Harris v. Stapleton*, 7 T. R. 205.

So must a memorandum indorsed on a deed, importing that the grantor may redeem it on certain terms. *Steadman v. Purchase*, 6 T. R. 737.

But a concession to the grantor of a greater facility of redemption, made at a time subsequent to the original grant of the annuity and inrolment of memorial, need not have been memorialized. *Booth v. Druce*, 4 Taunt. 252.

If a memorial stated a proviso to repurchase, by only referring to the deed, and stating the annuity to be redeemable, "on such notice, terms, and conditions as are therein expressed, it was not sufficient. *Ex parte Ansell*, 1 B. & P. 62.

Where a power to redeem upon six months' notice, terminating on one of the days of payment, was memorialized as a power to redeem at any time on six months' notice, the misdescription was fatal. *Tringham v. Bethune*, 7 Taunt. 429.

(f) *Other Covenants.*

*Under 17 Geo. 3, c. 26.*—A covenant that the premises assigned to the trustee to secure the annuity should be kept insured to a certain amount, at the grantor's expense; otherwise the grantee to insure, and the expense to be chargeable upon the premises, and to be levied in the same manner as the annuity itself, was sufficiently set out, by stating, "that the grantor would keep the premises insured, and, in default thereof, that the grantee might keep insured the same, as therein mentioned." *Bleamire v. Barfoot*, 2 Marsh. 204; 6 Taunt. 504.

In the memorial of an annuity or rent-charge, granted by a rector or vicar out of his benefice, it was not necessary to state the grantor's covenant to pay the annuity or rent-charge. *Mouys v. Leake*, 8 T. R. 411.

A stipulation that the trustee should permit the grantor to take the rents and profits until default in the payment of the annuity, and that, in case the annuity should be in arrear for sixty days, the trustee might enter and raise sufficient to satisfy it, and suffer the grantor to take the overplus from time to time, is not sufficiently described in a memorial, stating that the deed contained the usual powers of entry and distress, and perception of the rents and profits of the premises, for better securing and enforcing the payment of the annuity. *Des Enfants v. O'Brien*, 3 East, 559.

The grantor of an annuity was required, for further security, to make her will, and deposit it with the grantee; and to make an affidavit that she would not revoke it; a magistrate having refused to let her swear the affidavit, the grantee retained the will; and 10*l.*, which had been retained till the grantee should make the affidavit, were then paid to the grantor. The memorial did not notice the will.—Held, that the memorial was therefore bad, but that the 10*l.* was not money retained within section 4 of the statute 17 Geo. 3, c. 26. *Ex parte Mackenzie*, 4 Taunt. 323.

It was not sufficient if the memorial only stated the time at which execution might be sued out by words of reference to the deed. *Orton v. Knight*, 3 B. & P. 153.

Under 53 Geo. 3, c. 141.—It was not necessary to notice in the memorial a covenant in the annuity deed, that if the grantor went abroad, whereby the expense of insuring his life should be increased, the grantee might retain such additional amount out of the dividends; and, if they proved insufficient, the grantor should make up what was wanting. *Cane v. Lovelace*, 2 B. & Adol. 767.

In a case under 17 Geo. 3, c. 26, an annuity was set aside because one of the trusts (viz. that, in case the grantor should leave the kingdom, he should pay any extra expense of the grantee in insuring his life,) was not stated in the memorial. *Cummings v. Isaac*, 8 T. R. 183.

In the memorial of an annuity deed, it is not necessary to state a covenant by the grantor to insure his life for the benefit of the grantee; for that is a collateral matter. *Johnson v. Throed*, 1 Dowl. P. C. 459.

A sum contracted for to be paid as an annuity, being partly secured by the transfer of a policy of insurance on the life of the grantor, was in the annuity deed increased by the amount of the annual premium on the policy, which the grantee covenanted to pay.—Held, that this covenant was not a pecuniary consideration to be specified in the memorial, and that the amount of the annuity was properly described in the memorial as a total compounded of the sum originally contracted

for, with the annual premium of a policy added to it. *Faircloth v. Gurney*, 9 Bing. 456, 622; 1 Dowl. P. C. 724; 2 M. & Scott, 827.

(g) *Statement of Consideration.*

Under 17 Geo. 3, c. 26.—The memorial must set forth precisely the manner in which the consideration money was paid. *Kirkman v. Price*, 1 H. Black. 309.

And if it be paid in promissory notes, they must be set forth. *Rumball v. Murray*, 3 T. R. 298.

So, if part of the amount have been paid in country bank-notes. *Morris v. Wall*, 1 B. & P. 208.

So, if paid by a note, the time when payable must be set forth. *Berry v. Bentley*, 6 T. R. 690; *Poole v. Cabanes*, 8 T. R. 328.

But a check may be stated as money, the value of which had been actually received by the grantor some time before the execution of the deeds. *Ex parte Michell*, 2 East, 137.

And bank-notes may always be described as money. *Wright v. Reed*, 3 T. R. 554; *S. P. Cousens v. Thompson*, 6 T. R. 335.

Where, upon the execution of an annuity bond by three out of several obligors, the grantee of the annuity paid the consideration money to D. S., one of the three, who immediately paid it into a banker's in the names of himself and J. L., the attorney who acted for all parties, and took the banker's receipt for the money in the names of himself and J. L., which was done in consequence of the other obligors not attending to execute the bond, it being agreed by the parties then present, that until the securities should be executed the money should remain in the hands of the banker, and afterwards, upon the execution of the securities, the money was paid at the banker's with the authority of J. L. to D. S., and upon debt brought by the executors of the grantee on the annuity bond, the condition of which, on oyer, stated that the grantee paid the money to the obligors, and the memorial stated that the money was paid to D. S., to the use of himself and the other obligors, by the grantee.—Held, that a plea alleging, that, in the assurances, the consideration money was stated to be paid by the grantee, and that it was not stated in the assurances that the sum was advanced by any agent or agents of the grantee, and that the same was advanced on behalf of the grantee by J. L. and D. S., was to be taken as pleaded with reference to the annuity act, 17 Geo. 3, c. 26, and that it raised an objection which was sustained by the facts, and invalidated the bond. *Horwood v. Underhill*, 3 M. & S. 82; 4 Taunt. 346; 10 East, 123; 10 Ves. jun. 209.

Decided, on the 17 Geo. 3, c. 26, that if several deeds be given to secure an annuity, and the consideration be expressed in all, the memorial need only state the consideration once. *Hodges v. Money*, 4 T. R. 500.

Also, that it is sufficient to state the consider-

ation by reference. *Sowerby v. Harris*, 4 T. R. 494; *Consens v. Thompson*, 6 T. R. 335.

Also, that it was unnecessary that a consideration of 10s. paid to a trustee, should be set forth. *Ince v. Eversard*, 6 T. R. 545.

Also, that if it be agreed by the grantor and grantee, that the former shall pay the expenses of the writings, and he, immediately after receiving the consideration money, pay the fair charges of the writings out of that money, no notice need be taken of it in the memorial, but that it might be stated, that the whole consideration money was paid to the grantor. *Mouys v. Leake*, 8 T. R. 411.

But where part of the consideration of an annuity is paid over by the grantee to a third person, with the consent of the grantor, or is accounted for to the grantor by a note from a third person, the whole of the transaction must be stated in the memorial; and if it is stated that the whole consideration was paid in money, the annuity deeds will be set aside. *Watts v. Millard*, 3 T. R. 596.

If it be set forth in the memorial of an annuity, that the consideration was so much in money paid, when the real consideration is part in money and the giving up of a former annuity, the court will set aside the securities. *Wasburn v. Birch*, 5 T. R. 472.

Where the consideration of an annuity was stated in the memorial to be 640*l.*, 105*l.* of which was paid in money by the grantee to the grantors at the time, and the remaining 535*l.* was paid by the grantee, at the desire of the grantors, to another person, to redeem a former annuity granted by them, for which only 480*l.* was paid; this was held a sufficient and legal consideration. *Ex parte Fallon*, 5 T. R. 233.

In one case the court enlarged a rule, for the parties in the meantime to bring an action on the bond, and the defendant to take issue on the payment of the consideration in the very words of the act, in order to raise the question, whether it was necessary to state in the memorial the actual hand by which the money was paid. *Eastland v. Forrester*, 1 Smith, 256.

A memorial, stating that the consideration money was paid to A., B. and C., "some or one of them," was bad; though it appeared that the money was paid on the day on which the deed was executed by them all. *Vaux v. Ansell*, 1 B. & P. 224.

Where a bond, to secure an annuity, set forth in the memorial, recited, that the consideration money, 1,400*l.*, was paid on the 24th of December, when all the deeds except one were executed and bore date; and the memorial also contained a specific allegation that the consideration money was paid, but without stating any particular time; when, in fact, one deed not having been executed by one of the grantors, the grantee delivered over the consideration money on that day to another of the grantors, to be by him lodged in a banker's hands, in the names of himself and the grantee's attorney, till that deed was executed; and such deed was not in fact executed, nor

the money actually available to the grantors till the 26th of the same month:—Held, that this was a substantial compliance with the statute, the time of payment of the consideration money not being specifically required to be stated by the act, nor being any otherwise material than as entering into the question of the value of the consideration. *Coare v. Giblett*, 4 East, 85; 4 Esp. 231. And see *S. C.* 3 East, 461.

So where, 1,200*l.* have been paid for the grant of an annuity, and the securities, to prevent their being registered, had been renewed from twenty days to twenty days, and then 600*l.* had been paid for the grant of a further annuity, and the securities renewed in like manner, and sometimes after a longer period than twenty days, and afterward had been registered; a memorial of the annuity, stating the consideration to be 1,800*l.*, was deemed a valid memorial. *Symons v. Mortimer*, 5 T. R. 139.

A memorial, under 17 Geo. 3, c. 26, stated a deed-poll, by which (after reciting that A. had formerly granted an annuity of 24*l.* to B., who had assigned to C., and that A. had agreed to grant a further annuity of 7*l.* to C. for 42*l.*) certain tithes, &c. were assigned by A. to C.; and also a bond by A. to C. in 400*l.* for securing "one annuity of 31*l.*" without reference to the deed-poll:—Held, that the consideration for the annuity secured by the bond should have been stated, and that for want of it the bond was void; the annuity mentioned in it not appearing to be the same annuity as that secured by the deed-poll. *Saunders v. Hardinge*, 5 T. R. 9.

*Under 53 Geo. 3, c. 141.*—Held, on this statute, that where part of the consideration consisted of a draft payable at a banker's, it was necessary to state in the memorial at what time such draft was payable; and the application for setting aside the securities being made twelve years after the execution of the deed, and after the deaths of the attesting witnesses, the court of C. P. imposed on the grantors the terms of returning the principal, on taking an account before the prothonotary. *Drake v. Rogers*, 4 Moore, 402; 2 B. & B. 19.

An annuity deed stated the consideration to have been paid in bank-notes and sovereigns; the memorial stated it (according to the fact) to have been paid in bank-notes only:—Held, no ground for setting aside the annuity. *Faircloth v. Gurney*, 2 M. & Scott, 822; 9 Bing. 456, 623; 1 Dowl. P. C. 724.

A. having agreed with B. to advance him a sum of money, and to pay off an annuity formerly granted by him; B. executed a deed, whereby, in consideration of 1050*l.*, he covenanted to pay an annuity to A., and assigned to him certain dividends upon trusts for the purpose of securing the annuity. The 1050*l.* were paid to B. the grantor, who directly returned to the grantee the sum necessary for paying off the annuity, and he immediately paid it over for that purpose. In the memorial inrolled pursuant to 53 Geo. 3, c. 141, the consideration for the present annuity was stated to be 1050*l.*, without any notice of the

former annuity:—Held, that this statement was sufficient. *Cane v. Lovelace*, 2 B. & Adol. 767.

An annuity deed contained a covenant by the grantor, that he would not at any time during the continuance of the annuity go upon the seas, or parts beyond them, without first giving the grantee seven days' notice, in writing, of such his intention, in order to enable him to pay such additional premiums of insurance as might be incurred on account thereof, which premiums the grantor covenanted to pay to the grantee:—Held, that it was not necessary to state such covenant in the memorial, under the statute 53 Geo. 3, c. 141. *Wood v. Perrott*, 5 Moore, 63.

Where the grantor of an annuity assigned a policy of assurance on his own life to the grantee, whereby the latter was enabled to insure the life of the former at a less premium than he otherwise might have done:—Held, that such assignment was no part of the consideration, and need not have been set out in the memorial, under 53 Geo. 3, c. 141, s. 2, the other requisites of that statute having been complied with. *Morris v. Jones*, 3 D. & R. 263; 2 B. & C. 232.

#### (h) Statement of Trusts.

Under the 17 Geo. 3, c. 26, the memorial should contain an accurate description of the trusts and interests of the parties, and, in fact, the whole *res gestæ*. *Cummins v. Isaac*, 8 T. R. 183; *Dupuis v. Edwards*, 18 Ves. jun. 358.

But see stat. 53 Geo. 3, c. 141, which gives a concise tabular form for memorials.

A memorial must, under 17 Geo. 3, c. 26, show for whom parties are trustees. *Defaria v. Sturt*, 2 Taunt. 225. And see *Bleamire v. Barfoot*, 6 Taunt. 504, 2 Marsh. 204; *Bradford v. Burland*, 14 East, 445.

And state the trusts. *Askew v. Mackreth*, 1 N. R. 214.

Only those trusts created in consequence of the annuity need be stated. *Toldervy v. Allan*, 5 T. R. 480.

But stating, "for purposes therein mentioned," not sufficient. *Denn d. Dolman v. Dolman*, 5 T. R. 641. And see *Leycester v. Lockwood*, 1 M. & S. 527; 5 Taunt. 587. But see *Brown v. Rose*, 1 Marsh. 478; 6 Taunt. 124.

So, stating a trust to permit grantee to receive profits until default, and then for grantee as a trustee for him generally, was held bad. *Taylor v. Johnson*, 8 T. R. 184.

#### (i) Statement of other Matters.

The court will not set aside annuity deeds for a mere clerical mistake in the memorial; as if, in stating the assignment of a term of 61 years, it set forth a term of 62 years. *Ince v. Everard*, 6 T. R. 545. And see *Wyatt v. Bandell*, 19 Ves. jun. 438.

Or if, after reciting the true consideration, e.g. 280*l.* it afterwards state "which said sum of 250*l.* was paid," &c. *Id.*

A warrant of attorney for securing an annuity

set aside, with the judgment and execution thereon, because the annuity was stated in the memorial to be 257*l.* instead of 237*l.* per annum. *Nash v. Godmond*, 1 B. & Adol. 634.

The annuity originally agreed to be paid by the grantor was 80*l.*, and, in consideration of a covenant by the grantee to pay the annual premium on the policy (33*l.* 19*s.* 6*d.*), the grantor consented that that sum should be added to the annuity, which was accordingly described in the deed and in the memorial as an annuity of 113*l.* 19*s.* 6*d.*:—Held, that it was properly so described. *Faircloth v. Gurney*, 2 M. & Scott, 822; 9 Bing. 456, 622; 1 Dowl. P. C. 724.

Under 53 Geo. 3, c. 141, it is sufficient to state that the annuity was granted for the lives of three persons by name, without stating their places of abode or other additions, or averring that the annuity was granted for their joint lives, or the life of the survivor of them, or for a term of years determinable on such lives. *Barber v. Gamson*, 4 B. & A. 281.

It need not be stated that an annuity was payable for the portion of time from the last quarter-day to the death of the annuitant. *Ince v. Everard*, 6 T. R. 545.

The estates charged need not be specifically set forth, under 17 Geo. 3, c. 26. *O'Callaghan v. Ingilby (Bart.)*, 9 East, 135.

Nor need the covenant of grantor, for due payment of the annuity, be stated. *Id.*

Where an annuity was granted by three, one of whom was known to be only a surety for the other two, to whose use the money was, in fact, applied; yet all three being present when the money was paid down upon the table, and counted over by them all, and the receipt of it signed by all, it was properly stated in the memorial as a payment made to the three. *Cook v. Jones*, 15 East, 237.

When the deed and memorial stated the consideration money to have been paid by the grantee by the hands of W., his agent, yet as it also appeared by the same instruments that a part of it was the money of a third person; that was held to be no objection: for either W. was the agent in fact of the sole grantee, or impliedly the agent, through the medium of the grantee, for such third person also, whose interest was stated in the deed and memorial according to the truth. *Id.*

A memorial of a bond and warrant of attorney, under 17 Geo. 3, c. 26, need not express for whose life the annuity is granted, if it be expressed in the memorial of the indenture which recites the said bond and warrant of attorney. *Ranger v. Chesterfield (Earl)*, 5 M. & S. 2.

### III. WHEN VOID AND VOIDABLE.

#### 1. Generally.

An annuity deed was considered absolutely void, and not merely voidable, if the memorial was not registered according to the directions of the an-

nuity act, 17 Geo. 3, c. 26. *Crossley v. Arkwright*, 2 T. R. 603.

Therefore, where a person against whom a writ of *fi. fa.* is taken out, was in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable from thenceforth; it was held that the sheriff was warranted in returning *nulla bona*, if it appear that the memorial of such annuity was not registered according to the act, for in that case the deed was absolutely void. *Id.*

But in another case it was held, that the executor of the grantee of an annuity which was regularly paid until the time of his death, could not bring an action for the consideration money on the ground that no memorial of the grant was inrolled, as the contract was not therefore void, but voidable only. *Davis v. Bryan*, 6 B. & C. 651; 9 D. & R. 726.

If the memorial of a deed to secure an annuity be defective, the whole deed is void for every purpose, even though there are other parts of it not connected with the annuity. *Dann v. Dolman*, 5 T. R. 641.

Therefore, if A. being entitled to a life estate, subject to a condition not to charge or incur a debt, grant an annuity, and demise the land as a security, but there be a defect in the memorial of the annuity, the deed is wholly void, and does not work a forfeiture of the estate. *Id.*

If several deeds be given to secure an annuity, and one of them be not properly inrolled, *quære*, if all of them be not void by the annuity act. *Hart v. Lovelace*, 6 T. R. 471.

If a memorial of an annuity be defective in stating one of several securities, *semble*, that the particular instrument only is void, and not the other assurances. *Brown v. Rose*, 6 Taunt. 124; 1 Marsh. 478.

Where several deeds were executed to secure one annuity, and the christian name of the witness to one of the deeds was omitted in the memorial, the court would not set aside the deeds. *Watts v. Millard*, 5 T. R. 598.

Where a party gave a bond as a security, and the memorial defectively described it, the court only set aside the judgment entered up by warrant of attorney on such bond, and directed the warrant of attorney to be deposited with the proper officer of the court. *Denne v. Dupuis*, 11 East, 134.

A bond and warrant of attorney to confess a judgment were given to secure an annuity, and the date of the latter was not set forth in the memorial, the court only set aside the latter. *Ex parte Chester*, 4 T. R. 694.

And on motion, without action brought, or judgment entered up, under the warrant of attorney. *Id.* *S. P. Thurkill v. Wallace*, 4 T. R. 595, n. And see 1 B. & P. 66, n.

## 2. Keeping back Consideration.

*Statutes.*—By 17 Geo. 3, c. 26, s. 4, if any part of the consideration shall be returned to the per-

son advancing the same; or, if paid in notes, any of them, with the privity and consent of the person advancing the same, be not paid when due, or be cancelled or destroyed without being paid; or if the consideration or any part of it be paid in goods; or if any part of the consideration be retained on pretence of answering the future payments of the annuity, the annuity is void. *The 53 Geo. 3, c. 141, s. 6*, has an enactment precisely similar, except that it is extended to a retainer under any pretence whatever.

*What is a keeping back.*—Where an annuity was granted in consideration of a debt before secured by bond, and the grantees refused to deliver up the bond:—Held, that it was not such a keeping back of part of the consideration as vacated the annuity. *Cook v. Tower*, 1 Taunt. 372.

So, where the consideration was a bill accepted, which was dishonoured by the acceptor, but paid by the drawer on notice:—Held, that it was not such a non-payment of the bill as to vacate the annuity, though it was accepted for the accommodation of the drawer, who undertook to furnish assets for payment, and neglected so to do. *Id.*

Where, upon the grant of an annuity, the agent of the grantees, on paying the consideration money, retained a considerable sum for the expenses of preparing the deeds, and a further sum, by way of advance, to answer the first year's payment of the annuity; the court of C. P. set aside the deed against a person who was surety for the payment of the annuity by two collegians, who were minors, at Cambridge, on the ground that this was an illegal retainer; but they imposed on such trustee the terms of returning the principal with interest, on taking an account before the prothonotary. *Mence v. Hammond*, 6 Moore, 491.

A, an attorney, purchases an annuity of B., and, having paid the consideration money, receives from B. the amount of a bill for business done, including, by mistake, a charge for searches for incumbrances, which searches had never been made:—Held, that the payment of this charge, so inadvertently made, was not a return of the consideration money within the meaning of 17 Geo. 3, c. 26, § 4. *Hurd v. Girdlestone*, 1 Marsh. 407; 6 Taunt. 8.

And where the attorney for the grantor of an annuity, at the time of the payment of the purchase money, takes and keeps an unreasonnable part thereof for the expenses of the deed, this is not a ground on which the court will set aside the annuity. *Mootham v. How*, 7 Taunt. 596.

And where part of the consideration money for an annuity was deposited in the hands of the grantee's attorney until some houses, out of which the annuity was granted, should be completed, but such money was paid over to the grantee in a short time after the date of the deeds, and there was no fraud in the transaction, the court refused to set aside the annuity, it not being the case of a fraudulent retainer contemplated by the 53 Geo. 3, c. 141, § 6, as the power

given them by that statute was discretionary. *Barber v. Gamson*, 4 B & A. 281.

A solicitor, who advances his own money on the purchase of an annuity, is not entitled to any commission fee; and if any part of the consideration money be returned to him by the grantor, as a charge for such commission, the court will set aside the annuity deeds. *Broomhead v. Eyre*, 5 T. R. 597.

After the consideration of an annuity had been paid to the grantor, the latter immediately paid back to the grantee (who was in partnership, as an attorney, with two other persons) a sum for procuration money, in pursuance of an agreement for that purpose, and there appeared to be no fraud or collusion:—Held, that the deeds were not void by the fourth section of 17 Geo. 3, c. 26, and that the court might impose such terms upon the parties as seemed just and reasonable. *Girdlestone v. Allan*, 2 D. & R. 150, 157; 1 B. & C. 61; *S. P. Cook v. Tower*, 1 Taunt. 372.

S. having occasion to raise 2,800*l.* by way of annuity, desired the annuities to be divided into three; the consideration for all three was paid at one time and place to one person, who was agent to all the grantors, and he retained 300*l.* for the expenses of all three annuities:—Held, that all three might be set aside on equitable terms on account of this retainer, although the 300*l.* was retained in a bank note, which formed part of the consideration money of only one of the grantors. *Jones v. Silberchildt*, 4 Bing. 26; *S. C. nom. Chappell v. Silverchild*, 12 Moore, 113.

Where, on the grant of an annuity, the consideration money was, with the assent of the grantor, paid to a trustee, to be applied by him in payment of the costs of the annuity deeds, afterwards of certain debts due from the grantor to certain judgment creditors, and the surplus to the grantor:—Held, that this was not a retainer within the meaning of the statute, so as to render the annuity void, notwithstanding the trustee was the partner of the grantee, and both of them were the solicitors employed in the transaction. *Aston v. Gwinnett*, 3 Y. & J. 136.

Where the issue is whether the consideration of an annuity has been paid, it is not necessary to prove the consideration had in money or bank notes. *Franco v. Lindo*, 1 Esp. 300—Buller.

**Retainer by Agents.**—Where the grantor of an annuity, in pursuance of an agreement with the broker, received the whole consideration money, and immediately afterwards returned 15*l.* per cent. for law expenses and brokerage, and the amount of one year's annuity, which was deposited in a bank, and drawn out quarterly to pay the annuitants:—Held, that this was an illegal retainer of part of the consideration money within the meaning of the 53 Geo. 3, c. 141, s. 6, and after the lapse of eight years, the court set aside the annuity, on paying principal and interest on the money advanced, together with reasonable expenses, although the annuitants were not directly privy to the retainer, and although one of them was dead before the applica-

tion was made. *Finley v. Gardner*, 9 D. & R. 207; 6 B. & C. 165.

Where a person was employed as an agent by the grantor, to raise money by way of annuity, and by the grantee to pay the consideration money over to the grantor; and at the time of the payment of the annuity, such person received or retained part of it for a debt alleged to be due to him from the grantor, the court of C. P. set aside the annuity on the terms of the grantor's paying the principal and interest at the rate of 5*l.* per cent., although the grantee had not received any part of the money so returned, and although it was done without his privity or knowledge. *Gorton v. Champneys*, 8 Moore, 302; 1 Bing. 287.

Where, upon the grant of an annuity, the agent of the grantee, on paying the consideration money, retained, or cause to be returned to him, a considerable sum for the expenses of deeds, investigating title, journeys, &c. (two witnesses, brought from a considerable distance for the purpose of attesting the annuity deed, having first retired); the court held that this was an illegal retainer, for which the grantee was responsible, and on that ground set aside the annuity, ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for, and was ignorant of such retainer, on the terms of an account being taken before the prothonotary, who was to ascertain what sum might be due to the grantee in respect of principal and interest. *Williamson v. Gould*, 1 Bing. 234; 8 Moore, 109.

So the court of C. P. set aside an annuity where 910*l.*, the consideration money, was paid to the grantor, who immediately returned it all but 1*l.* to pay off preceding annuities, and 165*l.* which the attorney, who negotiated the affair, retained for his trouble. *Henry v. Taylor*, 3 Bing. 177; 10 Moore, 588.

In all such cases of retainer by agents, the court will set aside the annuity, on payment of principal and interest, even though the grantee be not privy to the transaction. *Calton v. Porter*, 2 Bing. 370; 9 Moore, 703.

### 3. Other Things.

Held; that paying a half-yearly instalment for half a year sooner than the deed required it, on a mistaken claim of the grantee, did not avoid the annuity. *Jackson v. Milsentown (Lord)*, 6 Taunt. 180; 1 Marsh. 533.

An annuity being in arrear, and the rent of an estate on which it was secured being unpaid, the trustee of the estate, who had negotiated the annuity between the grantor and grantee, having advanced a sum to the latter in anticipation of the coming rents, and received from the grantee on such advance the commission which he usually received on annuity payments—the court of C. P. set aside an execution which (the rents proving insufficient) was afterwards issued for that sum in the name of the grantee, against one who, as surety for the payment of the annuity, had given a warrant of attorney to confess judg-



ment. *Williamson v. Gould*, 7 Moore, 579; 1 Bing. 171.

So, that court afterwards set aside an execution which the grantee had issued for the same sum against the grantor. *Correll v. Gould*, 8 Moore, 109; 1 Bing. 190. *And see* 7 Moore, 621; 1 Bing. 171.

#### 4. Who may apply to avoid.

An application to set aside an annuity must be made bona fide on behalf of the grantor. *Faircloth v. Gurney*, 1 Dowl. P. C. 724; 9 Bing. 456, 622; 2 M. & Scott, 822, 827.

The court declined to hear a rule for setting aside an annuity, upon its appearing that the rule had not been obtained on behalf of the grantor; but on behalf of a party who had purchased the annuity from an assignee, and who had raised objections to avoid completing his purchase. *Id.*

A creditor of the grantor may avail himself of the invalidity of an annuity for want of registration. *Saunders v. Hardinge*, 5 T. R. 9. *And see* *Newland v. Watkin*, 2 M. & Scott, 174.

The grantor of an annuity, having assigned a lease for securing the payment of it, and having afterwards sold his interest in the lease to a fair purchaser:—Held, that the latter was not entitled under the annuity act, 17 Geo. 3, c. 26, to apply to the court to have the security delivered up to be cancelled, because the memorial required by the act was not duly registered. *Garrod v. Sanders*, 6 T. R. 403.

A party outlawed in K. B., in an action to recover the arrears of an annuity, cannot be heard in C. P. on a motion to set aside the annuity. *Loukes v. Holbeach*, 4 Bing. 419; 1 M. & P. 126.

#### 5. Time and manner of applying.

*Statutes.*—By statute 17 Geo. 3, c. 26, s. 4, in all cases where for the causes before stated the annuity is void, "the person by whom the annuity or rent-charge is made payable, may apply to the court in which any action is brought for payment of the annuity, or judgment entered, by motion to stay the proceedings on the judgment or action; and if it shall appear to the court that such practices have been used, they may order the deed, bond, or instrument, or other assurance, to be cancelled, and the judgment, if any has been entered, to be vacated." The 53 Geo. 3, c. 141, s. 4, extends the right of application to any person whose property is liable to be charged or affected.

*Concurrent Jurisdiction of Courts of Law and Equity.*—There is jurisdiction in equity to order instruments void under the annuity act, to be delivered up. *Underhill v. Horwood*, 10 Ves. jun. 209.

The Court of Chancery has jurisdiction, even after the grantor has twice failed at law in his attempts to set aside the annuity, to declare it void, and order the securities to be delivered up. *Bromley v. Holland*, Coop. C. C. 9; 7 Ves. 18.

Where the grantee of an annuity is induced by false representations or improper concealment of facts on the part of the grantor or his agent, to

become the purchaser of an annuity, although he may have relief at law, a court of equity has concurrent jurisdiction. *Adameon v. Eviatt*, 2 Russ. & Mylne, 66.

The grantor and his agent in such transaction are not bound to disclose all the circumstances of the grantor's situation; they are, however, bound to give honest answers to questions put to them. *Id.*

*Jurisdiction of Courts of Law.*—Quære, whether the courts have a summary jurisdiction under sect. 4 of the 17 Geo. 3, c. 26, to set aside annuity securities for objections arising on sect. 1. *Steadman v. Purchase*, 6 T. R. 737.

The court of C. P. cannot order an annuity bond to be delivered up to be cancelled for want of a memorial pursuant to 17 Geo. 3, c. 26, though it be void by the 1st section of that act. Quære, whether in such a case they would stay proceedings on the bond. *Symonds v. Cobourne*, 1 B. & P. 482. *See also* 7 T. R. 253, and 1 B. & P. 66, n.

It is discretionary with the court, whether they will give relief under the fourth section of the annuity act, 17 Geo. 3, c. 26; and they may either vacate the securities given for an annuity, in case of a violation of that clause, or do so on certain terms, or refuse to do so altogether, according to the circumstances of each particular case. *Girdlestone v. Allan*, 2 D. & R. 150, 157; 1 B. & C. 61; S. P. Cook. v. Tower, 1 Taunt. 372.

So is the power given to the courts under stat. 53 Geo. 3, c. 141, s. 6. *Barber v. Gamson*, 4 B. & A. 281.

Courts of law have no authority to order instruments void under the annuity act, to be delivered up further than the act expressly gives it. *Bromley v. Holland*, 7 Ves. jun. 18; Coop. C. C. 9; S. P. Bolton, (Duke) v. Williams, 2 Ves. jun. 154; 4 Bro. C. C. 297.

The court of Exchequer cannot proceed, on motion, to order the securities to be delivered up, for want of a proper memorial, but can only set aside the warrant of attorney and judgment. *Appleby v. Smith*, 3 Anst. 865; S. P. Jeffrey, v. Athol (Duchess), 3 Anst. 865, n.

A fine levied of a rent-charge, assigned by way of annuity, will not give the court of C. P. authority to set aside the annuity securities, &c. on account of a defective memorial, there being neither a warrant of attorney to enter, nor judgment actually entered in the court. *Craufurd v. Gaines*, 2 H. Black. 438.

When an action was brought by executors, on a bond given by the defendant to their testator, for securing an annuity, and, upon a plea of non est factum, they obtained a verdict and judgment, and levied execution thereon, the court held this not a case where they could give relief upon a summary application under the annuity act, for a defect in the memorial. *Buck v. Tyte*, 7 T. R. 495.

A. grants an annuity for his own life to B., to secure which a bond and warrant of attorney are given, and judgment entered; B. dies; after his

death the court of C. P. will not admit evidence of a parol agreement between the parties, that A. should be at liberty to redeem the annuity on certain terms, (especially if it be the evidence of the attorney concerned), as a ground to order the securities to be given up, and satisfaction entered on the judgment. *Haynes v. Hare*, 1 H. Black. 659.

Though the court, on the ground of minority, and the want of a proper memorial, will set aside a judgment entered up on a warrant of attorney to secure an annuity, they will not, on these grounds alone, order the deeds to be delivered up to be cancelled. *Storton v. Tomlins*, 2 Bing. 475; 10 Moore, 172.

If, in a deed of grant of annuity, which is void, the grantor also covenant personally to pay the said rent charge or annuity, and give a warrant of attorney to confess judgment, as a collateral security for payment of the annuity, this court will not order the deeds to be delivered up to be cancelled. *Mouys v. Leake*, 8 T. R. 411.

Where an ejectment was brought to recover possession of lands extended under an elegit upon a judgment confessed, which had been entered up on a warrant of attorney given for securing an annuity, it is too late for the grantor to object to the consideration of such annuity, upon a summary application for staying the proceedings after verdict in such ejectment, because he had an opportunity of making his defence to the action. *Withy v. Wooley*, 7 T. R. 540.

But a scire facias to revive a judgment entered up by warrant of attorney given to secure the payment of an annuity, and a fieri facias issued thereon, are not such proceedings as to call upon the grantor of the annuity to avail himself of an objection to the memorial. *Fielde v. Cole*, Forrest, 125.

Where several persons who had purchased annuities of A. agreed to give up these annuities on receiving a certain sum of money and a bond payable at a future day, they retaining their annuity securities till the bond becomes payable: the court cannot under the statute order any of the securities so retained to be delivered up, although they may be void. *Goring (Bart.) v. Welles*, 1 B. & P. 395.

*Course of Proceeding.*—Where a rule to show cause is obtained for the purpose of setting aside an annuity, the several objections thereto, intended to be insisted upon by counsel at the time of making such rule absolute, shall be stated in the said rule nisi. *Reg. Gen. K. B.*, T. T. 42 Geo. 3, 2 East, 569; C. P. M. T. 10 Geo. 4, 3 M. & P. 761; 6 Bing. 349.

An annuity is secured upon land, expressed to be of equal or greater annual value; before the court will set aside, for the want of a memorial, upon the inferiority of the value of the land, a warrant of attorney given as a collateral security, they will direct an issue to try whether the land be of the annual value, and will not try that matter upon affidavits, especially if there be conflicting evidence of the value of the land. *Saunders v. Wright*, 1 Taunt. 369.

On a motion to set aside an annuity, after a lapse of eleven years, on the ground of a misstatement in the consideration, the affidavits should state that the parties are alive. *Amstead v. Atkins*, 2 Chit. 32.

Where an annuity is sought to be set aside on the ground of the insufficiency of the consideration, there must be an affidavit of the circumstances from the grantor himself. *Dartnell v. Wellesley (Marquis)*, 3 B. & B. 255; 7 Moore, 63.

So, where the application to set aside is on the grounds that the consideration money did not belong to the grantee, and that part of it was retained at the time the annuity was granted. *Id.*

The court of C. P. in one case set aside a judgment and warrant of attorney given to secure an annuity, for a defect in the memorial, without costs, because it was the case of an executor. *Dickenson v. Boyne*, 1 B. & P. 335.

Courts of equity, on setting aside, decree an account. *Holbrook v. Sharpey*, 19 Ves. 131.

*Operation of previous Application.*—If the validity of an annuity has come in judgment before a court of competent jurisdiction, no other court will suffer the same objection to be stirred again. *Hart v. Lovelace*, 6 T. R. 471. But see *Ex parte Mackreth*, 2 East, 563.

Where, upon a summary application to set aside an annuity for non-compliance with the requisites of the 17 Geo. 3, c. 26, the rule was discharged upon discussion of the merits, the court will not entertain a similar application between the same parties on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered. *Greathead v. Bromley*, 7 T. R. 455.

Where a former rule for setting aside an annuity was discharged, because it did not appear that an indorsement (not memorialized), containing a clause of redemption (bearing date after the deed), had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the court will not enter into the question on a subsequent rule, although it appear clearly that the indorsement was made before the deed was executed, and that such clause of redemption was not inserted in the memorial of the annuity inrolled according to the stat. 17 Geo. 3, c. 26. *Schumann v. Weatherhead*, 1 East, 537.

The refusal of a summary application to set aside an annuity, is no objection to the same ground being taken again upon an attempt to enforce it. *Bromley v. Holland*, 5 Ves. 617.

*Operation of Delay.*—An annuity granted in 1790, the grantee of which died in 1794, and the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee if living. And semble, that an annuity, paid without objection for more than six years, shall be protect-

ed, by analogy to the statute of limitation, against any such objection debars the memorial, without strong reasons to the contrary. *Ex parte Maxwell*, 2 East, 85.

The court of C. P. in one case held that they could not refuse to interfere, on the ground of eighteen years having elapsed since the grant of the annuity, and the grantee being dead. *Van Braem v. Isaac*, 1 B. & P. 451.

In another case the court refused to set aside an annuity granted eighteen years since. *Const v. Phillips*, 4 D. & R. 344; 3 Russ. 267.

If the grantor of an annuity pay it without objection, during the lifetime of the person who negotiated the business for the grantee, the court will not permit the grantor to apply to set aside the annuity deeds, on a representation of facts that could only have been answered by such agent for the grantee. *Peole v. Cabanes*, 8 T. R. 328. And see *Flaircloth v. Gurney*, 2 M. & Scott, 627; 9 Bing. 623; 1 Dowl. P. C. 724.

#### IV. RECOVERY OF CONSIDERATION.

*When and how recoverable.*—Assumpsit for money had and received lies to recover back the purchase money, either where the annuity has been set aside by the court, or where the grantor, upon the discovery of a defect, refuses to re-execute any fresh securities. *Weddel v. Lynam*, 1 Esp. 309; *Peake's Add. Cas.* 30.—Kenyon.

So after a nolle prosequi had been entered in an action on an annuity bond for defect of memorial. *Este v. Broomhead*, 3 Esp. 261.

So it lies for money advanced on an agreement for an annuity which has never been carried into effect. *Richards v. Borrett*, 3 Esp. 102.—Kenyon.

But it will not lie by an attorney for the consideration which he has paid to his client as damages in action for negligently preparing the annuity securities. *Burdon v. Webb*, 2 Esp. 527.—Kenyon.

To entitle the grantee to recover back the price, as money had and received, it is sufficient if the grantor has communicated to the grantee that there are defects in the memorial, and has treated for a compromise on the ground of the annuity being void, although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old ones, before he sues. *Waters v. Mansell (Bart.)*, 3 Taunt. 56.

And although the grantor has taken no active measures to set aside the securities. *Id.*

The grantee of a void annuity, on account of an informality in the deeds, cannot maintain an action for money had and received to recover back the money until he has demanded fresh deeds from the grantor. But it is not necessary for the grantee to tender back the old deeds previous to the commencement of such action. *Weddel v. Lynam*, *Peake's Add. Cas.* 30; 1 Esp. 309.—Ken.

The consideration of an annuity, being partly a debt antecedently due for goods sold, and the residue thereof money paid at the time of granting it, the grantee may recover back the whole con-

sideration, if the annuity be set aside for informality in registering the memorial. *Shove v. Webb*, 1 T. R. 732.

Quere, whether he can if part of the consideration be for goods sold at the time of granting the annuity. *Id.*

Where the grantor of an annuity applied to have it set aside on motion, and to vacate a judgment irregularly signed upon a warrant of attorney which had been improperly described in the memorial, and the court of K. B. accordingly held that the grantee might recover back the consideration money in assumpsit, and was not put to his action on a bond which was also given for securing the annuity, and which bond was not ordered to be cancelled, though voidable in pleading by virtue of the annuity act, 17 Geo. 3, c. 26. *Scurfield v. Gouland*, 6 East, 241; 2 Smith, 332.

But where an annuity bond, granted by two becomes void by the neglect of the grantee in not registering the memorial under the statute, he cannot recover back any part of the consideration money from the one, who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it. *Stratton v. Rastall*, 2 T. R. 366.

On an annuity secured upon a rent charge, which was settled in trust for a married woman, being set aside, the annuitant is not entitled to recover the consideration given by him for the annuity out of the arrears of the rent-charge paid into court under a decree made upon a bill of interpleader filed by the owner of the estate, subject to the rent-charge. *Angell v. Hadden*, 2 Mcr. 169.

*Deductions allowed.*—Where an annuity is set aside, and an action brought for the money, an account is always taken of all money received under the annuity. *Byne v. Vivian*, 5 Ves. jun. 608.

Where an annuity is void under the act at law, the balance of the consideration may be recovered, deducting the payments under the annuity. *Bromley v. Holland*, 7 Ves. jun. 23; 5 Ves. 617; *Coop. C. C.* 9.

On an account of the consideration and the payments under the annuity, if the balance is against the grantee, it has been decided in equity that it cannot be recovered. *Id.*

Quere, where a contract of life annuity is avoided, and the grantee is to receive back his principal and legal interest, if annuity instalments to a greater amount than the principal and interest have been paid, whether it is reasonable that the grantee shall refund. *Burdon v. Brown*, 1 Taunt. 520.

Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration money paid for it, the grantor may set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hicks v. Hicks*, 3 East, 16; *S. C. nom. Hills v. Hills*, 4 Esp. 196; *S. P. Weddel v. Lynam*, 1 Esp. 309; *Peake's Add. Cas.* 30.

But held, at *Nisi Prius*, that, when an annuity is rescinded after it has been paid for some time, the purchaser is entitled to receive back the whole of his purchase money. *Beauchamp v. Borret*, Peake, 109—Kenyon.

Premiums of life insurance cannot be charged on the vendor of a rescinded annuity. *Burdon v. Browning*, 1 Taunt. 520.

The grantee cannot claim sums paid by him for insuring the life of the grantor, unless there has been a special provision in the deed to that effect. *Williamson v. Gould*, 8 Moore, 324; 1 Bing. 316.

Nor cost incurred in supporting the annuity. *Ex parte Shaw*, 5 Ves. 620.

The court allowed the grantee of an annuity his reasonable disbursements for the conveyances by which the grant of such annuity was effected and secured, where it had been previously set aside on the terms of the grantor's paying the grantee what should be found by the prothonotary to be due to the latter for principal and interest at the rate of 5*l.* per cent. *Williamson v. Gould*, 1 Bing. 316; 8 Moore, 324.

Where a surety obtained an order for setting aside an execution under a judgment which he had given to secure the payment of an annuity, upon his entering into an account and paying the grantee the balance which might be found due under the provisions of the annuity deed, which was afterwards set aside upon the ground of an illegal retainer of part of the consideration money: the court of C. P. refused to discharge such surety out of execution until he had accounted, or paid money into court to cover the amount of the sum which might be ultimately ascertained by the prothonotary to be due to the grantee for principal and interest on the annuity. *Williamson v. Gould*, 8 Moore, 224; 1 Bing. 274.

#### V. PAYMENT OF ANNUITIES.

Where the defendant, as surety for the grantor of an annuity, executed a warrant of attorney to confess a judgment, as a collateral security for the due and regular payment of the annuity, subject to a defeasance, that, after any default should be made by the grantor in payment of the annuity, the grantee might sue out execution upon such judgment against the defendant for such part of the annuity as should be then due: and the annuity being in arrear, and the rents of the estates of the grantor, on which it was originally secured, being unpaid, the agent and trustee of the estates, who negotiated the annuity as between the grantor and grantee, advanced to the latter a sum of money in anticipation of the accruing rents, and deducted and retained the usual commission charged by him on the receipt and payment of annuities: Held, that such advance must be considered as a payment made on account of the grantor, as the principal; and that, on the insolvency of the latter, and the rents of his estates proving insufficient to satisfy the amount, the grantee could not resort to the defendant as his surety, to recover the whole of the arrears of the

annuity then due; as, whatever sum he had received from the agent on account of the annuity, operated to that extent to the extinguishment of the liability of the surety. Where, therefore, an execution was issued against the defendant, as such surety, for the whole of the arrears due from his principal (the grantor), and under which he was detained in custody, the court of C. P. ordered him to be discharged, on payment into court of the balance due, after giving credit for the advance; the amount of which balance was to be ascertained by the prothonotary. *Williamson v. Gould*, 7 Moore, 579; 1 Bing. 234, 171.

So where upon the grant of an annuity, the agent who negotiated it as between the grantor and grantee, was appointed trustee and receiver of the rents of the estates of the grantor on which it was charged, and afterwards advanced money to the grantee out of his own funds, in anticipation of the receipt of the arrears from such estate, and debited the grantee with the usual commission charged by him on annuity payments:—Held, that, upon the eventual failure of the securities and insolvency of the grantor, the agent could not treat such an advance as a mere loan; but that it must be taken as payment made to the grantee in liquidation of the arrears of the annuity; and the latter could only issue execution against the grantor for the amount of the arrears actually due, after deducting the sum advanced and received by him from such agent. *Carroll v. Gould*, 7 Moore, 621; 1 Bing. 191. And see *Williamson v. Gould*, 1 Bing. 190; 8 Moore, 109.

Where the grantor of an annuity assigned it to A., together with all the securities, for a valuable consideration, part of which belonged to B., one of the co-sureties for payment of the annuity; and it was agreed by deed, between A. and B., that the former should retain out of the annual payments sufficient to pay him the principal sum advanced, together with the interest, and that when he should have been paid principal and interest the annuity should be for the benefit of B.:—Held, that the annuity did not thereby become extinguished, and that the co-sureties still remained liable to contribution to A., although B. had assigned stock for further securing the payment of the annuity. *Browne v. Lee*, 9 D. & R. 701; 6 B. & C. 689.

APOTHECARY—See *PHYSIC*.

APPEAL—See *COMMON*—*POOR*—*SESSIONS*.

#### APPEAL OF MURDER.

Method and form of proceeding upon an appeal of murder. *Bigby v. Kennedy*, 5 Burr. 2643; 2 W. Black. 713. *Rez v. Taylor*, 2 Burr. 2793.

Appellees are not to be put to plead till over had of all prior proceedings, if demanded. *Id.*

An objection to the memorandum of the bill of appeal cannot be taken before arraignment. *Id.*

In an appeal of death, the appellee waged his battle:—Held, that the counterplea, to oust him of this mode of trial, must disclose such violent and strong presumptions of guilt, as to leave no possible doubt in the minds of the court. And therefore a counterplea which only stated strong circumstances of suspicion, was held to be insufficient. *Ashford v. Thornton*, 1 B. & A. 405.

Held also, that the appellee may reply fresh matter tending to show his innocence, as, for instance, an alibi, and his former acquittal of the same offence on an indictment. *Id.*

But quære, where the counterplea is per se insufficient, or, where the replication is a good answer to it, whether the court should give judgment that the appellee be allowed his wager of battle or that he go without day. *Id.*

In this case, as the appellant prayed no further judgment, the court, by consent of both parties, ordered that judgment should be stayed on the appeal, and that the appellee should be discharged. *Id.* 460.

Appeals of murder, as well as of treason, felony, or other offences, together with wager of battle, are absolutely abolished by stat. 59 Geo. 3, c. 46.

#### APPEARANCE—See PRACTICE.

#### APPOINTMENT—See POWER.

#### APPRAISER.

Nothing being referred to the appraisers except the mere value of the goods and of the repairs, an appraisement stamp upon the written valuation is sufficient under the statute 46 Geo. 3, c. 43, and an award stamp is not necessary. *Leeds v. Burrows*, 12 East, 1; *S. P. Perkins v. Potts*, 2 Chit. 399.

The word "appraiser" in statute 46 Geo. 3, c. 43, s. 4, does not mean a person who, in one single instance only, shall happen to make a valuation for another; but is intended to designate persons who exercise the calling or occupation of an appraiser, and who bear a known character as such. *Atkinson v. Fell*, 5 M. & S. 240.

Therefore, a valuation made of parish lands by two resident parishioners appointed for that purpose by parish officers, for the purpose of equalizing a rate for the relief of the poor, does not require an appraisement stamp, within the statute, it being merely for the information of the parties employing the valuers. *Id.*

If a broker is called to prove the value of goods, he need not produce an inventory written on an appraisement stamp. *Stafford v. Clarke*, 1 C. & P. 25—Burroughs.

#### APPRENTICE.

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##### I. CONTRACT OF APPRENTICESHIP.

###### 1. *General Requisites.*

No agreement whatever will constitute an apprenticeship unless there are indentures executed. *Rex v. Whitchurch*, 1 Bott's P. L. 532; *Burr. S. C. 540*; *Rex v. Margran*, 5 T. R. 153; *Rex v. Mawman*, *Burr. S. C. 290*; *Rex v. Stratton*, *Burr. S. C. 272*; *Rex v. Kingweare*, *Burr. S. C. 839*.

A contract to serve for three years, at so much per week, the master agreeing to teach the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship, if the instrument be sealed and stamped. *Rex v. Rainham*, 1 East, 531.

If an apprentice be bound, it is not necessary to the validity of his indenture, that the master should sign a counterpart. *Rex v. Fleet*, Cald. 31; *Rex v. St. Peter's on the Hill*, 2 Bott's P. L. 367.

An indenture by which an apprentice was bound for seven years, to serve one person for the first four years, and his own father for the last three, to learn two different trades, is a valid indenture. *Rex v. Louth*, 8 B. & C. 247; 2 M. & R. 273.

###### 2. *Stamp.*

*Operation of Statute 8 Anne, c. 9.*—The statute 8 Anne, c. 9, s. 39, makes void indentures of apprenticeship in which the full sum or sums of money received, given, paid, secured, or contracted for, are not truly inserted. It does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of the stamp duty. *King v. Low*, 3 C. & P. 690—Tenterden.

An undertaking by the mother of an apprentice, without the knowledge of her husband, to pay the master a sum of money beyond the premium inserted in the indenture and paid by the husband at the time of its execution (the stamp on the indenture being sufficient for both sums), does not make the indenture void under the act, the undertaking being void and no fraud being practised on the revenue. *Rex v. Burton, on Dunsmore*, 3 M. & R. 631; 9 B. & C. 872.

The consideration expressed in an indenture of apprenticeship was 4*l.*, to be paid to the master by a public charity: but the apprentice's mother privately agreed to pay, and did pay the master, after execution of the indenture, 1*l.* in addition: Held, that the indenture (though stamped) was void by s. 39, the full sum contracted for with or in relation to the apprentice, not being inserted. *Rex v. Baildon*, 3 B. & Adol. 427.

Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly: Held, well, though in fact only four guineas were paid. *Rex v. Keynsham*, 5 East, 309.

An indenture of apprenticeship is not void by that statute, although it was originally agreed between the master and the apprentice's father that a premium of 20*l.* should be paid, and the master afterwards, to reduce the amount of the duty, agreed to take 19*l.* 19*s.* 6*d.*, which was the sum inserted in the indenture and actually paid. *Shepherd v. Hall*, 3 Camp. 180—Ellenborough.

Nor is it necessary under that statute, to call on the party at the time of giving an indenture of apprenticeship in evidence, to make oath as to the amount of premium actually paid with the apprentice at the time he was bound. *Stewart v. Lawton*, 8 Moore, 414; 1 Bing. 374.

In indentures of apprenticeship the apprentice covenanted to provide for himself meat, drink, lodging, and physic in sickness, during the term, for which benefit to the master no additional duty was paid under sect. 45: the indentures were held to be admissible evidence; it not appearing that weekly payments, which the master covenanted to make to the apprentice during the term were not an equivalent. *Rex v. Walton in Le Dale*, 3 T. R. 515.

If the friends of an apprentice covenanted to maintain him, and to provide him with clothes, it is not such a benefit as is liable to the duty imposed by s. 45. *Rex v. Leighton*, 4 T. R. 732; Nolan, 100.

A master stipulating for 4*d.* out of every 1*s.* of the earnings of his apprentice, is no benefit to him within the statute, for which an additional duty is to be paid, being by law entitled to the whole. *Rex v. Wantage*, 1 East, 601.

Nor is an agreement before the binding to pay the master 30*s.*, to clothe the apprentice, within the statute, and the indenture is not void for want of inserting it therein. *Rex v. North Onam*, Burr. S. C. 145; 2 Stra. 1132.

Nor is an agreement by the father of an apprentice, to provide necessaries for his son, in consideration of a weekly sum to be paid him by the master, within the statute. *Rex v. Porteus*, Burr. S. C. 834.

The premium given by the parish officers upon the binding out of a poor apprentice, need not be set out in the indenture in words at length; such an indenture being exempted from any duty by sect. 40; and the insertion of the premium being required for no other purpose but to ascertain the amount of the duty. *Rex v. Oadby*, 1 B. & A. 477.

Neither is any duty payable for any consideration money, unless it be given to the master or mistress of the apprentice. *Rex v. Saint Petros, Dartmouth*, 4 T. R. 196.

No action can be maintained by the plaintiff on a note given to him by the defendant, as an apprentice fee with his son, who was to be bound to the plaintiff, if it appear that the indenture executed was void by the statute, for want of the insertion of such premium therein, and a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and until he absconded. *Jackson v. Warwick*, 7 T. R. 121.

An assignment of a parish apprentice is not subject to the regulations imposed by the statute, and need not, therefore, be stamped within two months, nor must the consideration paid for such assignment be set forth in it. *Rex v. Ide*, 2 B. & Adol. 866.

An unstamped assignment of a parish apprentice stated that D. E. the new master, in consideration of 3*l.* 10*s.* paid him by H., the old master, agreed to accept the apprentice, &c.:—Held, that parol evidence was admissible to show that the money paid on the assignment was parish money; and, therefore, that the instrument did not require a stamp. *Lex v. Langunnor*, 2 B. & Adol. 616.

*Revenue Stamp Acts.*—The amount of duty is now regulated by 55 Geo. 3. c. 184, *sched.* 1 *tit.* Apprenticeship.

An indenture to two masters, to serve them consecutively in distinct trades, requires only a single stamp. *Rex v. Louth*, 2 M. & R. 273; 8 B. & C. 247.

The stamp duty on indentures of apprenticeship, where the premium exceeds 50*l.* and is less than 100*l.* is 50*s.* by 48 Geo. 3. c. 149. *Gye v. Felton*, 4 Taunt. 876.

An indenture of apprenticeship, executed before the passing of the statute 44 Geo. 3. c. 98, must be stamped with the premium stamp within the time prescribed by the statute 8 Anne, c. 9; and, where such an indenture was stamped at the time of its being produced in evidence with the stamp required by the 55 Geo. 5. c. 184, but not within the time prescribed by the statute of Anne:—Held, that the indenture was altogether void. *Rex v. Chipping Norton*, 5 B. & A. 412.

An agreement for the assignment of an apprentice from one master to another, must be stamped, by statute 23 Geo. 3. c. 5. *Rex v. St. Paul's Bedford*, 6 T. R. 452.

An unstamped indenture of apprenticeship, recited that a premium had been paid with the ap-

prentice; but added, that it was paid out of a charitable fund belonging to the parish: the master also proved that the premium had been paid by the parish officers, who informed him at the time that it came out of such fund:—Held, that the fact of payment being proved, the recital in the indenture, and the declaration of the parish officers, could not be admitted in evidence, so as to bring the case within the exception in the 44 Geo. 3, c. 98, s. 190, and that the indenture being unstamped, was void. *Rez v. Skeffington*, 3 B. & A. 352.

A binding with the consent of trustees of funds bequeathed for that purpose, though they do not execute, is exempt from duty. *Rez v. Quainton* 2 M. & S. 238.

A pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term; and he did so. It did not appear that the trustees were privy to this engagement:—Held, that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master, within the 55 Geo. 3, c. 184, sched. part 1, tit. Apprenticeship, or, assuming that it was, then it was void as being a fraud on the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. *Rez v. Aylesbury*, 3 B. & Adol. 569.

In an indenture of apprenticeship, a covenant by the apprentice to allow his master 2s. per week, and to have wages, and provide for himself during the term, does not require the additional stamp required by 44 Geo. 3, c. 98, upon an indenture, where a sum of money is contracted for with the apprentice. *Rez v. Bradford*, 1 M. & S. 151. And see *Aldridge v. Ewen*, 3 Esp. 188.

On parol evidence of the existence of an indenture, the sessions may presume that it was stamped, and the duty paid. *Rez v. Badby*, 1 Bott's P. L. 549.

The sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for 7 years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture, had relieved him for the last 12 years, was properly stamped in proportion to the apprentice fee of 12*l.* received by the master, although the deputy-registrar and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or inrolled during that period; and the judgment of the justices was confirmed in *K. B. Rez v. Long Buckley*, 7 East, 45; 3 Smith, 92.

**Effect of Want of Stamp.**—An indenture of apprenticeship, unstamped, is void. *Rez v. Holbeck*, Burr. S. C. 198; *Rez v. Llanvair*, Burr. S. C. 236; *Rez v. All Saints*, Burr. S. C. 656.

But not so where the consideration money was

only sixpence. *Rez v. Yarmouth*, Burr. S. C. 379: say, 107; *S. P. Baxter v. Faulam*, 1 Wils. 129.

And if the indenture be not stamped, and the duty not paid, it cannot be given in evidence, nor is it available for any purpose whatsoever. *Cuerden v. Leland*, 1 Bott's P. L. 545.

An agreement for an apprenticeship must be stamped in order to confer a settlement by service under it. *Rez v. Ditchingham*, 4 T. R. 769; Nolan, 109; *S. P. Rez v. Edgeworth*, 3 T. R. 353.

### 3. Length of Term.

The statute 5 Eliz. c. 4, avoided all indentures of apprenticeship other than for seven years: but the 54 Geo. 3, c. 96, repealed that statute, and enacted that it might be lawful for persons to take apprentices though not according to the provisions of the statute, 5 Eliz.

The stat. 5 Eliz. c. 4, was construed as rendering indentures made for a less time voidable only, and not void. *Gray v. Cookson*, 16 East, 13; *S. P. Rez v. St. Nicholas*, Burr. S. C. 91; 2 Stra. 1066.

But such indenture was not to be avoided by the mere act of an apprentice absenting himself from his master's service, which is an offence under the statute 20 Geo. 2, c. 19. *Id.*

And, generally, it seems that no act could be relied on as such an avoidance, in an action of trespass against the convicting magistrates, except it appeared on the face of the conviction. *Id.*

So, a refusal of the apprentice to return into the service of his master, when urged to it by the magistrates themselves in the course of the inquiry, upon the complaint of the master, on a prior absenting himself by the apprentice from the service, was not available in support of such action, against the conviction. *Id.*

Where an indenture was for five years, the father covenanting for the due service of the apprentice, and the son avoided the indenture by leaving the service, it was held void against the father also. *Guppey v. Jennings*, 1 Anst. 256.

The statute related only to infants, and not to adults. *Smedley v. Gooden*, 3 M. & S. 189.

Where an apprentice was bound for five years only, and a bond was given conditioned for his service, the binding being void by the statute, as not being for seven years, the bond was also void. *Burnly v. Jennings*, 6 Esp. 8—Ellenborough: *S. P. Jackson v. Warwick*, 7 T. R. 121.

But it was held that it was no objection to an action on a promissory note, that it was given as part of the consideration of an indenture of apprenticeship for less than seven years, by being antedated; such indenture being only voidable: nor did the consideration of the note fail because the apprentice was discharged by a magistrate after two years, on account of the master having enticed him to commit felony; particularly when the apprentice fee was to be paid in the first instance, though in that case a note was taken for part of it, payable at a distant day. *Grant v. Welchman*, 16 East, 207.

4. *Dissolution.*

Apprenticeship is determined by the death of the master. *Rez v. Clark*, Burr. S. C. 782.

And by the indenture being given up, though not cancelled. *Rez v. Titchfield*, Burr. S. C. 511.

And by the master telling his apprentice, "he might go where he pleased," and giving up his indenture. *Rez v. Notton*, Burr. S. C. 629.

So, where a master receives money of his apprentice, who is of full age, to vacate his indenture, the relation is dissolved, although the indenture remains uncanceled. *Rez v. Devonshire*, (*Justices*), Cald. 32.

The apprenticeship of an infant may be dissolved with the consent of all parties concerned. *Rez v. Weddington*, Burr. S. C. 766. *S. P. Rez v. Spaurston*, Burr. S. C. 801.

Where there has been such an agreement between the master and the apprentice to give up the indentures, that, to an action of covenant brought by the former, the latter could plead the matter in bar; the indentures are considered as cancelled, though the indentures still subsist in fact. *Rez v. Harberton*, 1 T. R. 139.

A verbal agreement by a master, "upon being paid three pounds, to set his apprentice at liberty, and to give him up his indenture," does not discharge the indenture. *Rez v. Warden*, 2 M. & R. 24.

The mother of an apprentice, before the expiration of his apprenticeship, applied to his master to give him up to her, to which he consented, and the apprentice left him; but the indenture remained in the hands of the overseers, and was never applied for, or given up:—Held, that the apprenticeship was not put an end to by the agreement between the parties. *Rez v. Skeffington*, 3 B. & A. 382. See also *Rez v. Warminster*, 3 B. & A. 121.

The bankruptcy of the master does not discharge the indenture, although he absconded and afterwards delivered it to the person to whom the apprentice had hired himself as a yearly servant. *Rez v. Shepton*, 2 Bott's P. L. 395.

Where an apprentice was bound for seven years to A., and served him in his house between five and six, and resided at his mother's for the remainder of the term, having previously agreed with A. that he might work for whom he pleased on his paying a weekly sum to A., who also during the term occasionally gave him work for which he was not paid:—Held, that this was not a continuance of the service to A. for seven years under the indenture. *Rez v. Inman*, 4 B. & A. 55.

Where the master had agreed by indorsement (unstamped) on the indenture to cancel it, "provided the apprentice made no engagement or entered into any person's service in the town of N.:" it was held, that the apprentice setting up a trade for himself in N. was a breach of the condition, which entitled the master to recal him back into his service. *Gray v. Cookson*, 16 East, 13.

5. *Proceedings on.*

The covenants in an indenture of apprentice-

ship are distinct and independent of each other. *Winstone v. Linn*, 2 D. & R. 465; 1 B. & C. 460.

A declaration on an indenture for a breach of a covenant whereby a master covenanted to instruct the apprentice in the business of a tobacconist for four years, and to board and lodge him during that time, alleged, first, a general breach in the terms of the covenant; secondly, a particular breach on the 13th July, averring a refusal to instruct on that day, or at any other time; and thirdly, a similar breach as to boarding and lodging on the same day, and alleging that on that day the master compelled the apprentice to quit the service, and refused to maintain and keep him, contrary to the effect of the covenant. Pleas, first, performance of the covenant until the 10th July: secondly, willingness to maintain and keep the apprentice during the whole term; but that from the date of the indenture until the 10th July the apprentice would not truly and faithfully serve the defendant, nor attend to his business, but on the 10th July refused so to do; and setting forth various acts of misconduct on his part during the interval mentioned; and concluding, that on the 10th July, the apprentice, against the orders of the defendant, quitted the service, declaring that he would never return again, whereby the defendant was hindered and prevented from performing his covenant; thirdly, readiness to instruct and maintain according to the effect of the covenant, but averring neglect and refusal of the apprentice to obey the defendant's lawful commands on the 10th July, and a refusal any longer to serve him, and absconding on that day, whereby he was prevented from performing his covenant: fourthly, averring a wrongful absence of the apprentice on the 10th July, whereby, &c.: and fifthly, a denial that the defendant had compelled the apprentice to quit his service. And the replication took issue on the first and fifth pleas: and as to the others, there was a confession of the breaches of duty mentioned therein; but replying, that, on the 13th July the apprentice returned to the defendant, and tendered and offered himself to serve and obey him according to the indenture, but that the defendant upon request refused to receive him, &c. And the defendant demurred specially to the replication, and assigned for causes that the plaintiff had by his declaration complained of a continued breach of covenant in not instructing, &c. the apprentice, from the time of making the indenture to the commencement of the suit; and that, although the second plea answered to the whole time in the declaration after the 10th July, yet that the plaintiff had omitted to reply to such parts of the defendant's second plea as related to not instructing, &c. the apprentice on the 10th July, and between that time and the 13th July:—Held, that the plaintiff's claim was not entire, but divisible; and covered every part of the time during which the master refused to instruct the apprentice; and consequently, that there was no discontinuance:—Held, also, that the replication was not a departure from the declaration, the gravamen of the complaint being that the defendant had compelled the apprentice to quit his service, and the replication showing the manner in which he had



so done:—Held, also, that, as the covenants were independent covenants, the acts of misconduct on the part of the apprentice stated in the second plea, were not an answer to an action brought for a breach of the covenant by the master, to instruct and maintain the apprentice during the term agreed upon by the indenture. *Winstone v. Linn*, 2 D. & R. 465; 1 B. & C. 460.

Covenant, by the father of an apprentice, against the master, for not teaching the apprentice: plea, that defendant did teach, until the apprentice ran away, and never returned: replication, that, on a certain day, defendant refused then or ever to take back the apprentice, and thereby discharged him: rejoinder, that the apprentice had previously enlisted as a soldier, and that plaintiff never requested defendant to take the apprentice when he was able to return: sur-rejoinder, that soon after the apprentice had enlisted, defendant refused then or ever, to take him back, and wholly discharged him: demurrer: Held, that the surrejoinder was bad, and no answer to the rejoinder; and that the plea was a good answer to the action; and that the plaintiff should have alleged an offer to return the apprentice. *Hughes v. Humphreys*, 9 D. & R. 715; 6 B. & C. 680. And see *Cunningham v. Hill*, 3 B. & A. 59.

#### 6. Proof of.

[See EVIDENCE.—Proof of private Documents.]

Parol evidence of an indenture, not produced, is in general inadmissible. *Rez v. St. Helens*, Burr. S. C. 735.

Unless under particular circumstances. *Rez v. St. Helens*, Burr. S. C. 292: *S. P. Rez v. East Knogle*, Burr. S. C. 150.

But under circumstances an indenture may be presumed. *Rez v. St. Michael's*, Burr. S. C. 731.

An averment in a declaration on the stat. 8 Ann. c. 9, against the master of an apprentice, for not inserting the true consideration in the indenture, "that A. B., the apprentice, by a certain indenture, executed on, &c., put himself apprentice to the defendant," &c. may be proved by the production of that part of the indenture executed by the defendant, in which it is recited that A. B. had put himself apprentice, &c. *Burleigh v. Sibbes*, 5 T. R. 465.

Where, in the absence of the usual proof in support of a settlement by apprenticeship, it appeared that the pauper, when a boy, had lived for three years with his master, and then ran away; that, twenty years since, a fire had happened in the apartment in which the pauper's father lived, and destroyed every thing he had; that the father and mother of the pauper were both dead; that the pauper's master, and the wife of the latter, were also dead; that the master had left no property at his decease, and that no relatives of his were to be found; that a fellow-apprentice of the pauper had seen in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; and that, after the pauper had left his master's service, he married, and the parish in which he was supposed to have served as an apprentice, relieved his wife by re-

ceiving her into the workhouse:—Held, that this was sufficient evidence to warrant the sessions in presuming a legal binding and service as an apprentice, so as to confer a settlement. *Rez v. St. Mary-lebone*, 4 D. & R. 475.

It was proved by a pauper that he had been bound apprentice twenty-three years ago, by the overseers of the parish to A. B., for seven years, that the indenture was signed and sealed, and that he served the seven years, and that A. B. had the indenture; that, when the apprenticeship expired, the pauper asked A. B. for the indenture, who said the overseers had it:—Held, that the declarations of A. B. who might have been called as a witness, were not admissible in evidence, and that parol evidence of the contents was not admissible, the indenture not having been sufficiently accounted for. *Rez v. Denio*, 7 B. & C. 620; 1 M. & R. 294: *S. P. Rez v. Castleton*, 6 T. R. 236.

## II. RIGHTS AND LIABILITIES OF PARTIES.

### 1. Of Master.

Generally.]—It was doubted whether a master who exercised a trade not within the stat. 5 Eliz. c. 4, could legally take an apprentice. *Gye v. Felton*, 4 Taunt. 876.

That statute is repealed by 54 Geo. 3. c. 96.

Seemable that an infant may take an apprentice. *Rez v. St. Petrox, Dartmouth*, 4 T. R. 196.

But the binding an apprentice to a feme covert is void. *Rez v. Guildford*, 2 Chit. 284.

The interest of a master in his apprentice is a mere personal trust; and the indentures not being assignable in his life time, except by custom, and with the consent of the apprentice, the master's executors cannot maintain debt on a bond for performance of the covenants in the indenture, unless his executors are named. *Baxter v. Burfield*, 1 Bott's P. L. 581.

If a lad goes on liking, with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor, perhaps, for so long a time as he conducts himself with propriety; but if he stays for many months, behaving ill, after complaints to his father of his misconduct, it will be for the jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging. *Earratt v. Burghart*, 3 C. & P. 381—Tenterden.

So, in another case, under similar circumstances, it was held, that, if no fresh agreement were entered into, the master was not entitled to charge for the board and lodging of the lad whom he employed in his trade; and by consequence, could not set it off in an action by the lad's father for money lent. *Wilkins v. Wells*, 2 C. & P. 231—Garrow.

So, where a surgeon agreed with defendant to take his son an apprentice in consideration of a premium; and after the son had served a short time, the agreement was broken off on account of the refusal to pay the expense of the stamp for the

indenture:—Held, that the surgeon could not recover damages for a breach of the agreement, nor for the board and lodging of the son during the time he remained with him. *Keene v. Parsons*, 2 Stark. 506—Abbott.

If an apprentice absent himself from his master, and his master take him back, and an action be afterwards brought for such absention, the taking back, to constitute a defence, must be specially pleaded. *Wright v. Gihon*, 3 C. & P. 583—Best.

The staying out by an apprentice on a Sunday evening, beyond the time allowed him, is not such an unlawful absention of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture. *Id.*

The statute 10 Geo. 2, c. 31, s. 5, after reciting the inconvenience which happens by watermen, &c. taking apprentices before they are housekeepers, or have any settled habitation for themselves or their apprentices, enacts, That it shall not be lawful for any waterman, though a freeman of the (waterman's) company, or his widow, to take and keep any person as his or her apprentice, unless he or she shall be the occupier of some house or tenement wherein to lodge him or herself and such apprentice; and that he or she shall keep such apprentice in the same house or tenement wherein he or she shall lodge or lie, on pain of forfeiting ten pounds for every offence. By section 4, it is provided, That no such freeman, or freeman's widow, shall take or retain more than two apprentices at the same time, under a penalty.

Any contract to take an apprentice, entered into by a freeman or widow, not being an occupier of some house, &c., or having already two apprentices, is prohibited; and, therefore, where a pauper bound himself by indenture of apprenticeship to serve the widow of a waterman, she not having such house, &c., but it being understood that he was to live at the house of a freeman of the company (which he did), and to serve him conformably to the indenture, he having two other apprentices at the time, such indenture was absolutely void. *Rez v. Gravesend*, 3 B. & Adol. 240.

*Harbouring apprentices.*—The master may have an action against those who detain the apprentice after knowing him to be such. *Rez v. Edwards*, 7 T. R. 745.

But an action does not lie for harbouring an apprentice, if the master at the time of binding was not a housekeeper, and twenty-four years of age. *Gye v. Felton*, 4 Taunt. 876.

Quære, whether, in an action for harbouring an apprentice, it be necessary to prove that the master has made oath that the premium mentioned in the indenture is the whole premium he received? *Id.*

*To earnings of Apprentices.*—A master is entitled to maintain assumpsit for the work and labour of his apprentice, against another who har-

bours him after desertion. *Feater v. Stewart*, 3 M. & S. 191.

So the master of an apprentice who has been seduced from his service to work for another person, may waive his action for the tort, and bring an action of indebitatus assumpsit for work and labour done by his apprentice, against the person who tortiously employed him. *Lightly v. Clouston*, 1 Taunt. 112.

So the captain of a ship of war, detaining an impressed apprentice after notice, is liable to the master for wages for the service of the apprentice. *Eades v. Vandeput*, 5 East, 39, n.; 4 Dougl. 1.

Even if the captain have knowledge of the fact, from the apprentice's assertion merely. *Id.*

The prize money gained by an apprentice, serving on board a letter of marque ship, does not belong to the master of the apprentice, the usage being proved to be, that such money is the property of the apprentice, (Ashhurst, J., dissentiente.) *Carson v. Watts*, 3 Dougl. 350.

*Impressment.*—If an apprentice be impressed into the sea service, the master cannot sue out a habeas corpus to bring him up to be discharged, though the apprentice may. *Rez v. Edwards*, 7 T. R. 745; *S. P. Anon.* 1 Chit. 654, n.; *Rez v. Reynolds*, 6 T. R. 497.

Even if the apprentice, of the age of eighteen, voluntarily enter into the sea service, or he is anxious to return to his master's service. *Id.*

Nor where the apprentice is impressed, if he be willing to enter into the king's service. *Ex parte Lansdown*, 5 East, 38.

So a habeas corpus was refused to discharge an apprentice from a king's ship, where the apprentice did not allege that he was detained against his own consent. *Ex parte Grocut*, 5 D. & R. 610.

The master, however, may have a warrant to the commander of the vessel, to have the apprentice discharged. *Id.*

Such warrant is granted by the Chief Justice of K. B. *Apprentices' Case*, 1 Leach, C. C. 203.

So an apprentice, enlisted without his master's permission, may be discharged by the Lord Chief Justice. *Rez v. Parkins*, 2 Ld. Ken. 295.

## 2. Apprentice.

An infant may bind himself apprentice by indenture, because it is for his benefit. *Rez v. Arundel*, 5 M. & S. 257. And see *Keane v. Boycott*, 2 H. Black. 511.

It was once doubted whether an indenture of apprenticeship, made by an infant, being for his benefit, was voidable by him; but it was held, that it was not avoided by the act of his leaving his master's service, and going into the service of another. *Ashcroft v. Bertles*, 6 T. R. 652.

Nor is going into the king's service with his master's approbation such an avoidance. *Rez v. Hindringham*, 6 T. R. 557. And see *Rez v. Mountsorrel*, 3 M. & S. 497.

The indenture cannot be avoided when the apprentice is before a magistrate, charged with

misbehaviour under the indenture. *Rex v. Boer-  
erd*, Cald. 26.

Nor by the apprentice's absenting himself from the service. *Smedley v. Gooden*, 3 M. & S. 189.

Quere, whether an apprentice by the custom of London is compellable to serve after twenty-one? *Ex parte Eden*, 2 M. & S. 226.

A return to a habeas corpus for the discharge of an apprentice above the age of 21, stating the custom of London, that every citizen and free-man of the city may take as an apprentice any person above the age of 14, and under 21, to serve for 7 years and more, must show that the apprentice was within those ages when he bound himself apprentice; for the court will not intend that from matter debors the return. *Id.*

The Court of K. B. has no power to discharge an apprentice from his indentures who has bound himself when an infant to serve till 25, and who when he came of age elected to avoid the indentures, after which he had been committed to the house of correction for a misdemeanour in absenting himself from his master's service, when it appeared by the return to a writ of habeas corpus that he was committed, upon a regular conviction, by two magistrates. *Ex parte Gill*, 7 East, 376; 3 Smith, 369.

But the court said, that such apprentice, having made such objection to the validity of the indenture before the convicting magistrates, who disregarded it, had a remedy against them. *Id.*

An apprentice, of seventeen years of age and upwards, bound by indenture (which stated her to be fourteen) for seven years, is entitled to be discharged at twenty-one. *Ex parte Davis*. 5 T.R. 715.

An infant can do no act to bind himself, except such as is clearly for his own benefit; therefore, though he may bind himself an apprentice, he cannot dissolve the indenture. *Rex v. Wigston*, 5 D. & R. 339; 3 B. & C. 484.

Where an infant bound himself apprentice for seven years, and after serving three years quarrelled with his master, paid him 6*s.* for the remainder of his time, and then left him, and bound himself to another master in another parish:—Held, that the apprentice had no power to dissolve the first apprenticeship, and that the second, therefore, was invalid, and conferred no settlement. *Id.*

The statute 28 Geo. 3, c. 48, s. 4, makes void all indentures whereby children under eight years of age are bound apprentices to chimney sweepers. *Rex v. Hipswell*, 8 B. & C. 466; 2 M. & R. 474.

An indentured apprentice deserting his service, on entering on board ship cannot maintain an action for wages. *Bright v. Lucas*, Peake's Add. Cas. 121—Kenyon.

### 3 Father.

A father cannot bind his infant son an apprentice without his assent; therefore, an indenture of apprenticeship executed by the master and

father, but not by the apprentice himself, was held to be invalid. *Rex v. Arnesby*, 3 B. & A. 584.

An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice. *Rex v. Ripon*, 9 East, 295.

Where the master and father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and the son should receive half his earnings, and the master the other half; under which the boy served out the time as an apprentice:—The Court of K. B. held, that this agreement between the father and master (to which the son was no party), not binding the son, or the father for him, to any service to the master, but the son's service in fact being merely voluntary, was no apprenticeship in point of law. *Rex v. Cromford*, 8 East, 25.

Money paid as a premium for an apprentice, by a parent to a master under an indenture, cannot be recovered back if such indenture be void for not having the amount of the premium inserted therein; although the statutes relative to the duties payable on such indentures impose a penalty on the master alone for such omission; as the parent, by executing the instrument, must be considered to be aware of its illegality, and therefore in *pari delicto* with the master. *Stokes v. Twitche*, 2 Moore, 538; 8 Taunt. 492.

In a common indenture of apprenticeship under 5 Eliz. c. 4, between the father, son, and master, the father is answerable for what is to be performed by the son. *Branch v. Errington*, 2 Dougl. 518.

In an action of covenant on an indenture of apprenticeship, by the master against the father, the declaration assigned for breach, that the apprentice absented himself from the service, and the defendant pleaded that his son faithfully served till he came of age, and that he then avoided the indenture:—Held, that this was no answer to the action, as it did not discharge the father's liability on the covenant, which was that his son should serve for seven years. *Cum-  
ing v. Hill*, 3 B. & A. 59. And see *Hughes v. Humphreys*, 6 B. & C. 680; 9 D. & R. 715.

### III. JURISDICTION OF JUSTICES.

The stat. 20 Geo. 2, c. 19, s. 4, enabling two magistrates, "upon application or complaint made upon oath, by any master against such apprentice," as is described in the act, touching any misdemeanour in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master, and verified by the oath of another person. *Finley v. Jowle*, 12 East, 248.

This statute is not repealed by 6 Geo. 3, c. 25, s. 1, empowering the justices to oblige an apprentice, absenting himself from his master's service, to serve out, after the expiration of the apprenticeship, such time of absence, or to make satisfaction for it; and in default of such satisfaction, to commit the apprentice; for, the remedy given

to the master, by the latter statute, is cumulative to the punishment inflicted on the apprentice by the former statute for his offence. *Gray v. Cookson*, 16 East, 13.

A conviction on the 4 Geo. 4, c. 34, of an apprentice for misbehaviour, must show on the face of it that the defendant is an apprentice within the 4 Geo. 4, c. 29, which extends previous acts to apprentices upon whose binding out no larger sum than 25*l.* has been paid. *Rez v. Taylor*, 7 D. & R. 622.

The sessions may order an apprentice to be discharged, and money to be returned, though bound to a trade not mentioned in the act; but the order must state that the defendant appeared, or was summoned and made default; and that the master had received money with the apprentice. *Rez v. Aimes*, 1 Bott's P. L. 574.

#### IV. PARISH APPRENTICES.

##### 1. Statutes.

By 43 Eliz. c. 2, s. 5, churchwardens and overseers, or the greater part of them, by the assent of any two justices, may bind children apprentices; if males, till they are twenty-four years of age, and, if females, until twenty-one, or time of marriage.

By 51 Geo. 3, c. 80, (which has a retrospective operation) indentures signed by two persons only, acting as churchwardens as well as overseers, are as good as if executed by distinct persons as churchwardens, and distinct persons as overseers, as required by the statute of Elizabeth.

By 56 Geo. 3, c. 139, s. 11, no indenture, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices, under their hands and seals.

Sect. 2 enacts, that in all cases where the residence or establishment of business of the person to whom any child shall be bound, shall be within a different county from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed as well by two justices of the peace for the county or district within which the place shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve.

It has been held that in such case the indenture must be allowed by four distinct persons, two of them being justices of the county from which the apprentice is to be bound, and the other two being justices of the county into which he is to be bound. *Rez v. Shipton*, 8 B. & C. 772.

By sect. 7, children are not to be bound until they are nine years of age.

Justices may appoint apprentices at any age beyond that of nurture, except, perhaps, in cases of husbandry. *Rez v. Saltern*, Cald. 444.

By 1 & 2 Geo. 4, c. 32, indentures signed by one church or chapelwarden only, where there is one only, are sufficient.

By 3 & 4 Will. 4, c. 63, s. 1, reciting the last statute, it is enacted, that all indentures allowed by two justices, acting as well for the county or district within which the place by the officers of which the child shall be bound shall be situated, as for the county or district within which the place shall be situated wherein such child shall be intended to serve, shall be as good as if allowed by two justices acting for each respectively.

Sect. 3, provides, that indentures with the corporation seals of directors, guardians, or other corporations authorized to bind children, shall be sufficient.

By sect. 4, indentures for binding parish apprentices within cities, boroughs, or towns corporate, shall be allowed by two justices, one acting for the county, and the other for the corporate jurisdiction.

##### 2. To whom.

A person occupying lands in a parish, but living out of it, is compellable to receive a parish apprentice. *Rez v. Clap*, 3 T. R. 107.

Where several persons hold land in partnership, some of whom actually reside on and occupy it, and others reside at a distance in another parish, the latter, as well as the former, are bound to take parish apprentices if in other respects they are fit persons to take them. *Rez v. Barwick*, 7 T. R. 33.

So although it is enacted by 20 Geo. 3, c. 36, relative to the binding of poor apprentices within particular incorporated districts, that no person shall be bound to receive any such apprentice, unless he be an inhabitant and occupier in the parish where such child lives, it is not necessary that the master should actually reside in the parish; if he be an occupier there it is sufficient, for inhabitant and occupier are for this purpose synonymous terms. *Rez v. Tunstead and Happing Hundreds*, 4 T. R. 523.

'Incorporeal property (as tithes) makes the holder liable to take parish apprentices. *Rez v. Saltern*, Cald. 444.

A poor child may be bound apprentice to the inhabitant of another parish. *Rez v. St. Margaret's*, Burr. S. C. 728: *S. P. Anon. Loft*, 79.

Quære, whether a parish apprentice can be bound to a person living abroad, though retaining property in the parish? *Rez v. Spreyton*, 3 B. & Adol. 818.

##### 3. By whom.

The stat. 43 Eliz. c. 2, does not require absolutely two church wardens in every parish for the management of the poor; and, therefore, an indenture binding out a poor apprentice, by one churchwarden (where by custom there was but one,) and one overseer, was held to be good with-

in the fifth section of that statute, which requires it to be executed by the greater part of the churchwardens and overseers. *Rez v. Skilton (Earl)*, 1 B. & A. 275.

Since the 13 & 14 Car. 2, c. 12, an indenture executed by the overseers of a township which has no churchwardens or chapelwardens, and maintains its own poor separately, is valid, although neither of the churchwardens of the parish at large within which the township is situate join in the execution. *Rez v. Nantwich*, 16 East, 228.

An indenture, executed by W. S. churchwarden and J. G. overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet, as required by stat. 13 & 14 Car. 2, c. 12, s. 21, and only one churchwarden, by custom, in the same place. *Rez. v. Hinckley*, 12 East, 361.

Where a parish is incorporated with others for the maintenance of its poor, and a guardian is appointed under the 22 Geo. 3, c. 83, the churchwardens and overseers may still bind out poor children apprentices, and the indentures need not be signed by the guardian. *Rez v. Lutterworth*, 5 D. & R. 343; 3 B. & C. 487.

Where a poor child was bound apprentice by two persons styling themselves churchwardens and overseers, who had been appointed overseers at a time when one of them was churchwarden, who continued sole churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place, it was held that the 43 Eliz. c. 2, s. 5, was not satisfied. *Rez v. All Saints, Derby*, 13 East, 143.

The statute 51 Geo. 3, c. 80, extends to parishes where there are three officers only, one of whom acts as churchwarden as well as overseer; and, therefore, an indenture in such a case, signed by two parish officers, one of whom acted in a double capacity, was held to be valid. *Rez v. St. Margaret's, Leicester*, 2 B. & A. 200.

And notwithstanding that statute, an indenture signed by two parish officers, one of whom acted in the double capacity of churchwarden and overseer, was held good. *Rez v. Stoke Golding*, 1 B. & A. 173.

#### 4. Assent of Justices.

*When Required.*—The 56 Geo. 3, c. 139, applies to cases where the binding is either directly or indirectly by the parish officers, the first ten sections applying to cases where the parish officers were parties to the indenture, the eleventh to cases where they were not actual parties to the indenture, but procured the binding. *Rez v. St. Peter (Herefordshire)*, 1 B. & Adol. 916.

A. intending from charitable motives, to apprentice a poor person, collected a sum of money for that purpose from several individuals, and, among others, from the overseers of three different parishes, though there was no evidence

that the person belonged to either; and the sums given by the overseers were charged and allowed them in their respective accounts. With the sums so collected, and with money of his own, A. paid the premium of apprenticeship. The sessions thought that this was not a binding by the parish officers; that the payments by the several parishes were voluntary; and that the indenture was one within 56 Geo. 3, c. 139, s. 31, which would have required the assent of two justices: Held, that the decision was right. *Id.*

Lands were devised for the relief of the poor of H., one half of the revenue to be employed for the relief of widows, the other half towards binding out apprentices. The rents were received by the churchwardens, and not mixed with the poor's rates; but kept in a distinct account. A parishioner of H., not receiving parish relief, applied to the churchwardens to provide him with the means of apprenticing his son. The son was apprenticed, and the churchwardens paid the premium, costs of indenture, and expense of clothing the apprentice, out of the charity fund:—Held, that this was not an indenture by which an expense was incurred by public parochial funds, within 56 Geo. 3, c. 139, s. 11, and therefore not void for want of the approval of two justices according to that statute. *Rez v. Halesworth*, 3 B. & Adol. 717.

And in a similar case, where lands were devised to the churchwardens and overseers of L., and their successors, upon trust to apply the rents towards educating twenty poor children, and a part thereof yearly towards apprenticing eight of such children, to be chosen out and allowed by the said churchwardens and overseers and the principal inhabitants:—Held, that this also was not a public parochial fund within the meaning of the act. *Id.*

Where an apprentice is bound out of a parish by his father, but part of the expenses is paid out of the parochial funds, the indenture must be approved by two justices, or it will be void ab initio. *Rez v. Stoke Damarel*, 1 M. & R. 458; 7 B. & C. 563.

Before the execution of an indenture, the master said that the intended apprentice should have better clothes. The apprentice then applied to the parish officers, who agreed to give him 2l. on the execution of the indenture for the purpose of buying clothes, which they did accordingly:—Held, that the money paid by the parish officers was an expense incurred by reason of an indenture of apprenticeship, within the meaning of the 56 Geo. 3, c. 139, s. 11, and therefore that the indenture required the assent of two justices. *Rez v. Mattishall*, 8 B. & C. 733; 3 M. & R. 386.

Though an infant be a pauper in the parish workhouse at the time of the binding, and the parish officers pay the premium, still it is not necessary for them to sign the indenture, or that the justices should assent thereto, if the infant be not a parish apprentice within the meaning of the 43 Eliz. c. 2. *Rez v. Arundel*, 5 M. & S. 257.

*What Justices, and how testified.*—To make a

good binding, under 43 Eliz. c. 2, s. 5, one of the two justices who assent to it must be of the quorum; and this must be alleged. *Rex v. Woolstanton*, Burr. S. C. 129; 2 Stra. 1110.

The 56 Geo. 3, c. 139, s. 2, gives the justices a discretion to determine on the propriety of the binding generally, and not merely with regard to the fitness, respectively, of the master and apprentice. *Rex v. Mills*, 2 B. & Adol. 578.

At the time of the execution of the indenture by the master, it seems that the indenture ought to have the signature and allowance of two justices. *Rex v. Salters*, Cald. 444.

An indenture assented to by the two justices separately, is void. *Rex v. Hamstead Ridware*, 3 T. R. 380.

The assent of two magistrates is sufficiently signified by one of them first signing it alone, and being afterwards present when the other signs it. *Rex v. Winwick*, 8 T. R. 454.

An indenture stated that the overseers and churchwardens of M. in the county of Warwick, with the consent of justices of the said county, bound a pauper apprentice to T. W. of H., in the county of Leicester, and the justices in their written consent in the margin, described themselves as justices of the county aforesaid:—Held, that it sufficiently appeared that they were justices of the county of Warwick. *Rex v. Hinckley*, 1 B. & A. 273.

By an indenture which purported to be made between the churchwarden and overseers of the parish of D., in the county of Northampton, of the one part, and A. B. of Countesthorpe, in the county of Leicester, of the other part, it was witnessed that the said churchwarden and overseers of the parish of D., with the consent of two of his majesty's justices of the peace for the said county, dwelling in or near the said parish, had bound, &c.; the justices in their written consent in the margin of the indenture, described themselves as justices of the county aforesaid:—Held, that the words "county aforesaid," had the same meaning as the words "said county" in the body of the indenture; and, that it sufficiently appeared, by the reference to the latter words, that the consenting justices were justices of the county of Northampton. *Rex v. Countesthorpe*, 2 B. & Adol. 487.

The approval of the justices must be sealed as well as signed, by 56 Geo. 3, c. 139, s. 11, and if it is not the indenture is void. *Rex v. Stoke Damerel*, 7 B. & C. 563; 1 M. & R. 458.

And such an indenture, approved of under their hands only, is void, and not voidable. *Id.*

An indenture to which parish officers are parties is valid, if allowed by two justices under their hands only, though expense be incurred, but not clandestinely, by the parish funds, under sections 1 to 10. *Rex v. St. Paul, Ezeter*, 5 M. & R. 94; 10 B. & C. 12.

Section 11, requiring an allowance by two justices under their hands and seals, applies only to cases where expense is incurred by the parish funds, the parish officers not being parties to the indenture. *Id.*

### 5. Notice to Overseers.

Under the statute 56 Geo. 3, c. 139, s. 2, when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace. *Rex v. Threlkeld*, 4 B. & Adol. 229; 1 Nev. & M. 14.

Where, pursuant to an order of county justices overseers of a county parish bound one of their paupers apprentice to a master residing in a borough within the same county, having justices of exclusive jurisdiction therein, and gave no notice of such binding to the overseers of the borough parish:—Held, that the indentures were void by 56 Geo. 3, c. 139. (Abbott, dissentiente.) *Rex v. Newark-upon-Trent*, 4 D. & R. 745; 3 B. & C. 59.

### 6. Indentures.

An indenture by which a poor girl is bound to serve till 21, (without saying "or till marriage," as directed by the statute 43 Elizabeth,) is voidable and not void; and can only be avoided before justices. *Rex v. Stoke*, 1 Wils. 96; *S. P.* *Rex v. St. Petros*, Burr. S. C. 248.

Where a parish apprentice was bound by the order of two justices, which was referred to in the indenture, in which the date of the order was omitted: Held, that such indenture was void by the first and fifth sections of the statute 56 Geo. 3, c. 139, and consequently that it conferred no settlement by serving under it. *Rex v. Bewburgh*, 3 D. & R. 338; 2 B. & C. 222.

Parish apprentices may be bound for a shorter, but not for a longer time than the statutes mention. *Rex v. Woolstanton*, 1 Bott's P. L. 606.

The person to whom a parish appoint an apprentice, is concluded by signing the indenture; nor can parol evidence be admitted of any prior informality in such indenture. *Rex v. Salters*, Cald. 444.

The signing of the indenture by a parish apprentice is not necessary to its validity. *Rex v. Chalbury*, 1 Bott's P. L. 640.

If a poor boy be bound apprentice by the parish officers, with the consent of two justices of the county, to a master residing in a different parish and county, and all the parties (except the apprentice) sign the indenture, it is sufficient. *Rex v. St. Nicholas, Nottingham*, 2 T. R. 726.

### 7. Dissolution of Contract.

A parish apprenticeship cannot be dissolved, whilst the apprentice is under age, without the consent of the parish officers. *Rex v. Austery*, Burr. S. C. 441.

An infant parish apprentice and his master cannot by themselves vacate the indenture. *Rex v. Langham*, Cald. 126.

But the indenture may be dissolved, by an agreement betwixt the master and apprentice, after he has attained twenty-one years of age; and the assent of the parish officers is not necessary to the validity of such agreement. *Rex v. Hachburton*, 1 Bott's P. L. 615.

A parish apprentice may agree with his master to cancel his indentures at twenty-one though bound till twenty-four. *Bierlow v. Warslow*, 1 W. Black. 592; Burr. S. C. 562.

Since the act 32 Geo. 3, c. 57, for the regulation of parish apprentices, which recites, "that on the death of the master during the term of such apprenticeship, the agreement for service on the part of the apprentice is at an end;" but the covenant for maintenance on the part of the master still continues as far as his assets extend, or doubts have arisen with respect thereto, &c.: and then enacts that such covenants for maintenance of parish apprentices, with whom no more than 5l. shall be given, shall not continue in force longer than for three calendar months after the death of the master, &c., during which three months the apprentice shall continue to serve the executors, &c. or their appointee; and that within the three months, two justices of the peace, on application by the widow, or certain relatives of the master, may, by indorsement on the indenture, &c., direct such apprentice to serve out his time with the applicant; such applicant having lived with and been part of the family of the master, &c. at his death; but otherwise, that such apprenticeship shall be determined; and then it provides (sect. 5.) "that nothing thereinbefore contained shall extend to any parish apprentice, but to such only as shall be living with and make part of the family, or be in the actual employment of the original master, &c. or of any subsequent master, &c. appointed under the provisions of the act at the time of the death of such master, &c.:"—Held, that a parish apprentice, who was not living at the time of his mistress's death with her appointee under the provisions of the act, though living with her son by her individual consent, could not gain a settlement in another parish by serving another mistress with the consent of the son and assignee of the original mistress; given after the death of the original mistress; the contract of service being declared by the recital of the act to be at an end upon the death of the original mistress, unless continued in the manner described in the second, third, and fourth sections of the act: to which sections the proviso in the fifth section seems properly to apply. *Rez v. Sheephead*, 15 East, 59.

#### 8. Effect of Fraud.

An indenture of apprenticeship of an infant pauper, sanctioned by the overseers and magistrates acting bona fide, is not avoided by its having been fraudulently contrived between the parent and nominal master, for the purpose of obtaining a premium from the parish, and keeping such infant at home. *Rez v. Great Sheepy*, 2 M. & R. 286; 8 B. & C. 74.

Where the parish officers, wishing to put out a child at the age of nine years as an apprentice, upon the refusal of his mother, withdrew her parish allowance; but two years afterwards, she not being able to support him, went to the parish officer and consented to her son's being put out, and, by desire of the parish officer, chose a master, to whom the parish officer agreed to give

three guineas, &c.; and afterwards all the parties met, and went before the justices, who, thinking that the master had already a sufficient number of apprentices, refused to bind the son; whereupon the parish officer declaring, that, if he could not have him bound there, he would elsewhere, took the parties to an inn, and procured an indenture, which was filled up and executed, and the son, with the mother's consent, bound himself for seven years:—Held, that the sessions were not warranted in finding fraud, so as to defeat the settlement under the indenture. *Rez v. Kilby*, 2 M. & S. 501.

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#### APPROVEMENT OF COMMON—See COMMON.

### ARBITRATION.

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## I. SUBMISSION.

1. *Where there is a Cause depending.*

Where the parties intend to refer all disputes, the terms of the reference should be "of all matters in difference between the parties;" and when the reference is only intended to be of the matter in the particular cause, "of all matters in difference in the cause." *Smith v. Muller*, 3 T. R. 624.

It is best, in entering into a rule of reference, to stipulate that the reference shall not be defeated by the death of one of the parties before award made. *Toussaint v. Hartop*, 7 Taunt. 571; *Moore*, 287; *Holt*, 335.

After an order of reference has been made with the consent of counsel and attorney, the court will not set it aside on an affidavit by a party expressly denying his attorney's authority to refer, though the application be made before any step taken by the arbitrator, excepting the appointment of a meeting. *Filmer v. Delber*, 3 Taunt. 486; 1 Chit. 193, a.

Where matters in a suit in Chancery were ordered by the Vice-Chancellor, with the consent of the attorneys of the parties in the suit, to be referred to A. B.:—Held, upon error, that no sufficient authority to refer on behalf of the infant plaintiffs was shown, the attorneys in the suit having no such authority, and that therefore the submission was not mutual, and consequently the award was bad. *Biddell v. Douse*, 6 B. & C. 255; 9 D. & R. 404, reversing S. C. nom. *Douse v. Coxe*, 10 Moore, 272; 3 Bing. 20.

Parties may, if they choose, take arbitrators instead of the master in equity; and they must proceed in the same way as the master, and make the same report. *Dick v. Milligan*, 2 Ves. jun. 23.

By a reference to arbitration both at law and equity, the court divests itself of all judgement upon the facts. *Id.*

2. *When there is no Cause depending.*

[*Statute 9 & 10 Will. 3.*]—By 9 & 10 Will. 3, c. 15, merchants, traders, and others, desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, may, by arbitration, agree that their submission of their suit to the award or umpirage of any person shall be made a rule of any of his majesty's courts of record, and insert the agree-

ment in the submission, which may, on affidavit of the witnesses thereto, or any one of them, be made a rule of court, and enforced by the usual means.

The act was made to put submissions, where no cause was depending, upon the same footing as where there was, and is only declaratory of what the law was before in the latter cases. *Leucas v. Wilson*, 2 Burr, 701.

Under this statute a submission to arbitration may be made a rule of court in vacation. *In re Taylor*, 5 B. & A. 217.

The court have no authority under the statute to make a parol submission to an award a rule of court. *Ansell v. Evans*, 7 T. R. 1 *But see* — *v. Mills*, 17 Ves. 419.

Where, in the course of proceeding before an arbitrator, the parties agreed by parol that the arbitrators should determine as to a lease to be granted: it was held, that such an agreement was within the statute of frauds; and the award, having directed a lease to be made, could not be enforced. *Walters v. Morgan*, 2 Cox, 369.

Where the plaintiff's attorney, having received a sum of money from the defendant for the plaintiff in the progress of a cause, entered into an agreement to secure it to the latter, in which was contained a proviso that the agreement should be made a rule of court:—Held, by C. P., that they had not authority to direct it to be done, as the stat. 9 & 10 Will. 3, c. 15, is confined to cases of submission to arbitration, and the plaintiff's attorney was no party to the original suit; and that therefore the plaintiff's only remedy was by action for the breach of the agreement. *Steers v. Harrop*, 7 Moore, 466; 1 Bing. 133.

The courts have jurisdiction though the submission were to make the award, instead of the submission, a rule of court. *Pedley v. Westmacot*, 3 East, 603; *Powell v. Phillips*, 2 Tidd's, Prac. 875.

So also a submission to arbitration may be made a rule of court, where the bond, made between the trustee of a wife and her husband, recited that a suit for separation had been instituted between the husband and wife in the commons, and that, in order to put an end to any contest about the terms of separation, it had been agreed that all matters should be referred to J. S., and either of the parties should be "at liberty to apply to the court" to make the award a rule of court. *Soilleux v. Herbst*, 2 B. & P. 444. *And see Thompson v. Charnock*, 8 T. R. 139.

The court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment. *Watson v. McCullum*, 8 T. R. 520.

Nor where there is a cause depending. *Lonsdale (Lord) v. Littledale*, 2 Ves. jun. 451.

But a party who has preferred an indictment for an assault, may submit the adjustment of the reparation to arbitration, as well as the costs. *Baker v. Tunstend*, 1 Moore, 120; 7 Taunt. 422; 1 Moore, 287; *Holt*, 335.

Where an agreement of reference is to be made



a rule in the alternative of one of two courts, and it is made a rule of one, it cannot be made a rule of the other :—*Semble*, that, under the statute, such an agreement in the alternative is illegal. *Wispenny v. Bates*, 1 Dowl. P. C. 559 ; 2 C. & J. 379 ; 2 Tyr. 466.

Where four actions, three in the Exchequer, and one in K. B., were referred by an agreement, which had been made a rule of K. B., under a clause therein, empowering the parties to make it a rule of the K. B. or Exchequer, the court refused to allow the agreement to be made a rule of the court of Exchequer. *Id.*

A submission may be made a rule of court after the award is made. *Smith v. Symes*, 5 Madd. 74 ; *S. P. Fetherstone v. Cooper*, 9 Ves. 67.

But a submission ought not to be made a rule of court after it has been revoked by one of the parties. *King v. Joseph*, 5 Taunt. 452.

*Submission ought to be mutual.*—In an action of debt on an award, the execution of the submission by all the parties on both sides must be proved. *Ferrer v. Owen*, 7 B. & C. 427 ; 1 M. & R. 222.

So in the case of bonds of submission, though the action is against only one of the obligors in one of the bonds. *Id.*

Where, in an action by the assignee of a bankrupt, the petitioning creditor's debt was to be proved by a deed of reference between himself, the bankrupt, and others, their partners, of all accounts between them, or any two of them ; and by an award (inter alia) of a separate debt of above 100*l.* due from the bankrupt to the petitioning creditor, who was also the assignee :—*Held*, that it was not sufficient to prove the execution of the deed by the petitioning creditor and the bankrupt, without proving also the execution by the other partners, (by whom it appeared on the face of it to have been also executed) ; for the consideration to each to execute his own submission was the submission of all the others, and without proof of that, the arbitrators had no authority to make their award between any of the parties. *Anstrum v. Chace*, 15 East, 209.

In an action against the marshal for an escape of a prisoner committed under an attachment for not performing an award, an allegation that plaintiff and the prisoner referred their disputes to arbitration "by mutual bonds of submission," is a material and necessary allegation, and must be strictly proved ; proof of the prisoner only having executed a submission bond is insufficient, and the plaintiff must be nonsuited. *Brazier v. Jones*, 2 M. & R. 88 ; 8 B. & C. 124.

*Semble*, that he need not have done so had he alleged and proved a rule of C. P., ordering the issuing of the attachment, although proof of such rule, without a statement of it in the declaration, would not be sufficient. *Id.*

### 3. Effect on claims of Parties.

*Generally.*—A submission to arbitration of all matters in difference between the parties in the cause is not confined to the subject-matter in the

particular action then depending, but will extend to cross demands between the parties, though not pleaded by way of set-off ; and the costs being to abide the event makes no difference. *Malcolm v. Fullarton*, 2 T. R. 645.

But a reference of all matters in dispute in the cause between the parties, is confined solely to the matters in dispute in that trial. *Id.*

Where cross actions and all matters in difference are referred, and the award decides the actions only, it is no objection to the award that a claim not included in either action was brought before the arbitrator, upon which he has not adjudicated, unless it be also averred that he did not take such claim into his consideration. *Rez v. St. Catherine Dock Company*, 1 Nev. & M. 121.

By an order of reference, all matters in difference in a cause between A. and B. were referred to an arbitrator, and by a subsequent order C. was made a party thereto, and it was directed that all matters in difference between A., B., and C., should be referred to the same arbitrator, and that the costs of the suit should abide the event of the award. The arbitrator made two awards, in the one of which he awarded that A., at the date thereof, was indebted to B. without mentioning C., and in the other that A. was indebted to C., without mentioning B. :—*Held*, that both these awards were bad, as he had not decided all the matters in difference between all the parties, *Winter v. White*, 2 Moore, 723. *But see Jackson v. Yabely*, 5 B. & A. 848.

On a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party ; no evidence was therefore given concerning it, nor any adjudication upon it requested. The arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money (without saying on whose account) to the party against whom the above claim had been made, with costs, and it was proved that they left that claim out of consideration in making their award, as a matter not in dispute :—*Held*, that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. *In re Robson & Railson*, 1 B. & Adol. 723.

*Prevention of future Litigation.*—An award, made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred. *Ravee v. Farmer*, 4 T. R. 146. *But see* 1 Bro. P. C. 528. *And see Mason v. Thornton*, 4 Esp. 180.

Otherwise, if included in the reference. *Smith v. Johnson*, 15 East, 213.

Therefore, where disputes existed between the master and owner of a ship, touching the ship's accounts on a certain voyage, they referred all actions and causes of action to arbitrators, who awarded a balance to be paid by the owner to the master :—*Held*, upon a rule for an attach-

ment for non-payment of the sum awarded, that it was not competent to the owner to claim a deduction of a certain sum, the price and proceeds of certain goods shipped on their joint account, the whole of which price had been paid by the owner in the first instance, on the ground that such particular adventure formed no part of the disputes between them, and had not been submitted to, nor taken into the consideration of the arbitrators; because it was plainly within the terms and scope of the reference; the direct object of which was to make a final settlement of all matters of account between the parties; and it was the owner's own fault if he kept back that item of the account. *Smith v. Johnson*, 15 East, 213.

So, where all matters in difference in a cause were referred, and the arbitrator awarded to the plaintiff a sum in satisfaction of his damages in the cause, it was held that the plaintiff could not afterwards support another action for a demand within the scope of the reference, and which he might have brought before the arbitrator. *Dunn v. Murray*, 4 M. & R. 571.

The plaintiff, an attorney in the country, sued his agent in town for negligence in conducting the plaintiff's business, and alleged in his declaration that he had thereby become liable to pay certain sums, and had lost the employment of divers clients. The cause was referred under an order of Nisi Prius, by which the plaintiff consented not to bring any action or suit concerning the premises referred. The order was afterwards made a rule of court, and the arbitrator directed a verdict to be entered for the plaintiff, who afterwards commenced a second action against the defendant, alleging in the declaration that the plaintiff had paid certain sums to persons who had threatened him with actions, and lost the employment of divers other clients, from the negligence of the defendant. The court refused to stay the proceedings in the second action on motion, but intimated an opinion that the recovery in the former action might be pleaded in bar to the latter. *Dicas v. Jay*, 4 M. & P. 285; 6 Bing. 519.

Where a party has agreed to refer all matters in difference to arbitration, and the arbitrator has decided on it, such determination shall be conclusive and binding on the party; nor shall he be allowed to go into the original case at the trial, unless there was some misconduct on the arbitration. *Bailey v. Leckmere*, 1 Esp. 377.—Kenyon.

**Mode of taking Objection.**—The objection to an award, that the arbitrator has left undetermined any of the matters submitted to him (though fatal), cannot be taken advantage of upon demurrer to a declaration in debt on the award, unless it appear on the face of the submission and award. *Aitcheson v. Cargay* (in error), 13 Price, 639; 9 Moore, 381; 2 Bing. 199; M'Clel. 367; affirming S. C. nom. *Cargay v. Aitcheson*, 3 D. & R. 433; 2 B. & C. 170. And see *In re Cargay*, 2 D. & R. 222.

But it may be put on the record by plea, with sufficient averments. *Id.*

Therefore, where arbitrators awarded that the

defendant should pay to the plaintiff 444l. part of a sum of 2,500l. recovered against the plaintiff: that the latter should pay five-eighths, and the defendant three-eighths of the costs of several suits; that the money already paid by either of them should be considered as in part payment of his proportion; and that, upon payment of the 444l. and the costs, mutual releases should be given and executed:—Held, on general demurrer to a declaration on the award, that the plaintiff was entitled to recover; for that, as to the first part of the award, nothing appeared on the record to show that the arbitrators had not taken all the matters into consideration; and that, as the plaintiff was originally liable for the whole 2,500l., he must continue so for all the sums, except the 444l. awarded to him; and consequently that the first part of the award was sufficiently certain:—Held, also, that the second part, respecting the costs, was sufficiently certain, as it would be made so on the taxation of the costs by the master; and that it would also have been final, if no dispute had existed respecting the amount of the money paid; and that, if such dispute did exist, or if the arbitrators had neglected to consider all or any of the matters submitted to them, the defendant should have pleaded the fact, instead of demurring. *Id.*

To debt on bond conditioned to perform an award, under a reference of all matters in difference between the parties, it is a good plea in bar, that, at the time of submission, certain negotiable bills of exchange, drawn by the defendant and accepted by the plaintiff, were then outstanding, and that, an indemnity of the defendant against such bills was a matter in difference between the parties, which was notified to the arbitrators before the award made, and that they made no award concerning it, and that some of the bills had not been paid by the plaintiff, and the defendant was still liable to the holders; though it appeared by the award set forth, that the arbitrators stated therein, that they had heard the allegations of the parties, and examined all the accounts, bills of exchange, &c., and all other evidence and proofs produced to them, touching the matters in difference, and awarded of and concerning the same, that the defendant should pay to the plaintiff 1,500l. in full of all claims and demands upon him, &c.; and so proceeded to award concerning other specific matters; but without mentioning such outstanding bills, or any indemnity concerning the same. *Mitchell v. Staveley*, 16 East, 58.

To debt on an arbitration bond of all matters in difference, averring that the arbitrators took upon themselves the arbitration, and awarded, &c.: the defendant pleaded that all matters were submitted, &c.; that there were disputes as to money claimed by him of the other party, and that the arbitrators took upon themselves to arbitrate of and concerning, &c., and that they made no award of those sums: the plaintiff replied, that the arbitrators made their award of and concerning, &c., as in the declaration; and to which there was a demurrer:—Held, that the plea was bad, for want of averring that the arbitrators had notice of the claims of the defendant, and refused

to arbitrate concerning them. *Elsom v. Relfe*, 2 Smith, 459.

Where matters have been referred to arbitration, it is a matter of evidence whether a particular matter of complaint has been subjected to the arbitrator's consideration. *Martin v. Thornton*, 4 Esp. 180—*Alvanley v. S. P. Raves v. Farmer*, 4 T. R. 146. And see *Smith v. Johnson*, 15 East, 213.

An order of reference was made in an action where the main point in dispute was, whether certain goods, the value of which (namely, 246*l.*) the defendants proposed to set off against the plaintiff's claim, had been bought by the plaintiff of the defendants, or of A. B. The question stated in the order was, whether or not the defendants were entitled to set off the sum of 246*l.* The arbitrators, as was alleged, being unable to decide the main point; but finding that, at all events, a small reduction (8*l.* 12*s.*) was to be made from the 246*l.*, awarded, in the terms of the order of reference, that the defendant was not entitled to set off 246*l.* A rule was afterwards obtained for setting aside the award as not being final, but discharged. The plaintiff then brought an action of debt on the award, and the defendants pleaded a set off to the amount of 247*l.* 10*s.* 6*d.*—Held, that they could not now set off the difference between the 246*l.* and 8*l.* 12*s.*, for that the award was conclusive as to the sum now sought to be set off, as well as that mentioned in the order of reference; and if the arbitrators had gone upon a mistaken ground, their decision could not be questioned in this form. *Johnson v. Durant*, 2 B. & Adol. 925.

#### 4. Effect as an Admission.

Agreeing to refer the quantum of damages to arbitration, after a question of law has been reserved by the judge at the trial, does not waive an objection to the defendant's liability in the action, after the arbitrator has made his award. *Oxenham v. Lemon*, 2 D. & R. 461.

Trustees of an insolvent debtor, by entering into an arbitration bond, admit that they have assets, and may be directed to pay costs. *Wansborough v. Dyer*, 2 Chit. 40.

In another case it was held, that proof must be given of assets to make a trustee who has submitted to arbitration personally liable. *Davies v. Ridge*, 3 Esp. 101.—*Eldon*.

As to executors, see EXECUTOR.

#### 5. Submission become abortive.

Where a verdict was found for the plaintiff at nisi prius for the damages laid in the declaration, subject to the award of an arbitrator, who declined proceeding in the reference, he having been previously consulted by one of the parties in the cause:—Held, that the plaintiff was entitled to issue judgment and execution against the defendant forthwith for the damages found by the jury, unless he consented to refer the damages to another arbitrator. *Woolley v. Clarke*, 2 D. & R. 158; *S. C. nom. Woolley v. Kelly*, 1 B. & C. 68.

But where a plaintiff recovered a verdict for 5*l.* subject to an order of reference at nisi prius whether such verdict should stand, or be reduced to 20*s.*, and the arbitrator refused to make an award, the court of C. P. would not allow a verdict to be entered for the lesser sum, until such order was made a rule of court. *Kirkus v. Hodgson*, 3 Moore, 64.

If in equity arbitrators under an order of reference in a cause decline to proceed, the suit may be prosecuted as if no reference had been made. *Crawshaw v. Collins*, 3 Swana. 90.

There is no case at law or in equity where an award is not made at the time and in the manner stipulated, in which the court have substituted themselves for the arbitrators, and made the award, even where the substantial thing to be done was agreed by the parties, but the time and manner left to others to prescribe. *Blundell v. Brettargh*, 17 Ves. 242.

#### 6. Proof of.

A submission to arbitration may be given in evidence on a count on the original promise. *Kingston v. Phelps, Peake*, 227—*Kenyon*.

Where the submission to arbitration has been obtained by fraud, it may be given in evidence under a plea of non assumpsit, or nil debet. *Jackett v. Owen*, 2 Chit. 39.

In an action on an award made under a judge's order, to prove the order, it is enough to put in the office copy of the rule making it a rule of court. *Still v. Halford*, 4 Camp. 17—*Ellenb.*

In such an action, where the submission is to A. and B., and such third person as they shall appoint; to satisfy an allegation that A. and B. appointed C., it is not enough to put in an award executed by all three, reciting that A. and B. did appoint C., and to prove that C. acted along with them in the arbitration. *Id.*

#### 7. Revocation.

##### (a) Death.

An arbitrator's power is determined by the death of the parties to the submission, or any one of them. *Edmunds v. Cox*, 2 Tidd's Prac. 877; 2 Chit. 432; 3 Dougl. 406. And see *Bristow v. Binns*, 3 D. & R. 184.

At any time before the award. *Cooper v. Johnson*, 2 B. & A. 394; 1 Chit. 387.

But the court will not set aside an award, made after the death of one of the parties, where a cause is referred by order of Nisi Prius. *Id.*

Where a cause was referred to arbitration, the court of C. P. however set aside an award made subsequently to the death. *Potts v. Ward*, 1 Marsh. 366.

So, where a verdict was found for the plaintiff, subject to an award, and, before award made, the defendant died, it was held that a subsequent award of a verdict for the defendant, and judgment thereon, could not be supported. *Toussaint v. Hartop*, 7 Taunt. 571; 1 Moore, 287; Holt, 335; *S. C. Anon.* 1 Chit. 187, n. (e).

So also if a juror be withdrawn, and the cause

referred an award made after the defendant's death is bad. *Id.*

The rule seems to be, that, where all the matters referred under an order of *Nisi Prius* will be embraced in the verdict and judgment, the death of either of the parties before the award is made will not revoke the submission. *Bower v. Taylor*, cited in *Rhodes v. Haigh*, 3 D. & R. 610; 2 B. & C. 345.

But it is otherwise if the verdict and judgment will not embrace all the matters referred. *Rhodes v. Haigh*, 3 D. & R. 608; 2 B. & C. 345. And see *McClell*, 253.

In that case a verdict was taken for the plaintiff, by consent, in an action on the case for diverting a stream of water, subject to the award of an arbitrator, to whom, by an order of *nisi prius*, all matters in difference were referred, with liberty for him to regulate the future enjoyment of the stream, according to the respective rights of the parties, and one of them died before any award was made:—Held, that the arbitrator's authority was thereby revoked and determined; and the court set aside an award made by him subsequently thereto. *Id.*

It is clear that the death of either of the submitting parties will not determine the authority of the arbitrator, or vacate the subsequent proceedings upon the reference, where the deed or instrument of submission contains a proviso that the submission shall not vacate or expire through the death of either of the parties. *Macdougall v. Robertson* (in error), 2 Y. & J. 11; 1 M. & P. 147; 4 Bing. 435.

So, where matters in a suit in equity, and all disputes, &c., were ordered by the Vice Chancellor, with the consent of the attorneys of the parties in the suit, to be referred to arbitration, and there was a clause that in case any of the parties should happen to die before the making of the award, the reference was not to abate, but the executors and administrators of the parties so dying were to be considered and taken as parties to the order, in like manner as their testator or intestate:—Held, that the death of one of the parties before the award was made did not revoke the authority of the arbitrator, but that the executors were bound by his award made after the death of the testator. *Dowse v. Coxe*, 10 Moore, 272; 3 Bing. 20: *S. C.* (in error) *nom. Biddle v. Dowse*, 9 D. & R. 404; 6 B. & C. 255.

So the authority of an arbitrator under a rule of court, which empowers him to deliver his award to the parties or their executors, does not determine by the death of one of the parties before the award is executed. *Clarke v. Crofts*, 4 Bing. 143; 12 Moore, 349.

So, where the plaintiff had died before award made, and the arbitrator had enlarged the time after his death:—Held, that an award made afterwards was valid, and binding upon the defendant. *Tyler v. Jones*, 4 D. & R. 740; 3 B. & C. 144.

An award against trustees and guardians of an infant tenant for life of the realty, who died before the award was made, is not binding. *Bristow v. Biane*, 3 D. & R. 184.

The death of the defendant after the making of an award in pursuance of a rule of court, where no verdict or judgment has been entered up, abates the suit, and the court will not enforce the performance of the award by attachment. *Maffey v. Godwyn*, 1 Nev. & M. 101.

If, after reference by bond, one of several of the obligees dies before the award is made, the arbitrator cannot award a payment to the survivors and executors of the deceased, and that they shall release the obligors. *Quære*, whether the award would have been good, if made on the surviving obligees only. *Edmunds v. Cox*, 2 Chit. 432; 3 Dougl. 406; 2 Tidd's Prac. 877.

Where a plaintiff obtained a verdict, subject to a reference, and the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, and one of them afterwards objected to such substitution, the court of C. P. refused to interfere, as the death of the arbitrator had the effect of opening the cause, and as execution could not be sued out on the verdict on account of such death. *Harper v. Abrahams*, 4 Moore, 3.

#### (b) Bankruptcy and Insolvency.

Whether bankruptcy revokes a submission to arbitration is not settled.—Per Tenterden. *Marsh v. Wood*, 9 B. & C. 659; 4 M. & R. 504.

If one of two parties who have submitted disputes to arbitration become bankrupt, if all his interest in the matter in dispute pass to the assignees, the other may revoke the submission without being liable to an action; for the submission was no longer mutual, and therefore was not binding. *Id.*

Where a cause was referred by order of *nisi prius*, and the plaintiff became bankrupt after the reference, but before the making of the award:—Held to be no revocation of the submission. *Andrews v. Palmer*, 4 B. & A. 250: *S. P. Snook v. Hellyer*, 2 Chit. 43.

Proof upon an award made after an act of bankruptcy, was in one case expunged. *Ex parte Kemshead*, 1 Rose, 149.

After traverse of an extent in aid, the prosecutor and defendant agreed to refer to arbitration the amount of the debt due to the former; and an award was made for payment of money by defendant to the prosecutor: before which, however, the defendant was discharged under an insolvent act, having inserted this debt in his schedule. The crown being no party to the reference, the award was set aside, and the insolvency was held to exonerate the defendant from liability to an attachment for not performing it. *Rex v. Bingham*, 2 Tyr. 46: *S. C.* not *S. P.* 1 C. & J. 245.

#### (c) Act of the Party.

By stat. 3 & 4 Will. 4, c. 42, s. 39, the power and authority of arbitrators or umpires appointed by or in pursuance of any rule of court, or judge's order, or order of *nisi prius* in any action, or by or in pursuance of any submission to reference containing an agreement that such submission shall be

made a rule of court, shall not be revocable by any party to such reference without leave of the court or a judge; and the arbitrators to umpires are to proceed with the reference notwithstanding any such revocation, and to make an award although the person making such revocation shall not afterwards attend; and the court or a judge thereof may from time to time enlarge the time for making the award.

Before the statute, it was held, that, where a cause is referred by order of nisi prius, either party has power to revoke the submission, and the court cannot vacate the revocation, or compel the party revoking to pay costs to the other party, unless a power to do so is given by the order of reference. *Stee v. Cason*, 10 B. & C. 483.

A judge's order directed that a cause should be referred, and that either party wilfully preventing the arbitrator from making an award by affected delay or otherwise, should pay such costs as the court thought reasonable and just:—Held, that such order might be made a rule of court after one of the parties had revoked the authority of the arbitrator. *Aston v. George*, 2 B. & A. 395; 1 Chit. 204.

Where the reference is made an order of a court of equity, it is a high contempt to revoke. *Haggett v. Welsch*, 1 Sim. 134; *S. P. Harcourt v. Ramsbottom*, 1 J. & W. 511.

A revocation may, under circumstances, be had in equity though good at law. *Id.*

A submission by deed may be revoked by deed and notice of revocation before award made; but the arbitrators are right in afterwards proceeding to award, because the party continuing in submission is entitled to his action for damages on non-performance of the covenant to abide by the award. *King v. Joseph*, 5 Taunt. 452.

So, if bound in a penalty, the penalty is not avoided by the revocation. *Id.*

Where parties by bond have agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the statute 9 & 10 Will. 3, c. 15, to revoke by deed his submission, and notify the same to the arbitrators before the authority be executed. *Milne v. Gratrix*, 7 East, 608.

A party is not liable to an attachment for not obeying an award, if made after a deed of revocation of the submission entered into, before the submission was made a rule of court, and notice thereof to the arbitrators. *Id.*

Where a cause was referred to arbitration under a judge's order, and one of the parties, before the award was published, and before the judge's order was made a rule of court, revoked his submission, and the arbitrator made an award notwithstanding such revocation, the court of C. P. set it aside, although the judge's order had been made a rule of court before any application to set aside the award was made. *Clepham v. Higham*, 7 Moore, 703; 1 Bing. 87.

So, where a cause was referred to arbitration by an order of nisi prius, and the arbitrator, after

a notice of revocation in writing, made an award directing a verdict to be entered for the defendant, the court set aside the award, assuming it to be a nullity. *Doe d. Turnbull v. Brown*, 8 D. & R. 100; 5 B. & C. 384.

Where the parties have proceeded under an order made by consent for referring a cause to arbitration; quære, whether it is competent to either to withdraw. *Crawshaw v. Collins*, 1 Swans. 40.

The plaintiff having a claim on the defendant, under a charter-party, which the latter disputed, it was by bonds of submission referred to two arbitrators and an umpire; and the order of reference was made a rule of court. The umpire having conducted himself with partiality towards the defendant, the plaintiff revoked his authority to the arbitrators, and went to Scotland, where he resided. The arbitrators afterwards made an award, by which they found that nothing was due to the plaintiff, and directed him to pay half the costs of the reference; notwithstanding which, he commenced an action against the defendant on the charter-party, and recovered a verdict, and sued out execution. The court refused to stay the execution, although it was insisted that the plaintiff was liable to an attachment for non-performance of the award, and that he could not be served with process, he being out of the jurisdiction of the court, and that the defendant had commenced an action against him on the arbitration bond. *Stewart v. Williamson*, 2 M. & P. 765.

A. declared in covenant against B. and her husband, for that B., before her intermarriage, covenanted with A. by deed to leave certain accounts in difference between them to arbitration, and to abide by and perform the award, provided it were made during their lives; and A., protesting that B. had not, before her intermarriage, performed her part of the covenant, averred, that, after making the indenture and the intermarriage of the defendants, the arbitrator awarded B. to pay A. a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on non est factum pleaded:—Held, that, upon this declaration, it must be taken that B. intermarried after the submission and before the award made; in which case, although the plaintiff could not recover upon the breach assigned for non-payment of the sum awarded, because the marriage was a countermand to the authority of the arbitrator; yet, as by the marriage itself, B. had, by her own act, put it out of her power to perform the award, the covenant to abide by the award was broken; and therefore judgment could not be arrested, on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover as for a breach by non-performance of the award. *Charnley v. Winstanley*, 5 East, 266; 1 Smith, 433.

#### (d) Time of Revocation.

A submission to arbitration by a baron's order is revocable until the order is made a rule of court. *Greenwood v. Misdale*, M'Clel. & Y. 276.

An order of Nisi Prius may be made a rule of

court after notice of revocation of the arbitrator's authority. *Aston v. George*, 1 Chit. 204; 2 B. & A. 395.

A judge's order of reference is not revoked by a revocation of the submission. *Id.*

Plaintiff who had taken a verdict subject to an award under order of Nisi Prius, after the case had been heard, and just before the award was about to be made, revoked the arbitrator's authority, with circumstances savouring of mala fides, and gave fresh notice of trial. The order of Nisi Prius not having been made a rule of court, the court refused to stay proceedings. *Green v. Pole*, 6 Bing. 443; 4 M. & P. 198.

#### (e) Proceedings for.

A revocation of a submission not under seal, before award made, is in effect a breach of an agreement to stand to, obey, abide, perform, &c. an award, for which assumpsit will lie. *Brown v. Tanner*, McClel. & Y. 464; 1 C. & P. 651.

A declaration for such breach may state that the defendant undertook to perform the agreement, and not to revoke the submission, and lay the revocation as a breach. *Id.*

Assumpsit will also lie on an agreement not under seal, when the parties bound themselves in a penalty "for the true and faithful observance and performance of the award which should be made," where one party revoked his submission before an award was made. *Warburton v. Storer*, 6 D. & R. 213; 4 B. & C. 103.

Seemingly, that no action can be maintained for refusing to nominate an arbitrator, in pursuance of a covenant to refer matters to arbitration. *Tattersall v. Groot*, 2 B. & P. 131.

Where the first count of a declaration in covenant by deed to abide by an award, alleged breaches generally, that the defendant did not on request pay the money awarded, and delayed the arbitrators from making their award so soon as they would have done; and the defendant pleaded to such count, a revocation by deed of the authority of the arbitrators, before they made their award:—Held, on demurrer, that this plea was not a confession of the covenant, upon which the plaintiff was entitled to judgment. The second count alleged, "that the defendant did, before the making of the award, hinder and prevent the arbitrators from making their award by executing a deed, whereby he did revoke, &c. the arbitration, and thereby hindered the arbitrators from making their award," &c.:—Held, on demurrer, that an allegation of notice of the revocation to the arbitrators was not necessary, it being sufficient to aver the fact of revocation by deed to sustain this count, and call upon the defendant to plead issuably. *Marsh v. Bulleel*, 1 D. & R. 106; 2 Chit. 316; 5 B. & A. 507.

If it be doubtful whether arbitrators had made their award either previous or subsequent to their receiving notice of a deed of revocation, the Court of C. P. will not stay the proceedings, but leave the party to plead such award puis darrein continuance. *Lowes v. Kermode*, 2 Moore, 30.

## II. EFFECT OF AGREEMENTS TO REFER.

Agreements or covenants, that, in case of disputes between the parties, all matters in difference shall be referred to arbitration, do not oust the courts of law or equity of their jurisdiction. *Thompson v. Charnock*, 8 T. R. 139; *S. P. Mitchell v. Harris*, 2 Ves. jun. 133; *Street v. Rigby*, 6 Ves. 822.

To covenant on a deed (made for the performance of several matters) the defendant cannot plead that in the deed there is a covenant, that, in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators, to be chosen, &c., and that he offered to refer the matter in dispute, &c., but that the plaintiff refused, &c. *Id.*

So an action on a policy of insurance lies although the policy says the matter shall be referred in case of a loss or dispute. *Kill v. Hallister*, 1 Wils. 129.

One of the conditions in a policy of insurance against fire, stated, that, if any difference should arise on any claim, it should be immediately submitted to arbitration; and, after directing how the arbitrators should be chosen, added, that no compensation should be payable until after an award determining thereof should be duly made. It was held, that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover any thing, and did not merely question the amount of damages. *Goldstone v. Osborn (Bart.)*, 2 C. & P. 551.—Best.

An agreement to refer to arbitration is not a bar to relief in equity. *Nichols v. Chalie*, 14 Ves. 270.

To a bill for discovery and relief, a plea of such an agreement to refer to arbitration was overruled. *Street v. Rigby*, 6 Ves. 815.

And a bill for the specific performance of such an agreement does not lie. *Agar v. Macklow*, 2 Sim. & Stu. 488.

Although an agreement to refer disputes to arbitration is generally no objection to a suit in a court of equity, yet in one case, upon the nature of the subject,—the management of the Opera House,—and the anxious provision of the parties for arbitration, the court refused upon motion to interfere before they had taken that course. *Waters v. Taylor*, 15 Ves. 10.

## III. ATTENDANCE OF WITNESSES.

By stat. 3 & 4 Will. 4 c. 42. s. 40, upon references by rule or order of court, or a judge, or of Nisi Prius, or by submission containing an agreement for making it a rule of court, the court by which the rule or order shall be made, or which shall be mentioned in the submission, or any judge, by rule or order may command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and disobedience shall be deemed a contempt, if in addition

to the service of such rule or order an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with or after the service of such rule or order: Provided, that the witness shall be entitled to the like conduct money, and payment of expenses, and for loss of time, as for and upon attendance at any trial; and provided, that the application for the rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: Provided also, that no person shall be compelled to produce any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order.

Before the statute, the Court of K. B. refused to compel a witness to attend before an arbitrator although the reference was by order of Nisi Prius. *Wansel v. Southwood*, 4 M. & R. 359.

#### IV. ARBITRATOR.

##### 1. Power and duty.

##### (a) As to Evidence and Witnesses.

*To administer Oath.*—By stat. 3 & 4 Will. 4, c. 42, s. 41, when it shall be ordered or agreed in any rule or order of reference, or submission containing an agreement to make it a rule of court, that the witnesses shall be examined upon oath, the arbitrator or umpire, or any one arbitrator, may and are required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and perjury may be assigned on such oath or affirmation.

And the court will not set aside an award, on the ground of the witnesses not having been examined on oath; if no such objection was made at the time of their examination. *Ridout v. Pye*, 1 B. & P. 91.

*As to reception of Evidence.*—Arbitrators are bound by those rules of evidence which govern the courts of law. *Att. Gen. v. Davison*, McClell. & Y. 160.

The clause in an order of reference, authorizing the arbitrator to examine the parties to the suit, on oath, if he thinks fit, empowers him to examine the plaintiff to a point upon which no other evidence can be adduced on the same side, *Warne v. Bryant*, 5 D. & R. 301; 3 B. & C. 590.

If arbitrators have power to examine the parties in the cause, they may waive the objection taken to the competency of a witness, that he has such an interest that he ought to have been made a party. *Lloyd v. Archbole*, 2 Taunt. 324.

An arbitrator may direct a party to verify particular documents before a government commissary. *Atkyns v. Baldwin*, 1 Stark. 209—Gibbs.

All the witnesses of a party against whom the award is made must have been examined, and in his presence, or it will be a ground for setting

the award aside; but that must be made clearly to appear. *Bedington v. Southall*, 4 Price, 232.

Quære, if it be not necessary to show that such examination was, in point of fact, required; or whether a witness having been named as to be examined, be not a requisition. *Id.*

The court refused to set aside the award of a barrister, on the ground that he had admitted an incompetent witness. *Perryman v. Steggall*, 9 Bing. 679; 3 M. & Scott, 93.

If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the Court of Exchequer will not interfere to set his award aside on that ground, although the party applying offer to pay all the previous costs incurred, considering the parties bound by his decision. *Campbell v. Twemlow*, 1 Price, 81.

An award is not to be set aside because the arbitrator made use of the judgment of another person. *Emery v. Wase*, 5 Ves. 848.

Referees may take the opinion of a third person as evidence, but cannot previously be bound by it. *Hopcraft v. Hickman*, 2 Sim. & Stu. 130.

##### (b) As to Matters referred.

*Authority of Arbitrator generally.*—An arbitrator, on a general reference of all matters in difference, may go farther than the court could, to do complete justice, and therefore may relieve against a harsh right which in a court of justice would prevail. *Knox v. Symonds*, 1 Ves. jun. 369.

An arbitrator to whom all actions and causes of action, and all matters in difference whatsoever, in two actions subsisting between the same parties, have been referred, is not compelled to take matters of an equitable nature into consideration, but an award made by him in reference to the two actions only is final. *Craven v. Craven*, 1 Moore, 403; 7 Taunt. 644.

If an arbitrator chooses to put the law out of the question, and to award the payment of a conscientious demand, arising out of a transaction which he knows to be illegal, he may do so. *Quære. Delver v. Barnes*, 1 Taunt. 48.

Though an arbitrator on a question of mixed law and fact has allowed transactions apparently illegal, as premiums of insurance on a voyage to a hostile port, the court will not set aside the award. *Wohlenberg v. Lageman*, 6 Taunt. 254; 1 Marsh. 579.

The plaintiff proceeded to, and obtained, out-lawry against two partners, and, afterwards, the partnership being dissolved, one arrived in England, and was arrested. On a rule being obtained for reversing the outlawry, an order of reference of all matters in difference between the parties was made. The arbitrator refused to consider the claims of the defendants respecting the outlawry, but confined himself to the action commenced against them:—Held, that he was not bound to take the outlawry into consideration, as no joint specific injury was stated to have been sustained by both the defendants; and the court of C. P. refused to set aside the award. *Garland v. Noble*, 1 Moore, 187.

In an agreement of reference it was agreed that the arbitrator "shall or may" award a certain matter, with a proviso, &c. &c.:—Held, that the words "shall or may" were imperative on the arbitrator, and that he was bound to insert the proviso in his award, the context of the agreement, and the situation of the parties, requiring such a construction. *Crump v. Adney*, 1 C. & M. 355.

An arbitrator, to whom a cause was referred from *Nisi Prius*, found that the plaintiff was entitled to a right of way for carriages which he had at first claimed by his declaration, but afterwards abandoned:—Held, that this was an excess of jurisdiction, and the award was set aside *pro tanto*. *Hooper v. Hooper*, M'Clel. & Y. 509.

**Entry of Verdict.**—A submission to refer a cause, and the subject matter thereof, and the issue therein, to the award of a barrister, does not authorize him to order a verdict to be entered up. *Hutchinson v. Blackwell*, 8 Bing. 331; 1 M. & Scott, 513; 1 Dowl. P. C. 267.

Where an arbitrator, to whom a cause, before it came to issue, was referred, awarded thus—"I award and direct, that a verdict in this cause be finally entered for the plaintiff, with 284*l.* 12*s.* damages:—Held, that he had exceeded his authority in directing the entry of a verdict; and that, as the award consisted of only one sentence, that direction could not be rejected, and the residue considered as an award that so much was due and to be paid; and that, therefore, the award could not be supported either by attachment or action. Semble, that, at whatever stage of proceeding a cause may have been referred, an arbitrator can in no case have authority of himself to direct the entry of a verdict. *Jackson v. Clarke*, M'Clel. & Y. 200; 13 Price, 28.

An order of *Nisi Prius*, referring an action of debt on a money bond (where the issue was payment by a co-obligor), and all matters in difference, to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the court refused to set aside an award directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum judgment and execution should have been taken out, without proof that there were other matters in difference between the parties. *Cayme v. Watts*, 3 D. & R. 224.

Upon the trial of an action of case, a verdict was found for the plaintiff, subject to a reference of all matters in difference. The defendant claimed before the arbitrators a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due. The award, without stating that it was made of and concerning the premises, directed a verdict to be entered for the plaintiff with damages:—Held, that this award was sufficient. *Gray v. Greenap*, 1 R. & A. 106.

Upon a declaration of eleven special counts for negligence, and common counts for money paid, &c., an arbitrator, under an order of *Nisi Prius*,

found that the plaintiff had "good cause" (not causes) of action for 23*l.* 14*s.* 10*d.*, and directed a verdict to be entered up for that sum:—Held, sufficiently certain, as the arbitrator had in effect ordered a general verdict to be entered for the plaintiff on the whole of the declaration. *Dicas v. Jay*, 2 M. & P. 448; 5 Bing. 281.

In an award, the direction to enter a verdict in favour of a plaintiff for a certain sum, is equivalent to an order to pay that sum. *Cartwright v. Blackworth*, 1 Dowl. P. C. 489.

**Limit by Amount of Verdict.**—Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by a rule of *Nisi Prius*, he cannot award a greater sum than that for which the verdict was taken; and if he do, no assumption by implication will arise to pay even to the extent of the verdict so taken. *Bonner v. Charlton*, 5 East, 139; 1 Smith, 369.

But it seems that, under a reference of all matters in difference, the arbitrator will not of necessity be confined to the amount of the damages for which the verdict is taken. *Pearse v. Cameron*, 1 M. & S. 675.

The court will not give leave to increase the sum in the declaration and rule of reference, on an affidavit that a larger sum will probably be proved before the arbitrator. *Id.*

If an arbitrator awards a greater sum than the amount of the verdict, and judgment is entered for the whole, and it appears that a part of the sum is covered by a countervailing demand which never was a subject of dispute, so that only a balance less than the amount of the verdict is ultimately to be paid over; the court will reduce the judgment to the amount of the verdict, and grant execution for the sum really due. *Prentice v. Reed*, 1 Taunt. 151.

Where an arbitrator has power to order what he should think fit to be done by either of the parties respecting the matters in dispute: quære, whether he might not direct them to consent to an application to the court for enlarging the damages given by the verdict. *Id.*

**Cases of Partnership.**—If an arbitrator be appointed to arbitrate a certain measure contemplated between two parties, as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved. *Simmonds v. Swaine*, 1 Taunt. 549.

If two persons enter into partnership, and covenant, in case of the dissolution of the partnership, to submit all matters relating thereto to arbitration, the arbitrators are not thereby authorized to determine whether any part of the sum of money which was the consideration of the partnership should be refunded. *Tattersall v. Groot*, 2 B. & P. 131.

By submission to arbitration, it was agreed between two partners to dissolve partnership, and that all matters in difference between them, and the terms and conditions on which the co-partnership should be dissolved, should be referred to



an arbitrator. The arbitrator awarded, that it should not be lawful for one, during the life-time of the other, to carry on business at the place they had done, or within thirteen miles:—Held, that the arbitrator had not exceeded his authority. *Morley v. Newman*, 5 D. & R. 317.

Six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award; and the latter gave a similar bond to the three former; the arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. In an action of debt on the award brought by the one against the other alone:—Held, that he might recover the sum awarded. *Winter v. White*, 3 Moore, 674; 1 B. & B. 350.

If a debt paid by one of two partners for the other on account of an illegal transaction, be referred together with other causes of dispute between the two to an arbitrator, who awards a sum due from one partner to the other for money so paid, the court will set aside that part of the award. *Aubert v. Mase*, 2 B. & P. 371.

**Award of Interest.**—An arbitrator is not bound by a rule of practice adopted by courts of law for general convenience; and therefore, where, on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest, (when it would not be allowed by a court of law or equity,) the court refused to set aside the award on that ground. *In re Badger*, 2 B. & A. 691.

The time for making an award having been extended by the alteration and re-execution of the arbitration bonds:—Held, that the arbitrator had authority to award interest on the principal sum found to be due, beyond the date of the original submission, but within that of the re-execution, because the date of the submission had been extended to the time of re-execution. *Watkins v. Phillpotts*, M'Clel. & Y. 393.

Quære, whether an award of interest on a sum due on securities carrying interest, beyond the submission and till payment, be good. *Id.*

An award is not to be impeached for allowing compound interest, for it may be allowed in case of a contract for it, either express or to be inferred from the nature of the dealings between the parties. *Morgan v. Mather*, 2 Ves. jun. 15.

And see stat. 3 & 4 Will. 4, c. 42, ss. 28, 29, 30.

**Future Direction.**—Where an arbitrator, in regulating the future use of a stream of water, the right to which was divided between two parties, interfered with the customary enjoyment by one of them of another stream, which exclusively belonged to him, and was not a matter in difference, and which joined the first:—Held, that he was empowered so to do, as being incidental to, and resulting from, his former direct and larger power. *Winter v. Lethbridge* (*Bart.*), M'Clel. 253; 13 Price, 533.

But if an arbitrator, after regulating on the subject matter referred to him in its then state, goes on and regulates prospectively on the same

subject matter, reduced to a different state, and thereby in some degree altered: quære, whether that be not a proceeding beyond the scope of his authority. *Id.*

An arbitrator, to whom the question of the right of two records to the tithe of certain lands, was referred, had power to devise all means to prevent future litigation between the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute:—Held, that he did not exceed his power by awarding undivided moieties of the tithes to the two rectors. *Prosser (Clerk) v. Goringe*, 3 Taunt. 426.

In an agreement for a lease for a term of years from the 1st of May, 1801, the lessee was to be allowed three years from that date, for winning a colliery, without payment of any rent: an arbitrator being authorized to give such directions for a lease, according to the agreement, as he should think fit, directed a lease for years from the 1st of May, 1804:—Held, that he had thereby exceeded his authority. *Bonner v. Liddell*, 1 B. & B. 80.

**Other Things.**—An award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of the lessor, is bad. *Alder v. Savill*, 5 Taunt. 454.

The court of C. P. refused to set aside an award giving a great loss to the defendant on some goods which had been damaged at sea, and sold at a loss at the loading port, although it appeared that the goods had been afterwards sold at the port of delivery for nearly as much as if they had received no injury whatever. *Hardy v. Innes*, 6 Moore, 574.

A rule to refer all matters in difference between the parties to the master, in a case where a rescue had been returned by the sheriff, and the court, on hearing affidavits, had refused to set a small fine, thinking the return warranted, is not an authority to him to decide upon the reality of the rescue; and such rule is incorrectly drawn up. *Rez v. Griffith*, 1 Ld. Ken. 138.

It is competent to arbitrators to inquire whether a ransom, for which the plaintiff seeks to be repaid, were justified by an extreme necessity, within the stat. 45 G. 3, c. 72, s. 16, which enables a Court of Admiralty to allow such necessity. *Miller v. Robe*, 3 Taunt. 461.

Assignees of a bankrupt, having received 1500*l.* from a debtor to the bankrupt, as a debt due to his estate, and having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agree with him to refer their differences to arbitration, and the submission is that all matters in difference between the parties in the cause be referred; the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appear to have been paid by mistake. *Malcolm v. Pullerton*, 2 T. R. 645.

Where an action by assignees to recover money

paid by a bankrupt, after an act of bankruptcy, to creditors, for goods bona fide sold in the ordinary course of trade, was referred at Nisi Prius to an arbitrator, who found specially a payment under arrest, and several other circumstances strongly tending to show knowledge in the creditors that the bankrupt was in insolvent circumstances, and awarded a verdict for the plaintiffs for the sum paid and costs, without stating on what ground he proceeded:—Held, that he must have concluded the defendants had notice of the insolvency, and that the award was sustainable on that ground. *Teale v. Young*, M'Clel. & Y. 497.

(c) *Ex parte proceeding.*

*Manner of taking Evidence.*—Where a cause is referred to arbitration (the mode of conducting it must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attorneys, and examine witnesses privately, at their (the witnesses') houses, it seems that such conduct is no good ground of objection, provided it does not proceed from corrupt motives; at all events, if either party would take advantage of it, he must give notice at the time that he intends to rely on it as an objection; and if he lie by and suffer other meetings to take place, and when the arbitrators are ready to make their award revokes his admission, he is liable in an action to the other party, who was desirous of having the benefit of the award. *Hewlett v. Laycock*, 2 C. & P. 574—Abbott.

Commissioners, under an act of parliament which authorized them so to do, examined witnesses, and took down their depositions in writing, and afterwards communicated the effect of them to the party sought to be affected by the proceedings, but who had no opportunity of being present at the examination, or of cross-examining the witnesses. On a subsequent reference to arbitration of these accounts, the court held, that the arbitrators could not receive as evidence the depositions taken before the commissioners. *Att. Gen. v. Davison*, M'Clel. & Y. 160.

Where, in an action for not repairing, arbitrators made their award upon a view of the premises without calling the parties before them, it was set aside, as other facts might be necessary to be inquired into. *Anon.* 2 Chit. 44.

A cause having been referred to arbitration under an order by consent, the court will not make an order on the arbitrators to proceed. *Crawshaw v. Collins*, 1 Swans. 40.

Where the arbitrator after having appointed several meetings to enable the defendant's witnesses to attend, at length gave the defendant's attorney notice that he should make his award if required by the plaintiff; and being required so to do, he awarded a sum to be paid to the latter: on the defendant's attorney swearing that he understood the arbitrator meant to call another meeting, the court of C. P. set aside the award, although no objection was made to the amount awarded, giving the plaintiff liberty to enforce the defendant's agreement to enter into the rule of Nisi

Prius for reinstating the premises. *Doddington v. Hudson*, 1 Bing. 384; 8 Moore, 163.

Where an arbitrator, having by mutual agreement of the parties closed his examination, refuses the application of the defendant's attorney for another hearing, and makes his award: the court will not set aside the award, on the affidavit of the defendant's attorney, that he is in possession of evidence which would repel that on which the award was founded. *Ringerv. Joyce*, 1 Marsh. 404.

Improper conduct of an arbitrator in making his award, without allowing the defendant further reasonable time to bring forward and examine his witnesses, cannot be pleaded in bar to an action on the bond condition for the performance of the award; though one of the terms of submission is, that the arbitrator shall examine the witnesses to be produced by the parties, and though the whole of the time limited for the making of the award is occupied in the examination of the plaintiff's witnesses. *Grazebrook v. Davis*, 8 D. & R. 295; 5 B. & C. 534.

Where arbitrators, who had proceeded in a reference, informed the defendant, who was present at the meeting, that they would suspend their proceedings till books of account had been referred to:—Held, that having afterwards made an award in his absence, without examining such books, was a good ground for setting aside the award. *Pepper v. Gorham*, 4 Moore, 148.

It is no ground for setting aside an award, that one of the defendant's witnesses was re-examined by the arbitrator, after the evidence was closed on both sides, and the plaintiff's attorney gone; though, by a different testimony from what he gave at first, the arbitrator's opinion was influenced; unless such re-examination was brought about by the management of the defendant's attorney. *Atkinson v. Abraham*, 1 B. & P. 175.

An award was set aside where the arbitrator received evidence, after notice to the parties that he would receive no more, in which they acquiesced. *Walker v. Froisher*, 6 Ves. 70.

*Absence of Parties.*—An arbitrator is not to consider himself agent for the person who appoints him. *Calcraft v. Roebuck*, 1 Ves. jun. 226.

One party having ineffectually attempted to revoke his submission and refused to attend, semble that the arbitrator may proceed ex parte, without giving him notice. *Harcourt v. Ramsbottom*, 1 J. & W. 512.

An arbitrator has a power subject to his discretion to proceed ex parte, if one of the parties will not attend. *Wood v. Leake*, 12 Ves. 412.

It is however irregular for two arbitrators to meet without notice to the third; but not a sufficient ground to set aside the award when the substance was settled in his presence. *Goodman v. Sayers*, 2 J. & W. 261.

On the evidence given by one of the parties at a meeting, of which the other had notice, but did not attend, the sum the party attending was to pay was decreased by the arbitrators. This private examination was held incorrect, and the award set aside. *In re Hick*, 8 Taunt. 694.

## (d) Costs.

[For Rights of Parties as to Costs—See Costs.]

After a payment of money into court in a cause, the parties agreed to refer the settlement of the accounts between them to arbitration:—Held, that the arbitrators had no power over the costs in the cause up to the time of the payment into court. *Stratton v. Green*, 1 M. & Scott, 668; 8 Bing. 437.

Where an order of Nisi Prius is silent upon the subject of the costs of the reference and award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expenses of the reference, and the half of the award. *Taylor v. Gordon*, 2 M. & Scott, 725; 9 Bing. 570; *S. P. Groves v. Cox*, 1 Taunt. 165.

Where a cause and all matters in difference were referred, but nothing was said about costs:—Held, that the arbitrator had power over the costs of the cause, but not those of the reference. *Firth v. Robinson*, 1 B. & C. 277.

Where all matters in difference are referred to arbitration, except the costs of the action, and no notice is taken of the costs of reference, the latter are not in the discretion of the arbitrator. *Strutt v. Rogers*, 2 Marsh. 524; 7 Taunt. 213.

An award of costs sustained in the action does not include the costs of the reference. *Brown v. Marsden*, 1 H. Black. 223.

An arbitrator may award costs without any express authority for that purpose. *Roe d. Wood v. Doe*, 2 T. R. 644; *S. P. Anon. Lofft*, 34.

Although the arbitrator may have exceeded their authority as to costs, it does not vitiate or invalidate the whole of the award. *Aitchison v. Cargay*, 9 Moore, 381; 2 Bing. 199; *McCl. 376*.

Where a court of sessions referred an indictment for an assault to an arbitrator, and empowered him to settle all costs incident to the indictment and subsequent proceedings thereon:—Held, that such arbitrator did not exceed his authority, by awarding the previous as well as subsequent costs. *Baker v. Townshend*, 1 Moore, 120; 7 Taunt. 422.

Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney and client. But the plaintiff, waiving his costs, and having only demanded the principal sum awarded, took his attachment for that sum. *Whitehead v. Firth*, 12 East, 165.

Where the submission to an award is by bond merely, the arbitrators may award costs between attorney and client; and, though the arbitrators award the costs of the reference, which are not within the terms of the submission, that will not vitiate the award itself, but it will be good as to the remainder. *Hartnell v. Hill*. *Forrest*, 73.

An award in which no partiality appears, is not to be set aside on the ground that the arbitrators have given more money as costs than by calculation they would amount to. *Turner v. Ross*, 1 Ld. Ken. 393.

A special jury having been obtained on the mo-

tion of the defendant, the cause was referred, and by the order of reference, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left to the discretion of the arbitrator:—Held, that the arbitrator could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury. *Finlayson v. McLeod*, 1 B. & A. 663.

Where the costs of the cause and of the special jury are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each, or the award is bad. *George v. Lousley*, 8 East, 13.

Where an arbitrator, authorized to tax costs in a cause, has allowed an item which it is insisted ought not to have been charged, the court will not refer the matter to the master. *Anon.* 1 Chit. 38.

Where a cause was referred to an arbitrator, to ascertain what verdict ought to be given, and his certificate was to be entered up as the verdict of a jury, and he certified that a verdict should be entered for the plaintiff for a certain sum; and told the parties that each should pay his own costs of reference, which was acceded to; and, upon a motion to set aside the certificate, the cause was referred back to him, when he certified to the same effect, but omitted to give any directions as to the costs of the second reference:—Held, that the plaintiff was entitled to such costs, as, in the absence of any specific direction, the costs must follow the verdict. *Mackintosh v. Blyth*, 8 Moore, 211; 1 Bing. 269.

An arbitrator, under a rule of reference which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred. But the award is not to be set aside entirely, but only for that part which is incorrect. *Hunsted v. Kidd*, 1 Chit. 526.

## (e) Altering Award.

After the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures, by making another award. *Ervine v. Elton*, 8 East, 54.

An alteration by the umpire of the sum awarded, though made on the same day, and after notice of the making, but before delivery of the award, is void; but the award is good for the original sum awarded, which was still legible. *Henfree v. Bromley*, 6 East, 309; 2 Smith, 400.

An arbitrator awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant; and then, by mistake, directed that the costs of the reference and award should be paid by the defendant, meaning the plaintiff:—Held, that the arbitrator, having executed his award in this form, could not rectify it. *Ward v. Dean*, 3 B. & Adol. 234.

The plaintiff moved the court for a taxation of his costs as adjudged; or that the award which had been executed in duplicate, and one copy af-

terwards corrected by the arbitrator, might be set aside. The defendant not agreeing to this latter proposal, the court ordered a taxation. *Id.*

The court cannot interfere to alter the terms of an award in order to make them consist with the submission, even where the submission to arbitration gives minute directions for the course to be pursued by the arbitrator. *Hall v. Alderson*, 2 Bing. 476.

Where an arbitrator, who had made his award in the plaintiff's favour, was supposed to have made a mistake in calculating the sum which the plaintiff claimed a right to recover:—Held, that the court would not refer it back to the arbitrator to correct the mistake without the consent of the defendant. *Ex parte Cuerton*, 7 D. & R. 774.

A motion to refer back an award to the same arbitrator for reconsideration, on the ground that he had not sufficient materials before him when he made it, must be made before the last day of the next term after such award made, according to the 9 & 10 Will. 3, c. 15, s. 2, although the arbitrator be not charged with corruption or undue means. *Zachary v. Shepherd*, 2 T. R. 781. *And see Synge v. Jervoise*, 8 East, 466.

## 2. Remuneration.

Assumpsit on an implied promise to remunerate an arbitrator cannot be maintained. *Virany v. Warne*, 4 Esp. 46—Kenyon.

But semble, that an arbitrator may recover a compensation for his trouble. *Swinford v. Burn*, Gow, 7—Dallas.

Where an award is taken up by one party, and all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause. *Burroughes v. Clarke*, 1 Dowl. P. C. 48.

Semble, an arbitrator has no action for his fees. *Id.*

If the submission to a reference mentions nothing respecting costs, the arbitrators have no power to award their own expenses to be paid by either party in particular. *Bell v. Belson*, 2 Chit. 157.

Quære, whether an award upon the reference of an action, directing the payment of costs of the award, without fixing the amount thereof, is bad in that point for uncertainty; or whether the amount may not be taxed by the officer of the court. *Barrett v. Parry*, 4 Taunt. 658.

The amount of the fee which an arbitrator, in a cause referred in the Court of C. P., awards to be paid to himself for his award, is examinable by the prothonotary. *Fitzgerald v. Graves*, 5 Taunt. 342.

If arbitrators award an excessive sum to be paid to themselves, the court of C. P. will refer it to the prothonotary to reduce it. *Miller v. Robe*, 3 Taunt. 461. *And see Musselbrook v. Dunkin*, 2 M. & Scott, 740.

## V. UMPIRE.

*When to be chosen.*—If the bond be, that, if

arbitrators do not make their award by the day named, then to abide the award of an umpire, to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire commences when the time for their making their award expires. *Beck v. Sargent*, 4 Taunt. 232.

Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire be chosen within the time limited for his umpirage. *Harding v. Watts*, 15 East, 556. *And see Doyley v. Pittslow*, 15 East, 557, n.

Arbitrators having power to choose an umpire, may elect one before they enter upon the examination of the matter referred to them. *Roe d. Wood v. Doe*, 2 T. R. 644: *S. P. Bates v. Cooke*, 9 B. & C. 407.

*How to be chosen.*—Where a cause is referred to two arbitrators, and their umpire in case of dispute, and it is afterwards agreed to appoint an umpire, such appointment must in no case be decided by chance. And, therefore, where each of two arbitrators had named a person to be umpire and neither was disapproved of, and it was thereupon proposed that the final choice should be determined by lot, which was accordingly done, in the presence and with the concurrence of the arbitrators and parties, an award made by the umpire so chosen was set aside. *Ford v. Jones*, 3 B. & Adol. 248.

A submission was made to two arbitrators, and to such third person as they should appoint; the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third, and, not being able to concur in such appointment, it was agreed between them that each of them should name two, and that the names of the four should be put into a hat, and the name drawn should be the third arbitrator; and the arbitrator was so appointed. The award was made by one of the arbitrators originally named and the person so appointed by the two:—Held, that the appointment of the third arbitrator was bad, inasmuch as the choice of the third ought to have been the act of the will and judgment of the two, and matter of choice, not of chance. *In re Cassell*, 4 M. & R. 555; 9 B. & C. 624.

Where the parties named two arbitrators, who were to choose a third, and the award was to be made by three, or any two of them; and each of the arbitrators proposed to the other a third, but not being able to agree which of the two should be selected, they agreed to decide the choice by lot:—Held, that this was within their authority, and that an award made by such third arbitrator, in conjunction with the one by whom he had been originally proposed, could not be impeached on that account. *Neale v. Ledger*, 16 East, 51.

But where the plaintiff's arbitrator won, on tossing up for the appointment, and appointed his own nominee, and the award was made in favour of the plaintiff by these two, the court set it aside, on the ground that this mode of appointing the third arbitrator was improper. *Young v. Miller*, 5 D. & R. 263; 3 B. & C. 407: *S. P. Wells v. Cooke*, 2 B. & A. 218.

**Validity of Umpirage.**—An award made by an umpire is good, although the arbitrators had no authority to appoint one, and although he examined the parties separately, they having attended him, and made no objection at the time. *Mateson v. Trower*, R. & M. 17—Abbott.

Where arbitrators determined on five points in dispute, and referred a sixth to an umpire, whom they were authorized to choose, the award made by the arbitrators and umpire was held bad, the arbitrators not being authorized by the terms of the submission to make the award upon some points in dispute, and refer others to the umpire. *Tollis v. Saunders*, 9 Price, 612.

The court will not set aside the award of an umpire, because he received the evidence from the arbitrators, without examining the witnesses; unless he were required to re-examine them before the making his award. *Hall v. Lawrence*, 4 T. R. 589.

Arbitrators, not agreeing in their award, choose an umpire, who makes umpirage, the arbitrators' joining with him does not vitiate it. *Soulsby v. Hodgson*, 3 Burr. 1474; 1 W. Black. 463.

Even although the arbitrators were functi officio. *Beck v. Sargent*, 4 Taunt. 232.

Nor by a stranger joining. *Id.*

An award, after reciting that A. B. and C. D. had been appointed arbitrators, and that they had appointed E. F. umpire, proceeded, "We, the said arbitrators, do award," &c., and was signed by the two arbitrators and the umpire:—Held, that the latter, by signing the award, adopted the language as his. *Bates v. Cooke*, 9 B. & C. 407.

A declaration upon an award, made under a submission to the award of two persons, who were authorized to appoint an umpire, if they should disagree, after stating the choice of an umpire, alleged that the arbitrators and umpire made the award:—Held, that, taking the whole together, it was substantially an allegation that the umpire made the award. *Id.*

Where the arbitrators were to make their award on or before a day certain, and an umpire, if they should differ, before a subsequent day; and the umpire made his award before the time given to the arbitrators had expired:—Held, that the umpirage need not state that the arbitrators had disagreed. *Sprigens v. Nash*, 5 M. & S. 193.

To prove that the umpire was appointed by the arbitrators according to the terms of the submission, it is not sufficient to prove that he acted with them, and put in an award executed by all three, though the appointment of the umpire be recited in the award. *Still v. Halford*, 4 Camp. 17—Edenborough.

## VI. AWARD.

### 1. Time of making.

**When within Time.**—An award is to be considered as published when the parties have notice that it is ready for delivery on payment of the

reasonable charges. *Musselbrook v. Dunkin*, 9 Bing. 605; 2 M. & Scott, 740; 1 Dowl. P. C. 722.

An award which is required to be made in writing, &c., and ready to be delivered at such a time, is complete if made in writing, and ready to be delivered by the arbitrator within the time, though not actually delivered. *Brown v. Vauver*, 4 East, 584.

The time for making an award was on or before the 1st day of Michaelmas term; it was afterwards enlarged till the 1st day of Hilary term: an award made on the 1st day of Hilary term is good. *Knox v. Simmonds*, 3 Bro. C. C. 358.

The amount of damages sustained, and to be thereafter sustained, by the plaintiff, by reason of the working of a mine by the defendants, was, by bond, referred to an arbitrator, who was to make his award, as to the damages already sustained, on or before the 20th December, 1830; and, as to the damages to be thereafter sustained, at the expiration of every two months from the said 20th December. The arbitrator duly made the first award, but the second was not made until the 13th July 1831, and it included damages sustained by the plaintiff from the 20th December, 1830, to the 26th April, 1831:—Held, that this was not an award made in pursuance of the bond, and was therefore void. *Stephens v. Lowe*, 2 M. & Scott, 44; 9 Bing. 32.

Where, by deed of arbitration, dated 1st June, the arbitrators were to make their award on or before the 1st of October, with power, in case they should not agree in making their award within the time, to appoint an umpire, and his award to be binding, so as to be made six months after the date of his appointment; and the arbitrators appointed an umpire within the time allowed to them, who made his umpirage within six calendar, but not within six lunar, months of his appointment:—Held, that the umpirage was ill made. *In re Swinford and Horn*, 6 M. & S. 226.

Held, that an umpirage might be made after the arbitrators had declared they would make no award, though before the time allowed them had expired. *Smailes v. Wright*, 3 M. & S. 559.

An award made within enlarged time, is good, though it do not recite that the arbitrators did enlarge the time. *George v. Lousley*, 8 East, 13.

To debt on an award made by arbitrators upon a submission to them generally without any time, a plea that the arbitrators did not make any award within a reasonable time, adjudged ill. *Curtis v. Potts*, 3 M. & S. 145.

By a deed of submission in the Scottish form, an award was to be made betwixt the and the day of next, or any other day to which the submission might be prorogated:—Held, that the absence of date was immaterial, as it was equivalent to a general authority to be executed within a reasonable time. *Macdougall v. Robertson (in error)* 1 M. & P. 147; 2 Y. & J. 11; 4 Bing. 435.

**Enlargement of Time by Consent of Parties.** }  
If the arbitrators cannot make their award with-

terwards corrected by the arbitrator, might be set aside. The defendant not agreeing to this latter proposal, the court ordered a taxation. *Id.*

The court cannot interfere to alter the terms of an award in order to make them consist with the submission, even where the submission to arbitration gives minute directions for the course to be pursued by the arbitrator. *Hall v. Alderson*, 2 Bing. 476.

Where an arbitrator, who had made his award in the plaintiff's favour, was supposed to have made a mistake in calculating the sum which the plaintiff claimed a right to recover:—Held, that the court would not refer it back to the arbitrator to correct the mistake without the consent of the defendant. *Ex parte Cuerton*, 7 D. & R. 774.

A motion to refer back an award to the same arbitrator for reconsideration, on the ground that he had not sufficient materials before him when he made it, must be made before the last day of the next term after such award made, according to the 9 & 10 Will. 3, c. 15, s. 2, although the arbitrator be not charged with corruption or undue means. *Zachary v. Shepherd*, 2 T. R. 781. And see *Synge v. Jervoise*, 8 East, 466.

## 2. Remuneration.

Assumpsit on an implied promise to remunerate an arbitrator cannot be maintained. *Virany v. Warne*, 4 Esp. 46—Kenyon.

But semble, that an arbitrator may recover a compensation for his trouble. *Swinford v. Burn*, Gow, 7—Dallas.

Where an award is taken up by one party, and all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause. *Burroughes v. Clarke*, 1 Dowl. P. C. 48.

Seemle, an arbitrator has no action for his fees. *Id.*

If the submission to a reference mentions nothing respecting costs, the arbitrators have no power to award their own expenses to be paid by either party in particular. *Bell v. Belson*, 2 Chit. 157.

Quære, whether an award upon the reference of an action, directing the payment of costs of the award, without fixing the amount thereof, is bad in that point for uncertainty; or whether the amount may not be taxed by the officer of the court. *Barrett v. Parry*, 4 Taunt. 658.

The amount of the fee which an arbitrator, in a cause referred in the Court of C. P., awards to be paid to himself for his award, is examinable by the prothonotary. *Fitzgerald v. Graves*, 5 Taunt. 342.

If arbitrators award an excessive sum to be paid to themselves, the court of C. P. will refer it to the prothonotary to reduce it. *Miller v. Robe*, 3 Taunt. 461. And see *Musellbrook v. Dunkin*, 2 M. & Scott, 740.

## V. UMPIRE.

*When to be chosen.*—If the bond be, that, if

arbitrators do not make their award by the day named, then to abide the award of an umpire, to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire commences when the time for their making their award expires. *Beck v. Sargent*, 4 Taunt. 232.

Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire be chosen within the time limited for his umpirage. *Harding v. Watts*, 15 East, 556. And see *Doyley v. Pitslow*, 15 East, 557, n.

Arbitrators having power to choose an umpire, may elect one before they enter upon the examination of the matter referred to them. *Roe d. Wood v. Doe*, 2 T. R. 644: *S. P. Bates v. Cooke*, 9 B. & C. 407.

*How to be chosen.*—Where a cause is referred to two arbitrators, and their umpire in case of dispute, and it is afterwards agreed to appoint an umpire, such appointment must in no case be decided by chance. And, therefore, where each of two arbitrators had named a person to be umpire and neither was disapproved of, and it was thereupon proposed that the final choice should be determined by lot, which was accordingly done, in the presence and with the concurrence of the arbitrators and parties, an award made by the umpire so chosen was set aside. *Ford v. Jones*, 3 B. & Adol. 248.

A submission was made to two arbitrators, and to such third person as they should appoint; the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third, and, not being able to concur in such appointment, it was agreed between them that each of them should name two, and that the names of the four should be put into a hat, and the name drawn should be the third arbitrator; and the arbitrator was so appointed. The award was made by one of the arbitrators originally named and the person so appointed by the two:—Held, that the appointment of the third arbitrator was bad, inasmuch as the choice of the third ought to have been the act of the will and judgment of the two, and matter of choice, not of chance. *In re Cassell*, 4 M. & R. 555; 9 B. & C. 624.

Where the parties named two arbitrators, who were to choose a third, and the award was to be made by three, or any two of them; and each of the arbitrators proposed to the other a third, but not being able to agree which of the two should be selected, they agreed to decide the choice by lot:—Held, that this was within their authority, and that an award made by such third arbitrator, in conjunction with the one by whom he had been originally proposed, could not be impeached on that account. *Neale v. Ledger*, 16 East, 51.

But where the plaintiff's arbitrator won, on tossing up for the appointment, and appointed his own nominee, and the award was made in favour of the plaintiff by these two, the court set it aside, on the ground that this mode of appointing the third arbitrator was improper. *Young v. Miller*, 5 D. & R. 263; 3 B. & C. 407: *S. P. Wells v. Cooke*, 2 B. & A. 218.

**Validity of Umpirage.]**—An award made by an umpire is good, although the arbitrators had no authority to appoint one, and although he examined the parties separately, they having attended him, and made no objection at the time. *Mason v. Trower*, R. & M. 17—Abbott.

Where arbitrators determined on five points in dispute, and referred a sixth to an umpire, whom they were authorized to choose, the award made by the arbitrators and umpire was held bad, the arbitrators not being authorized by the terms of the submission to make the award upon some points in dispute, and refer others to the umpire. *Tidit v. Saunders*, 9 Price, 612.

The court will not set aside the award of an umpire, because he received the evidence from the arbitrators, without examining the witnesses; unless he were required to re-examine them before the making his award. *Hall v. Lawrence*, 4 T. R. 589.

Arbitrators, not agreeing in their award, choose an umpire, who makes umpirage, the arbitrators' joining with him does not vitiate it. *Soulsby v. Hodgson*, 3 Burr. 1474; 1 W. Black. 463.

Even although the arbitrators were functi officio. *Beck v. Sargent*, 4 Taunt. 232.

Nor by a stranger joining. *Id.*

An award, after reciting that A. B. and C. D. had been appointed arbitrators, and that they had appointed E. F. umpire, proceeded, "We, the said arbitrators, do award," &c., and was signed by the two arbitrators and the umpire:—Held, that the latter, by signing the award, adopted the language as his. *Bates v. Cooke*, 9 B. & C. 407.

A declaration upon an award, made under a submission to the award of two persons, who were authorized to appoint an umpire, if they should disagree, after stating the choice of an umpire, alleged that the arbitrators and umpire made the award:—Held, that, taking the whole together, it was substantially an allegation that the umpire made the award. *Id.*

Where the arbitrators were to make their award on or before a day certain, and an umpire, if they should differ, before a subsequent day; and the umpire made his award before the time given to the arbitrators had expired:—Held, that the umpirage need not state that the arbitrators had disagreed. *Sprigens v. Nash*, 5 M. & S. 193.

To prove that the umpire was appointed by the arbitrators according to the terms of the submission, it is not sufficient to prove that he acted with them, and put in an award executed by all three, though the appointment of the umpire be recited in the award. *Still v. Halford*, 4 Camp. 17—Ellenborough.

## VL. AWARD.

### 1. Time of making.

**When within Time.]**—An award is to be considered as published when the parties have notice that it is ready for delivery on payment of the

reasonable charges. *Musellbrook v. Dunkin*, 9 Bing. 605; 2 M. & Scott, 740; 1 Dowl. P. C. 722.

An award which is required to be made in writing, &c., and ready to be delivered at such a time, is complete if made in writing, and ready to be delivered by the arbitrator within the time, though not actually delivered. *Brown v. Vauwer*, 4 East, 584.

The time for making an award was on or before the 1st day of Michaelmas term; it was afterwards enlarged till the 1st day of Hilary term: an award made on the 1st day of Hilary term is good. *Knox v. Simmonds*, 3 Bro. C. C. 358.

The amount of damages sustained, and to be thereafter sustained, by the plaintiff, by reason of the working of a mine by the defendants, was, by bond, referred to an arbitrator, who was to make his award, as to the damages already sustained, on or before the 20th December, 1830; and, as to the damages to be thereafter sustained, at the expiration of every two months from the said 20th December. The arbitrator duly made the first award, but the second was not made until the 13th July 1831, and it included damages sustained by the plaintiff from the 20th December, 1830, to the 26th April, 1831:—Held, that this was not an award made in pursuance of the bond, and was therefore void. *Stephens v. Lowe*, 2 M. & Scott, 44; 9 Bing. 32.

Where, by deed of arbitration, dated 1st June, the arbitrators were to make their award on or before the 1st of October, with power, in case they should not agree in making their award within the time, to appoint an umpire, and his award to be binding, so as to be made six months after the date of his appointment; and the arbitrators appointed an umpire within the time allowed to them, who made his umpirage within six calendar, but not within six lunar, months of his appointment:—Held, that the umpirage was ill made. *In re Swinford and Horn*, 6 M. & S. 226.

Held, that an umpirage might be made after the arbitrators had declared they would make no award, though before the time allowed them had expired. *Smailes v. Wright*, 3 M. & S. 559.

An award made within enlarged time, is good, though it do not recite that the arbitrators did enlarge the time. *George v. Lousley*, 8 East, 13.

To debt on an award made by arbitrators upon a submission to them generally without any time, a plea that the arbitrators did not make any award within a reasonable time, adjudged ill. *Curtis v. Potts*, 3 M. & S. 145.

By a deed of submission in the Scottish form, an award was to be made betwixt the and the day of next, or any other day to which the submission might be prorogated:—Held, that the absence of date was immaterial, as it was equivalent to a general authority to be executed within a reasonable time. *Macdougall v. Robertson* (in error) 1 M. & P. 147; 2 Y. & J. 11; 4 Bing. 435.

### Enlargement of Time by Consent of Parties.]

If the arbitrators cannot make their award with-

in the time limited by the rule of court or order of Nisi Prius, a rule may be obtained by consent, but not otherwise, for enlarging it: or, where the submission is by agreement, without suit, the time may be enlarged simply by the consent of the parties. *Teasdale v. Atkins*, 2 Tidd's Prac. 880.

Where, in debt on a common arbitration bond, in which the time was limited for the arbitrator to make his award, the declaration stated that the time was afterwards, by mutual consent, enlarged:—Held, that no action would lie on the bond to recover the penalty for not performing the award made after the time first limited. *Brown v. Goodman*, 3 T. R. 592, n.

An agreement to enlarge the time for making an award must contain a consent that it shall be made a rule of court, otherwise no attachment will be granted for not performing an award made under it. *Jenkins v. Lau*, 8 T. R. 87.

But where parties, by an indorsement in general terms on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference; amongst others, that the submission for such enlarged time shall be made a rule of court; and, consequently, the party is liable to an attachment for non-performance of an award made within such enlarged time, under the statute 9 & 10 Will. 3, c. 15. *Evans v. Thomson*, 5 East, 189; 1 Smith, 380.

A declaration on an arbitration bond averred, that, before the time limited had expired, the parties to the bond, by a deed-poll, indorsed on the back of the bond, agreed to give the arbitrators further time to make their award, and that it was accordingly made within the enlarged time, but not performed by the parties against whom it was so made:—Held, on special demurrer, that the plaintiff was entitled to maintain an action on such declaration, for the recovery of the amount of the penalty contained in the bond. *Greig v. Talbot*, 3 D. & R. 446; 2 B. & C. 179.

Where the defendants in an extent in aid, withdrew their plea, and suffered judgment to be entered up, upon an agreement to submit to arbitration the question of the amount of what was due to the prosecutor, provided the award was made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendant's having delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendants' solicitor afterwards wrote a letter requiring that the arbitrator would take into consideration matters not before him during the reference, which was refused, as the reference was considered to be closed:—Held, that, under these circumstances, the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; for that the conduct of the defendants and the solicitor's letter were equivalent to a consent to extend the time: and therefore the court of Exchequer refused to set aside the judgment

and the proceedings thereon, and the award, and allow the defendants to plead to the extent. *Res v. Hill*, 7 Price, 636.

A judge's order enlarging the time for an arbitrator to make his award, should show on the face of it that the time was enlarged with the defendant's consent, before the latter can be attached for not performing the award; but it seems that the defendant's consent may be collected from other circumstances, so as to cure the objection. *Halden v. Glasscock*, 8 D. & R. 151; 5 B. & C. 390.

*Enlargement of Time by Arbitrator.*—When an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once. *Payne v. Deakle*, 1 Taunt. 509; *S. P. Anon.* 2 Chit. 45.

If an arbitrator has power to enlarge the time for making his award to any other day, the court will expound it to mean to any other days. *Barratt v. Parry*, 4 Taunt. 658.

It is no plea to an action against sureties on a replevin bond, that the replevin cause was referred to an arbitrator; and that he, without their knowledge, enlarged the time for making his award. *Aldridge v. Harper*, 10 Bing. 118; 3 M. & Scott.

An objection that the time for making an award has not duly been enlarged, is waived by proceeding in the reference with a knowledge of that fact. *Lawrence v. Hodgson*, 1 Y. & J. 16.

By the terms of a reference to arbitration, two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, and to make their award before a certain day, or such time as they, or any two of them, should appoint: the arbitrators, before appointing an umpire, enlarged the time, and afterwards held a meeting, at which the parties attended:—Held, that the latter being aware of these facts, and having attended, could not afterwards make any objection on the ground of the enlargement of the time having been made before the appointment of the umpire. *In re Hick*, 8 Taunt. 694.

*Enlargement by Arbitrator and Judge.*—Where a cause is referred by a judge's order, empowering the arbitrator to enlarge the time as he shall appoint and a judge shall order, an enlargement by the arbitrator alone, is irregular, and an award made after such enlargement is void. *Mason v. Wallis*, 5 M. & R. 85; 10 B. & C. 107.

Where a cause was referred, under a judge's order, with a proviso that the arbitrator should make his award on or before a day certain; but, if he should not be then prepared, that the time should be enlarged from time to time, as he might require and a judge of the court might think reasonable and just:—Held, that the time for making the award was duly enlarged by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time; although the judge's order granting such further time was not obtained until a day subsequent. *Reid v. Fryatt*, 1 M. & S. 1.



And in a similar case, where the indorsement was made on a day subsequent, the court refused an attachment for non-performance. *Good v. Wilks*, 2 Tidd's Prac. 881.

By a judge's order, an award was to be made by the first day of Trinity term, or such further day as the arbitrator should appoint by indorsement on the order. The arbitrator enlarged the time by indorsement, and before the expiration of the enlarged time, one of the parties, at his request, procured a judge's order for a further enlargement, which was acted on by all parties, and the arbitrator made his award beyond the time of the first enlargement, but within the time so further enlarged, but made no further enlargement on the original order:—Held, that, as both parties had in effect assented to the enlargement, the award was valid, as the authority of the arbitrator had not expired. *Leggett v. Finley*, 6 Bing. 255; 3 M. & P. 629.

*Effect of Time running out.*—When a verdict is taken with damages subject to the award of an arbitrator, if the arbitrator omit to make his award within the specified time, the court will send the cause down to a new trial, the defendant consenting to accept short notice of trial; but will refuse to allow the plaintiff to take out execution for the amount of the verdict. *Hall v. Phillips*, 2 M. & Scott, 167; 9 Bing. 89.

If the day for making the award have elapsed, without any award made, the court of C. P. will not grant an attachment against a party for disobedience to the order, unless notice of the enlargement of the time have been served upon him. *Hilton v. Hopwood*, 1 Marsh. 66.

A verdict was taken for 3,000*l.* subject to an award, to be made by a certain day, as to the amount of damages. The arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged. The court granted liberty to the plaintiff to enter up judgment and issue execution forthwith for the whole amount of the verdict, unless the enlargement were consented to. But, at the instance of the bail, they ordered that no execution should issue against them before a certain time, when it appeared that the defendant, who was abroad, would probably be in England. *Taylor v. Gregory*, 2 B. & Adol. 774.

A verdict was taken for the plaintiff at the assizes, March 31st, subject to a reference, the award to be made on or before the first day of Easter term, April 16. The attorney for the plaintiff left the assize town for his own residence, having first directed his agents at the assize town to obtain the order of reference, and send it him. On the 4th of April, having again written to his agents respecting the order, he left home on business, and returned on the 14th, when he found that the order of reference had not been sent, and, in consequence, he was not able to obtain it till the time for making the award had expired. The defendant having declined submitting to a new order of reference on the former terms, the court of K. B. refused to grant a rule enabling the plaintiff to proceed

upon his verdict in default of such submission. *Doe d. Fisher v. Saunders*, 3 B. & Adol. 783.

## 2. Form generally.

An award was held sufficient, although it was drawn up in the shape of an opinion. *Matson v. Trower*, R. & M. 17—Abbott.

By a judge's order made upon hearing the attorneys on both sides, and by their consent, a cause was referred to arbitration, and the award recited that the cause was referred by an order of Nisi Prius: it seems that such award is a nullity, and cannot be enforced by attachment. *Christie v. Hamlet*, 2 M. & P. 316; 5 Bing. 195.

Upon a bond for the performance of an award, "so as it be made in writing under the hands of the arbitrators," by such a day, the declaration averred that the arbitrators did, in due manner, and within the time limited, duly make their award in writing:—Held, in error, that the declaration was insufficient, because it did not allege that it was under their hands. *Everard v. Patterson* (in error), 2 Marsh. 304; 6 Taunt. 625.

Where an agreement of reference provides that the award shall be made by four persons or any three of them, and the award purports to be the award of the four, but is executed by three of them only, it is void. *Thomas v. Harrop*, 1 Sim. & Stu. 524.

It is no objection to an award, that it was prepared by the solicitor of one of the parties. *Fetherstone v. Cooper*, 9 Ves. jun. 67.

## 3. Certainty and Conclusiveness.

*Generally.*—A prima facie uncertainty, or want of conclusiveness in an award does not vitiate, if it be capable of being rendered certain or conclusive; and the award may be good or bad, according to the event. *Aitchison v. Cargay* (in error), 9 Moore, 381; 2 Bing. 199; 1 M'Clel. 367; 13 Price, 639.

In construing an award it is the duty of the court to favour that construction which renders the award certain and final. *Wood v. Griffiths*, 1 Swans. 52.

If the terms of an award be clear upon the face of it, the Court of C. P. will not admit of an affidavit of one of the arbitrators to explain their intention. *Gordon v. Mitchell*, 3 Moore, 241.

An award, that the defendant should pay to the plaintiff a certain sum of money, unless, within twenty-one days, (which was after the time limited for making the award), the defendant should exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a less sum, is illegal and void, because uncertain and inconclusive. *Pedley v. Goddard*, 7 T. R. 73.

Where two parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, and he gave his opinion in favour of one; such opinion was considered as final and conclusive, though it recommended the printed statute to be compared with the parliament roll before the matter was settled,

under a doubt whether the statute was not misprinted. *Price v. Hollis*, 1 M. & S. 105.

An award that A. or B. shall do a certain act is bad, for uncertainty. *Lawrence v. Hodgson*, 1 Y. & J. 16.

In an action of ejectment:—Held, that an award was good, although the arbitrator did not find in terms that the plaintiff had any cause of action. *Doe d. Williams v. Richardson*, 8 Taunt. 697.

Upon a reference of all actions, controversies, &c. and also of two distinct matters of difference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award, which cannot, therefore, be enforced by attachment. *Randall v. Randall*, 7 East, 81; 3 Smith, 90.

Under a submission of all matters in difference between A. & B., an award on matters in difference between A. and B., and C. and D. jointly, directing A. to pay B. a certain sum as a compensation for coals gotten by A., belonging to B., or to B. and others, and directing B. to give A. a bond to indemnify him against the claims of C. and D., is bad. *Fisher v. Pimbley*, 11 East, 188.

An award which found that a canal company took water from two streams during prohibited times, and when other streams did not overflow, and consequently that it was not done in pursuance of the act of incorporation, or in the execution of its powers and authorities, and therefore not within the protection of the act as to the time of commencing the action, was ill. *Gaby v. Wilts Canal Company*, 3 M. & S. 580.

An action on the case for a fraudulent representation of the circumstances of J. S. was referred to arbitrators, who found that the defendant had omitted to state to the plaintiff certain debts which J. S. owed to him; wherefore the defendant did not give a fair representation of what he knew concerning the credit of J. S., but that in what he said he did not mean to hold out any inducement for the plaintiff to trust J. S.; and acquitted the defendant of all collusion with J. S., and of all premeditated fraud, with a view to benefit himself at the plaintiff's expense, and of any intention at the time of making the representation, of withdrawing his credit from J. S.; and awarded in favour of the plaintiff:—Held, that such award was bad, as the arbitrator had, in substance, acquitted the defendant of any fraud or intention to deceive the plaintiff, without which such action could not be supported. *Ames v. Milward*, 2 Moore, 713.

*Debt due.*—Where the award was, that "nothing was due to the plaintiff," it must be considered as intending that the plaintiff had no right to recover in the action referred. *Dickins v. Smith*, 8 D. & R. 285; *S. C. nom. Dickins v. Jarvis*, 5 B. & C. 528.

Upon a reference to a surveyor, of a cause and all matters in difference, an award that defendant had over-paid plaintiff 34*l.*:—Held, not sufficient to entitle the plaintiff to enforce the award by attachment. *Thornton v. Hornby*, 8 Bing. 13; 1 M. & Scott, 48; 1 Dowl. P. C. 237.

Attachment refused upon an award which found a debt, but contained no order to pay. *Edgell v. Dallimore*, 3 Bing. 634; 11 Moore, 541.

An award that money shall be paid to a stranger for the use of one of the parties to a submission, is sufficient. *Snook v. Hellyer*, 2 Chit. 43.

An award is not void for uncertainty, which directs an executor to pay a sum of money out of assets, but which does not determine whether in point of fact he has assets. *Love v. Honeybourne*, 4 D. & R. 814.

An award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the ratio of their shares not being a subject of dispute, is sufficiently certain. *Wolkenberg v. Legeman*, 6 Taunt. 254; 1 Marsh. 579.

An award fixing the rule for calculating the amount of money to be paid, without stating the result of such calculation, is sufficiently certain. *Higgins v. Willis*, 3 M. & R. 382.

Where all matters in difference between the plaintiff and defendant were referred to an arbitrator, and the defendant made several claims against the plaintiff, which might be the subject of a cross action, and the arbitrator found that the plaintiff had no cause of action against the defendant:—Held, that the award was sufficient; all matters in difference between the parties having been referred. *Hayllar v. Ellis*, 3 M. & P. 553; 6 Bing. 225.

The submission being of all matters in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their banking account, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for, no other matter in difference between them shall be intended unless it be shewn. And the award is good for so much, though the arbitrators also awarded a sum to be paid out of a partnership fund. *Ingram v. Milnes*, 8 East, 445. *But see* 2 Moore, 723.

An agreement of reference stated, that disputes had arisen between G. and a navigation company, respecting certain goods shipped by G. on board the company's vessels, and which G. complained had not been delivered; that G. had commenced an action in Scotland against the company for the recovery of the goods or their value, of the damage sustained by the non-delivery, and of the costs incurred in the action; and that the parties agreed to refer the said differences to arbitrators, the costs of the reference and award, and also of the action, to be in their discretion. The arbitrators awarded that 238*l.* were due from the company to G.; that the said sum, with 30*l.*, the costs of the reference and award, should be paid by the company on a certain day; and that the company should keep the goods, which were then in their possession:—Held, (*Parke, J.*, dubitante), that this was a sufficient adjudication upon all matters referred:—Held, also, that the award of the goods to the company was not void as an excess of authority. *In re Gillon*, 3 B. & Adol. 493.

An award that the sum of 230*l.* is due from defendants to plaintiffs, and that out of that sum

defendants should pay to the arbitrators 93*l.*, being the expenses of preparing the agreement of reference and their award, and for their charge, trouble, and attendance on the reference and arbitration, and certain costs which they award to be paid to the solicitors of plaintiffs, in respect of certain actions mentioned in the agreement of reference, leaving the sum of 136*l.* which they award to be paid to plaintiffs.—Held, that the award was void for uncertainty in directing a sum in gross to be paid to the arbitrators for the objects above mentioned, without specifying the particular sum to be appropriated to each object. *Robinson v. Henderson*, 6 M. & S. 276.

Two surveyors, who it had been agreed should fix the price of an estate, stated in their valuation the sum to be paid and the quantity of land, and that if it proved to be less, either 84*l.* or 42*l.* should be deducted, according to the parts of the estate in which the deficiency occurred, but did not state the quantity contained in each part.—Held, the valuation was uncertain, and that specific performance could not be enforced. *Hopcraft v. Hickman*, 2 Sim. & Stu. 130.

**Direction in the Alternative.**—If an award direct one of two things to be done in the alternative, and either of the two is uncertain or impossible, it is incumbent on the party to perform the other of them which is capable of being performed. *Simmonds v. Swaine*, 1 Taunt. 549.

Although it might be impossible for the defendant to perform certain parts of an award, yet if the award in each instance, gives an alternative which he could perform, it is sufficient. *Wharton v. King*, 2 B. & Adol. 528.

**Determination of Suit.**—An award that certain actions be discontinued, and each party pay his own costs, is final and good, being in effect an award of a *stet processus*. *Blanchard v. Lilly*, and *Rez v. Blanchard*, 9 East, 497.

An award which settles the costs on both sides, is final. *Hartnell v. Hill*, Forrest, 73.

Where an action for a breach of covenant was pending, which, with all the matters in difference, was referred to arbitration, the costs of the suit to abide the event:—Held, that an award, that the plaintiff had no demand on the defendant, on account of any alleged breaches of covenant, or on any other account whatsoever, was final, although the suit was not in terms concluded. *Jackson v. Yabeley*, 5 B. & A. 848. But see *Winter v. White*, 2 Moore, 723.

Award, made upon submission of all disputes, reciting "that there had been a suit at law between the parties, which had run to great expense on both sides, and being left to the arbitrator to make an end of, he did determine that they should each of them pay their own charges at law, and that defendant should pay plaintiff 5*s.* for his making the first breach in law; this is certain and final. *Hunkins v. Colclough*, 1 Burr. 274; 9 Ld. Ken. 553.

By an order of *Nisi Prius*, an action at law, and all matters between the parties at law and in

equity, including a chancery suit, were referred to an arbitrator, who, by his award, ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in Chancery should be dismissed, and that all proceedings therein should utterly cease and determine:—Held, that, the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties were thereby finally determined, although one of the matters in dispute in the Chancery suit was brought before the arbitrator as a matter of difference between the parties, and was not otherwise disposed of than by the ending of the Chancery suit. *Pearse v. Pearse*, 9 B. & C. 484.

**Award of mutual Releases.**—An arbitrator, by having awarded mutual and general releases, must be deemed to have adjudged and finally decided upon all matters, and the general release would be an answer to any action or claims founded upon them. *Wharton v. King*, 2 B. & Adol. 528.

Where the condition of an arbitration bond was, that G. F. should perform such award as should be made between plaintiff and J. F.; an award, that G. F., the defendant, should pay 298*l.* 9*s.* 7*d.*, and that they should execute releases, was held good. *Cayhill v. Fitzgerald*, 1 Wils. 28, 58.

Where, in an award reciting that disputes had lately arisen between the plaintiff and defendants, concerning a roadway claimed by the latter through the mow-hay of the former, the arbitrators awarded, that all actions, quarrels, &c., depending between the parties for any manner of cause whatever touching the roadway to the date thereof should cease, and be no further prosecuted; and that each of them should pay their own costs concerning the premises; and that the defendants should quit all claim to the roadway in dispute, it appearing to them to be the property of the plaintiff; and that the defendants, at their own costs, should replace the hedge of the mow-hay there standing before the defendant's door, as it formerly stood before the dispute; and that they should enjoy the old roadway behind their house; and that they should pay to the plaintiff a certain sum for damage sustained by her on account of the roadway; and that the plaintiff and defendants, on payment of that sum and performance of the award, should execute releases; and the plaintiff in a declaration on the arbitration bond averred, that the defendants had not paid that sum:—Held, on demurrer, that it did not appear from the award that the defendants had any legal title to the road granted to them, it not stating that such road belonged to either of the parties. *Harris v. Curnow*, 2 Chit. 594.

#### 4. Partial Validity.

An award may be good in part, and bad in part, where the subject is clearly capable of being separated. *Addison v. Gray*, 2 Wils. 293.

But not where all the matters are within the submission, and the award is upon the face of it entire. *Asriel v. Smith*, 1 Turn. & Russ. 128.

Though an award be bad in some respects, yet that does not vitiate those parts which are otherwise unobjectionable, and it may stand in toto until the particular contingency arises to which a prospective regulation made by the arbitrator applies. *Winter v. Leithbridge*, (Bart.), 1 M'Clel. 253; 13 Price, 533.

And also, if an award be bad as to the direction of mutual releases, where they are awarded, that will not vitiate the whole. *Doe d. Williams v. Richardson*, 8 Taunt. 697. See *Caila v. Elgood*, 2 D. & R. 193.

An award of general releases on a special reference is good for the matter referred, and void as to the rest. *Pickering v. Watson*, 2 W. Black. 1117.

If the arbitrator exceed his authority in going beyond the terms of the submission, to direct the mode in which any of the matters ordered by the award is to be done, that direction may be rejected as a nullity, forming no part of, and consequently not affecting, the award. *Aitcheson v. Cargrey* (in error), 13 Price, 639; 2 Bing. 199; 9 Moore, 381; 1 M'Clel. 367.

An arbitrator, to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff, and certain works to be done by the defendant. He then added, that, as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but, if no proceeding were taken by the plaintiff within two months after the work was done, the award then made should be final, and he enlarged the time for making his further and final award, if requested, to six months:—Held, that the latter part of this award was bad, as it assumed to reserve a power over future differences; but that it might be rejected, and the former part was final, and might stand. *Manser v. Heaver*, 3 B. & Adol. 295.

#### 5. Performance of Award.

Where lessees of land and of coal mines, covenanted forthwith to proceed to sink for coal as far as could and ought to be accomplished, &c., or in default thereof to pay so much to the lessor, as arbitrators should award, and the lessees gave bond to the lessor, conditioned to perform the award, which was made:—Held, that, to an action on the bond, it was a sufficient answer, that they had proceeded to sink as far, &c. (in the words of the covenant), but that none could be found. *Hanson v. Boothman*, 13 East, 22.

Seemle, that a person cannot be required to assign an interest in premises to A. B., his executors, administrators, and assigns, where the terms of the award were that he should assign to A. B. *Russel v. Headington*, 1 Stark. 13—Ellen.

Where, upon a reference of actions in C. P. and award of a sum to be paid by each party, the party entitled to the larger sum sued in

K. B. in order to make the defendant's set-off subject to the lien of his attorney for his costs, the former court would not interfere to enforce the set-off, nor would they order the award to be delivered up. *Symonds v. Mills*, 8 Taunt. 536.

Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award: the arbitrator awarded each of the two to pay a certain sum to the third:—Held, that they were jointly responsible for the sum awarded to be paid by each. *Mansell v. Burrledge*, 7 T. R. 352.

### VII. SETTING ASIDE AWARD.

#### 1. Mistake of Law.

*Must be apparent on Award.*—An award made by a barrister cannot be questioned, on the ground of any statement not appearing on the face of the award, or annexed to it. *Williams v. Jones*, 5 M. & R. 3.

It is final between the parties, unless the objection is apparent on the face of it. *Sharman v. Bell*, 5 M. & S. 504.

No objection can be taken on the ground of a mistake in point of law, unless the grounds of the objection appear upon the award, or in some authentic shape before the court. *Price v. Jones*, 2 Y. & J. 114; *S. P. Anon.* 1 Chit. 674; *Doe v. Thompson*, 1 Chit. 674, n.

The court refused to set aside an award, upon the face of which no objection appeared, on a mere statement of facts from which it might be inferred that the award was founded upon an incorrect notion of the law of the case. *Deloer v. Barnes*, 1 Taunt. 48.

If an arbitrator profess to decide upon the law, and he mistake it, the court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. So it seems it would be, if such reasons appeared in any other authentic manner to the court. *Kent v. Elstob*, 3 East, 18.

So, if a mistake in point of law be made out by clear evidence on one side, and be not denied by the other: and a mistake in the judgment of the arbitrator is considered as a mistake in point of law. *Wade v. Huntley*, 2 Tidd's Prac. 694.

Where an arbitrator had awarded to an apothecary in London charges for attendances, the court refused to refer back the award to him for reconsideration. *Gensham v. Germain*, 11 Moore, 1. And see *Handley v. Henson*, 4 C. & P. 110.

A mistake in an award must be plain and gross in order to set it aside on that ground. *Anon.* Lofft, 554; *S. P. Knox v. Symonds*, 1 Ves. jun. 369.

A party cannot, in shewing cause against an attachment for not performing an award, impeach the award for defects not appearing on it. *Holland v. Brooks*, 6 T. R. 161.

But it is competent to the parties to object to

the award, for any illegality apparent upon the face of it, though the time limited by 9 & 10 Will. 3, c. 15, for applying to set it aside is expired. *Pedley v. Goddard*, 7 T. R. 73.

An award contrary to law may be impeached, for that is excess of power. *Morgan v. Mather*, 2 Ves. jun. 15.

But not unless the law be clear upon the subject. *Richardson v. Nourse*, 3 B. & A. 237.

**Both Matters of Law and Fact referred.**—The court will not open an award on a suggestion that the arbitrator is mistaken in the law; facts as well as law having been referred to him, and his award being silent as to the grounds of his decision. *Boutillier v. Thick*, 1 D. & R. 366.

In such case the award is final and conclusive; and the court will not open it or set it aside, unless the principles upon which he has decided be apparent on the face of the award. *Payne v. Messey*, 9 Moore, 666.

Where a cause involving a question of law was referred to a barrister, and the question did not appear on his award, the court refused to open the award again on a suggestion of the barrister's mistake on the point of law, considering it the intention of the parties to refer questions of fact as well as of law. *Chace v. Westmore*, 13 East, 357. And see *Price v. Hollis*, 1 M. & S. 105.

Where a cause is referred to a layman, and he assumes to decide upon a point of law, and errs, the court will set aside his award: but, where the arbitrator is a barrister, both the law and the fact are left to his discretion; even though a question of law arises incidentally on the hearing, which could not have been in the contemplation of the parties at the time of referring. *Perryman v. Steggall*, 3 M. & Scott, 93; 9 Bing. 679.

**Matters of Law only referred.**—If an arbitrator, under a general reference, meaning to decide according to law, make a mistake, the court will set that right; yet, if the parties choose to refer matters of law, meaning to have the judgment of the arbitrator upon them instead of that of the court, the award, though not agreeable to law, cannot be therefore impeached. *Young v. Walter*, 9 Ves. jun. 364.

Even where matters of law and not of fact are referred to a barrister, the court of C.P. will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award itself. *Cramp v. Symons*, 7 Moore, 434; 1 Bing. 104.

An award made on a reference of a point of law is binding, though the arbitrator mistakes the law. *Steff v. Andrews*, 2 Madd. 6: *S. P. Ching v. Ching*, 6 Ves. jun. 282.

A cause was referred to an arbitrator, with liberty to him to state upon his award any point of law raised by either party in reference to the matters thereby referred. Certain points of law were accordingly submitted to the arbitrator, which he set out upon his award, but without reference to any particular state of facts, and certified that he had overruled them. The arbi-

trator's decision upon these points, as abstract propositions, being correct—the court refused either to refer it back to him to amend his award by setting forth the facts upon which the questions of law arose, or to set aside the award. *Jay v. Byles*, 3 M. & Scott, 86.

## 2. Collusion and Misbehaviour.

Although an award upon a general reference cannot be impeached for erroneous judgment upon facts, it may for corruption, misbehaviour, excess of power, and mistake, admitted by the arbitrators: there must however be satisfactory evidence against them, for the court favours awards. *Morgan v. Mather*, 2 Ves. jun. 15: *S. P. Knox v. Symonds*, 1 Ves. jun. 369.

An award may be set aside for collusion or gross misbehaviour of the arbitrators. *Sturt v. Moggeridge*, 2 Tidd's Prac. 594.

Partiality and improper conduct in the arbitrator is no answer to a motion for an attachment for non-performance of an award, although good reason for setting it aside. *Brasier v. Bryant*, 3 Bing. 167; 10 Moore, 587.

Partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned for the performance of the award, but is only matter for application to the equitable jurisdiction of the court to set aside the award: neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action. *Bradick v. Thompson*, 8 East, 344.

Nor can partiality in the arbitrators be given in evidence on nil debet in debt on an award. *Wills v. Maccormick*, 2 Wils. 148.

By an agreement, after reciting that divers disputes and differences had arisen and were depending between the plaintiff and defendant as executrix respecting certain unsettled accounts between them, and that for finally settling such differences, it was agreed that the matters in dispute should be referred to the final award of two arbitrators. Plea by the executrix, that no evidence was offered of assets before the arbitrators, nor did she admit she had any:—Held, ill on general demurrer, as it imputed misconduct to the arbitrators, which is not the subject of a plea, but only a ground to apply to the court to set aside the award. *Riddle v. Sutton*, 2 M. & P. 345.

## 3. Stamp.

An award in writing, and under seal, need not have a deed stamp, unless delivered as a deed; but, being only delivered as an award, it is sufficient if it have the award stamp of 10s. *Brown v. Vauceer*, 4 East, 584.

If an award be made on an improper stamp, and no application be made to enforce the award, the court will not set it aside. *Preston v. Eastwood*, 7 T. R. 95.

If an objection to the stamp be not alleged as a ground for obtaining a rule to shew cause why an award should not be set aside, it cannot be

relied upon afterwards when cause is shewn. *Liddell v. Johnstone*, 2 Tidd's Prac. 897.

The appointment of an umpire made in writing by two arbitrators, requires no stamp. *Routledge v. Thornton*, 4 Taunt. 704.

On the fly-leaf of an arbitration bond was an indorsement, bearing date after the time limited by the bond for making the award, and stating that the parties within named had met that day by consent, on the award:—Held, that this memorandum, being evidence of a new agreement to refer, was not admissible in evidence without a stamp. *Stephens v. Lowe*, 2 M. & Scott, 44.

#### 4. Other Grounds.

An award cannot be set aside on any ground which is a question of merits as between the original parties. *Winter v. Lethbridge (Bart.)*, M'Clel. 253; 13 Price, 533.

The court on motion refused a rule to set aside an award, on the ground that the submission had been obtained by fraud; as the application should have been made to set aside the order. *Sackett v. Owen*, 2 Chit. 39.

The court will not entertain an application for setting aside an award, founded upon an indictment at the assizes for not repairing a road, though the question in dispute be of a civil nature. *Rez v. Cotebatch*, 2 D. & R. 265.

The court granted a rule to set aside an award on the application of the party in whose favour it was made, on an acknowledgment by the arbitrator and defendant that a sum had been omitted by mistake to be awarded to him. *Anon.* 2 Chit. 44.

A declaration of one of the arbitrators, that, had he seen a letter, which being mislaid at the time, had not been proved, and known the contents, he would have acted otherwise, is not sufficient to set aside an award, on the ground of mistake. *Anderson v. Darcy*, 18 Ves. jun. 447.

The court refused to set aside an award, on the ground that, subsequently to the examination of the parties (by consent) before the arbitrator, the plaintiff had learned that the defendant had been sentenced to transportation, and had returned before the expiration of his term; it appearing that the arbitrator had expressly excluded from his judgment the entire testimony of both parties, conceiving neither of them worthy of credit. *Smith v. Sainsbury*, 2 M. & Scott, 53; 9 Bing. 31.

The mere fact of an arbitrator being indebted to one of the parties, is not of itself sufficient to set aside an award, though the other party was ignorant of the circumstance, and, as soon as he knew of it, objected to the arbitrator's proceeding. *Morgan v. Morgan*, 1 Dowl. P. C. 611.

#### 5. Proceedings to set aside at Law.

##### (a) When to be adopted.

Where a cause has been referred to arbitration, the court cannot interfere to enter a nonsuit against the arbitrator's direction; but the party

objecting to the award must move to set it aside. *Peters v. Anderson*, 1 Marsh. 238; 5 Taunt. 586.

So, a party must move to set the award aside if he be precluded by the terms of the rule from going into evidence of that which he is desirous to try. *Doe d. Carlisle (Lord) v. Morpeth (Baillie)*, 3 Taunt. 378.

After a submission of all matters in difference, an award made, a release given, and an acquiescence of nine years:—Held, that the award could not be set aside, nor the matters unravelled, upon a suggestion that the arbitrator had only particular matters under his consideration. *Jones v. Bennett*, 1 Bro. P. C. 528.

Where, by the terms of an order of Nisi Prius, referring matters in dispute to the award of an arbitrator, on the terms of the defendant paying the costs of the cause, and of the reference and award, the plaintiff, after having accepted the costs of the reference and of the award, was dissatisfied with the award:—Held, that he was precluded from moving to set it aside. *Kenward v. Harris*, 4 D. & R. 272; 2 B. & C. 801.

Where an award is void, and nothing can be done upon it without suit, the court will not interfere to set it aside, because such suit must fail. But, where a cause is referred by order of N. P., and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered; notwithstanding such award is void, the court will set it aside, for otherwise the party in whose favour the award is made, will have judgment upon the verdict, without any new proceeding to enforce the award. *Doe d. Turnbull v. Brown*, 5 B. & C. 384; 8 D. & R. 100.

##### (b) Limitation as to Time.

*Awards under Stat. 9 & 10 Will. 3.*—By this statute, *Awards procured by corruption, or undue means, are void, and may be set aside by any court of law or equity, if complaint be made in the court where the rule is made before the last day of the next term after such award published.*

If the motion be not made before the last day of the next term after such award is published, it is too late; and an attachment for the non-performance of it may issue. *Fream v. Pinneger*, Cowp. 23.

The limitation of time for application to the court to set aside awards, applies only to cases where an original authority is given to the court by that act; and though the court will, in general, adopt the same rule in cases where their authority existed independently of the act, yet, where they see sufficient reason for their interference, they will interpose their authority, though the time prescribed should have elapsed. *Rogers v. Dallimore*, 1 Marsh. 471; 6 Taunt. 111.

An application to set aside an award for objections apparent on the face of it, must be brought within the time limited by the statute. *Lowndes v. Lowndes*, 1 East, 276; S. P. Anon. 1 Ld. Ken. 118; *Anon.* Loft. 437.

Where there is a palpable objection upon the face of an award, the court may refuse to enforce,

but cannot set it aside, after the time limited by the statute has elapsed. *Auriol v. Smith*, 1 Turn. & Russ. 125.

Where an award under the statute was made after the *excegn* day, but before the *quarto* die post:—Held, that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term next following. *In re Burt*, 5 B. & C. 668; 8 D. & R. 431.

The time limited by the statute for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of *Nisi Prius*. *Synge v. Jervoise*, 8 East, 466.

*Awards not under the Statute.*—A motion to set aside an award made under an order of *Nisi Prius*, not under 9 & 10 Will. 3, c. 15, must be made within the time allowed for moving for a new trial, unless sufficient reason for delay be shown. *Rawsthorpe v. Arnold*, 6 B. & C. 629; 9 D. & R. 556.

Defendant gave plaintiff to understand he intended to move to set aside an award between them. Plaintiff, who intended to make the same motion, allowed a term to elapse, and then moved, the defendant having omitted to do so:—Held, no sufficient reason for the delay. *Emet v. Ogden*, 7 Bing. 258.

Motion to set aside an award under a reference at *Nisi Prius*, allowed to be made after the first four days of term, where the award was published too late in the vacation to take the necessary proceedings before. *Bennett v. Skardon*, 5 M. & R. 10.

A cause was referred at the assizes (without a verdict being taken) to a layman. The arbitrator, on the 19th of May, gave notice to the parties that his award was ready to be delivered to them, on payment of certain fees, which were deemed exorbitant. In Trinity Term following, the court made a rule absolute for referring the arbitrator's charge to the prothonotary for taxation. The prothonotary, after the expiration of the term, proceeded with the taxation, and reduced the fees. The defendant, on the 24th of November, paid those fees, and obtained the award. On the 26th, the last day of Michaelmas Term, the plaintiff moved to set aside the award:—Held, that the application was too late. *Muscellbrook v. Dinkin*, 9 Bing. 605; 2 M. & Scott, 740; 1 Dowl. P. C. 722.

A verdict was taken for the plaintiff at *Nisi Prius*, by consent, with leave for the defendant to move to set it aside; a rule having been obtained accordingly, the court ordered the verdict to stand, and the amount of damages to be referred to an arbitrator, who made his award in vacation:—Held, that an application to set aside the award must be made within the first four days of the next ensuing term. *Thompson v. Jennings*, 10 Moore, 110.

A defendant may move to set aside a judgment entered up on an irregular award, though the time of setting aside the award itself has elapsed, if the defect insisted on be apparent on the face of it; and an objection grounded on

such defect need not be stated in the rule nisi. *Manzer v. Heaver*, 3 B. & Adol. 295.

#### 6. Practice.

*What to be stated in Affidavit and Rule.*—Where a rule to shew cause is obtained to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute, must be stated in the rule to shew cause. *Reg. Gen. K. B. E. T.* 2 Geo. 4; 4 B. & A. 539; C. P. M. T. 10 Geo. 4, § 6 Bing. 349; 3 M. & P. 761.

The rule is the same in the Exchequer. *Smith v. Briscoe*, 11 Price, 57.

The court is not, however, precluded by the omission from entering into any valid objection that may be raised to the award. *Dicas v. Jay*, 2 M. & P. 448; 5 Bing. 281.

In moving to set aside an award made under a rule of court, the rule nisi ought to be drawn up, on reading the rule under which the matter was referred, and the objections to the award ought to be specified. *Christie v. Hamlet*, 4 Bing. 195; 2 M. & P. 316.

Strong facts are required, and they must be distinctly stated, on application for setting aside awards; and a denial of any such is conclusive. *Bedington v. Southall*, 4 Price, 232.

A rule nisi to set aside an award, because the arbitrator had not settled all matters in dispute, need not state what matters were unsettled; it is sufficient if they appear by the affidavit made to obtain the rule. *Rawsthorpe v. Arnold*, 6 B. & C. 629; 9 D. & R. 556.

Where it is stipulated that in case of the breach of an agreement, the sum of 100l. should be received as a stipulated debt binding on each party, as to the amount; and an action for damages generally, for the breach of this agreement, was referred to an arbitrator, who awarded only 10l. damages:—Held, that, in order to entitle the party to come to set aside this award, it was necessary expressly to state in the affidavit, that this clause was pointed out to the arbitrator at the time, and that he was required to act upon it. *Pinkerton v. Caslon*, and *Caslon v. Pinkerton*, 2 B. & A. 704.

*How Affidavit intituled.*—Affidavits in support of or in answer to a rule for setting aside an award made a rule of court under the statute, need not be intituled. *Bainbrigge v. Houlton*, 5 East, 21.

On motions to set aside awards where there is no cause pending, it is not necessary that the affidavits, on shewing cause, should be intituled with the christian and surnames of the parties, although the rule is generally drawn up with the names of the parties, as if there was a cause pending. *Anon.* 1 Smith, 358.

*Other Matters.*—The courts will not hear a motion for a rule to set aside an award on the last day of term. *Nettleton v. Crosby*, 1 Tidd's Prac. 503.

Questions on awards are not to be heard on the last day of term in the Exchequer. *Watkins v. Philpotts*, M'Clel. & Y. 393.

Nor will the courts grant a second rule to set aside an award, when a rule for that purpose has been already discharged. *In re Hellyer*, 2 Chit. 265.

Where counsel moved to make a rule absolute, which had been previously obtained to shew cause why an award should not be set aside on the grounds which appeared in the affidavit in support of the motion, on a suggestion that new evidence had been since discovered:—Held, that they should have applied to the arbitrator to delay making his award, and appoint another meeting to hear the additional evidence. *Eardley v. Oiley*, 2 Chit. 42.

If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs. *Snook v. Hellyer*, 2 Chit. 43.

#### 6. Proceedings to set aside in Equity.

*Jurisdiction.*—The jurisdiction in matters of award, referred under the statute 9 & 10 Will. 3, is altogether transferred to the court of which the submission is made a rule; and awards of that nature must be regulated by the statute with respect to the period within which application must be made to set them aside. *Auriol v. Smith*, 1 Turn. & Russ. 125.

Semble, a case of fraud does not constitute an exception. *Id.*

Where it is one of the terms of an agreement to refer disputes to arbitration, that the submission shall be made a rule of a court of common law, if either party require it; the court of Chancery has no jurisdiction to relieve against the award, although the submission has not been made a rule of court within the time limited by the statute. *Davies v. Getty*, 1 Sim. & Stu. 411.

Quære, whether a general reference to arbitration by parties in a suit then depending in chancery, made an order of a court of law, is an order within the statute 9 & 10 Will. 3, c. 15, excluding the equitable jurisdiction, to affect the award for mistake of law apparent, and to restrain an application to the court of law to enforce it. *Nichols v. Chalie*, 14 Ves. jun. 265.

There is no jurisdiction in equity by injunction, to stay process of a court of law upon an award made a rule of court under statute 9 & 10 Will. 3, c. 15, which confines the jurisdiction to set aside the award to the court of which the submission is made a rule. *Gwinnett v. Benister*, 14 Ves. jun. 530.

*Course of Proceeding.*—A bill in equity lies to set aside for fraud an award made a rule of a court of law under statute 9 & 10 Will. 3, c. 15. *Lonsdale (Lord) v. Littledale*, 2 Ves. jun. 151; *S. P.* — *v. Mills*, 17 Ves. jun. 419.

Where a party applies to set aside an award, on the ground of newly discovered fraud, he is bound to shew that it is a new discovery, and that he could not with due diligence have made the discovery before. *Auriol v. Smith*, 1 Turn. & Russ. 127.

A bill will not lie to set aside an award on a question of fact referred to arbitration, except for

corruption, partiality, or irregularity of conduct in the arbitrators. *Goodman v. Sayers*, 2 J. & W. 249; *S. P. Champion v. Winham*, Amb. 245.

Where the objections to an award were such as might have been equally the subject of jurisdiction in the court of law, where the reference was made a rule of court, an injunction was dissolved. *Fetherstone v. Cooper*, 9 Ves. jun. 67.

An award on a general reference is not to be impeached in equity by exceptions, but by cross motions to set aside and confirm it. *Knox v. Symonds*, 1 Ves. jun. 369.

Matter of exception to an award must be confined to what arises from the face of it, compared with the proceedings in the cause, and cannot be introduced by affidavit: any thing dehors charging misconduct, &c. must come upon motion to set it aside, and there cannot be a partial inquiry. *Dick v. Milligan*, 2 Ves. jun. 24.

### VIII. ENFORCING AWARD.

#### 1. By Action.

An action may be maintained on an award, made under a submission by a judge's order, the parties having attended at the reference. *Whar-ton v. King*, 1 M. & Rob. 96—Tenterden.

Two persons assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same; under which the plaintiff submitted to arbitration the matters in difference then subsisting between his principals and the defendants:—Held, that the plaintiff might maintain an action of assumpsit on the award in his own name. *Benfill v. Leigh*, 8 T. & R. 571.

The court will not presume that the matters in difference submitted to arbitration, arose subsequent to an indenture of assignment and power of attorney from principals; but such matter may be pleaded by way of defence to an action for the money: nor is it necessary in setting forth the assignment to make profert. *Id.*

In debt upon an award, the plaintiff needs shew forth nothing more than is necessary to support his claim, and entitle him to the thing demanded. *Perry v. Nicholson*, 1 Burr. 278; 2 Ld. Ken. 557.

In a declaration upon an arbitration bond, plaintiff must set forth his whole demand. *Id.*

Counts on an award may be joined with counts in assumpsit for the breach of an agreement to stand by, perform, and not revoke an award to be made; and the Judge at Nisi Prius will not put the plaintiff to elect which set of counts he will rest his case upon. *Brown v. Tsaer*, 1 C. & P. 651; *McClel. & Y.* 464.

If an award be alleged to have been made after the making of the arbitration bond, and before the exhibiting plaintiff's bill, it is sufficiently positive. *Bissex v. Bissex*, 3 Burr. 1729.

Where matters of account in dispute are submitted to arbitration, but not by bond, and the



arbitrator makes an award, the plaintiff may give the sum awarded in evidence on the common counts in assumpsit, without a special count, though the sum has been given in under a judge's order. *Keen v. Batschore*, 1 Esp. 194—Eyre.

Where there was a plea of no award to debt on an arbitration bond, to which the replication shewed an award, and assigned a breach, and the rejoinder averred that there were other matters pending, of which the arbitrators took no notice; this was a departure in the rejoinder from the plea. *Harding v. Holmes*, 1 Wils. 122.

Debt on bond, which was conditioned to perform an award: plea no award: replication setting out an award: rejoinder stating the whole award (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission); and then demurring:—Held, that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher v. Pimbley*, 11 East, 188.

A replication shewing an award to pay 16l. 10s. and costs, and assigning as breach the non-payment of the 16l. 10s. only:—Held, good on demurrer to a plea of no award to debt upon an arbitration bond. *For v. Smith*, 2 Wils. 267.

Six partners entered into two bonds of submission to arbitration: in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award; and the three latter gave a similar bond to the three former: in the recitals of the bonds, the differences were stated to be depending between the above bounden three, and the above named three; and in setting out the bond in the declaration, the differences were laid to be depending between the six partners collectively:—Held, that this was no variance. *Winter v. White*, 3 Moore, 674; 1 B. & B. 350.

The defendant cannot dispute the validity of an award in an action. *Swinford v. Burn*, Gow, 5—Dallas.

## 2. By signing Judgment.

Where a verdict is taken pro forma at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount without first applying to the court for leave so to do. *Lee v. Lingard*, 1 East, 401; *S. P. Grimes v. Naish*, 1 B. & P. 480. But see *Haywood v. Ribbons*, 4 East, 310.

If a verdict for a plaintiff be taken at Nisi Prius, subject to the award of an arbitrator, and the rule of reference be made a rule of court, the verdict may be entered according to his award, without any application to the court. *Borrodale v. Hütchenr*, 3 B. & P. 244.

If, in such case, the award be made before the term, the defendant can only impeach it within the four first days of term. *Id.*

And personal service of the award is not necessary to warrant the issuing of execution in

such case, if the attorney of the defendant has been served with the award. *Id.*

The Court of C. P. will give leave, in the first instance, to enter up judgment on a verdict reduced by an award. *Higginson v. Nesbitt*, 1 B. & P. 97.

If an award be lost, the Court of C. P. will, nevertheless, permit judgment to be entered accordingly, upon an affidavit of its contents. *Hill v. Thwensend*, 3 Taunt. 45.

Where a replevin cause was referred, after issue joined and before jury sworn, and the arbitrator found only one issue for the defendant, and awarded the payment of rent due to him, but ordered no verdict or judgment to be entered:—Held, that the defendant was not entitled, on motion, to enter up judgment in the action for the rent and costs to be taxed for him. *Grundy v. Wilson*, 7 Taunt. 700.

## 3. By Suit in Equity.

A court of equity will enforce an award made under an order of reference, by consent, in a cause; and it makes no difference that it is a part of the order that the parties should execute arbitration bonds. *Ormond (Marq.) Kynnersley*, 2 Sim. & Stu. 15.

The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous engagement between the parties; and although the illegality of the acts of which it directs the execution, will afford a ground for refusing to decree the performance. *Wood v. Griffith*, 1 Swans. 43.

The court, considering an award as the decision of the judges chosen by the parties, will not examine whether it is unreasonable. *Id.*

## IX. EFFECT OF ARBITRAMENT.

Arbitrament without performance is a good plea, where the parties have mutual remedies. *Gascoyne v. Edwards*, 1 Y. & J. 19.

But it is no answer to an action for a debt, where the amount only of such debt is referred, and the award merely ascertains the amount, and directs that it shall be paid in money. *Allen v. Milner*, 2 C. & J. 47; 2 Tyr. 113; 1 Price P. C. 142.

An award of a sum of money less than the amount of a money demand claimed by the action referred, is not a good bar to an action of indebitatus assumpsit for the original debt, without averring payment of the sum awarded. *Id.*

Under a submission to an arbitrator of all matters in difference between landlord and tenant, the arbitrator awarded, inter alia, that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord by a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it:—Held, that the property in the hay did not pass to the landlord on his tender of the money, so that the landlord could not maintain trover for it, but his re-

medy was upon the award. *Hunter v. Rice*, 15 East, 100.

ARBITRATOR—See ARBITRATION.

ARMY AND NAVY.

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- VIII. PRIVILEGES OF SOLDIERS AND SEAMEN FROM ARREST—See ARREST.

I. OFFICERS.

*Authority.*—The colonel of a regiment has no authority to order his servant to pay money towards lighting and warming a regimental school and school-master's salary. *Warden v. Bailey*, 4 Taunt. 67. And see *S. C.* (in error), nom. *Bailey v. Warden*, 4 M. & S. 400.

Nor, as it seems, to order the men to attend school to learn to read and write. *Id.*

A colonel of a regiment, on full pay, was appointed civil superintendent of a colony, and "to command such of his majesty's subjects as are now armed, or may hereafter arm, for the defence of the settlers." After acting both as military commander and civil superintendent some years, his regiment was disbanded, and he was reduced to half-pay; but still was recognized in both capacities by the authorities at home and in the colony:—Held, that his appointment to command all persons armed for the defence of the colony, gave him a right to command all the king's troops there, and that he did not lose that right by the disbandment of his regiment, and his reduction to half-pay; and, therefore, he was justified in putting under arrest, for disobedience to orders, a commissioned officer on full pay, holding equal regimental rank with himself. *Bradley v. Arthur*, 6 D. & R. 413; 4 B. & C. 292.

*Liability to Actions.*—An action of trespass lies for an inferior military officer against his superior officer, (both being under martial law), who imprisons him for disobedience to an order made under colour, but not within the scope of military authority; although the imprisonment be followed by a trial by a court-martial. *Warden v. Bailey*, 4 Taunt. 67. And see *S. C.* (in error), nom. *Bailey v. Warden*, 4 M. & S. 400.

In trespass against the adjutant of a regiment of local militia, for arresting and imprisoning a sergeant in the same regiment, upon a charge of unsoldier-like conduct, in exciting disobedience and mutiny, it is a good defence upon the general issue, that the action was not brought within six months after the fact committed; but, if the imprisonment be continued by the defendant, in pursuance of orders from the commanding officer

of the regiment, to a period within six months, the action lies; unless the continuance of it be justifiable on the part of the commanding officer; and such continuance was held to be justifiable where it was in order to bring the plaintiff to a general court-martial, for uttering words in the presence of several sergeants and others of the same regiment, amounting to disorderly conduct on the part of plaintiff, to the prejudice of good order and military discipline, within the 24th section of the Articles of War, art. 2, although the words uttered referred to an order made by the commanding officer, which he was not strictly competent to make, and although the plaintiff was acquitted by the sentence of the court-martial. *Id.*

A, being a captain in the navy, is accused by his commander in chief of neglect of duty, disobedience to orders, &c.; and being tried by a court-martial is honourably acquitted. A. then brings an action at law against his commander for a malicious prosecution:—Held, that no such action will lie. *Sutton v. Johnstone* (in error), 1 Bro. P. C. 76; 1 T. R. 493, 784.

A captain of a troop during the time of his absence, and while another officer is in the actual command of it, and by whom the orders for subsistence are issued, and the subsistence money is received from government, is not liable to pay for subsistence furnished to the men, though he was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. *Myrtle v. Beaver*, 1 East, 135.

Nor is the captain of a troop for which forage is furnished by the orders of a clerk appointed by such captain, liable for such forage, though present with the troop at the time; if it do not appear that he had received money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum, regulated by the returns of the preceding month. *Rice v. Chute*, 1 East, 579.

Otherwise, if at the time he had received the money from the paymaster. *Rice v. Everitt*, 1 East, 583, n. And see *Davis v. Edgar*, 4 Taunt. 63.

The liability of the colonel of a regiment, for knapsacks furnished to the regiment by his order, depends upon the question whether they were supplied upon his personal credit. Where the tradesman who furnishes necessities to a regiment, looks to the regimental fund as the medium through which he is to obtain payment, though by the assistance of the colonel, the latter is not personally responsible. *Prosser v. Allen*, Gow, 117—Dallas. And a new trial was granted after a verdict on a contrary supposition.

The officers of a regimental mess are only separately liable, each for his own share. *Brown v. Doyle*, 3 Camp. 51, n.—Kenyon.

*Pay.*—The king may at any time stop the half-pay of an officer in the army, by signifying

his pleasure that it shall no longer be paid. *Macdonald v. Steele, Peake, 175—Kenyon.*

The future half-pay of an officer is not assignable. *Lidderdale v. Montrose (Duke of), 4 T. R. 248.*

Neither is the full pay of a military officer. *Barwick v. Reade, 1 H. Black. 627.*

An assignment of the half-pay of an officer in the army, is bad in law and in equity. *Stone v. Lidderdale, 2 Anst. 533.*

Though an officer's half-pay is not assignable at law, yet the use of it may be assigned in equity; and, when so assigned, the assignor cannot maintain assumpsit for it, as money had and received to his use. *Stuart v. Tucker, 2 W. Black. 1137.*

By 11 Geo. 4, c. 20, s. 47, all assignments, sales, and contracts for naval half-pay, allowances, or pensions, are void.

The plaintiff being representative of a deceased officer of artillery, of which corps the defendants were paymasters, they delivered to him an account current, in which they acknowledged themselves to have received, from the year 1806 to the year 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806.—Held, that they could not, in 1821, be permitted to say that this admission was by mistake, as, in 1816, the Board of Ordnance had announced, that, by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it, this announcement of the Board never having been communicated to the deceased by the defendants till the year 1821. *Skyring v. Greenwood, 6 D. & R. 401; 4 B. & C. 281; 1 C. & P. 517.*

*Commission.*—An officer in the army cannot pledge or mortgage his commission. *Collyer v. Fallon, 1 Turn. & Russ. 459.*

A sum of money was paid by A. to B., for purchasing C.'s promotion in the army, and it remained unapplied in the hands of B. at the death of A. C. having been compelled, from the bad state of his health, to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche v. Kilmorye (Lord), 1 Turn. & Russ. 207.*

*Other things.*—Military officers in the service of the East India Company, are objects of their military laws so long as they remain on pay and in service. *Vertue v. Clive (Lord), 4 Burr. 2472.*

And they have not a right to resign whenever they please. *Parker v. Clive (Lord), 4 Burr. 2419.*

At the trial of an officer on an information for defrauding government by false returns of musters, it was held sufficient to prove that he acted in the character mentioned in the information, without proving his commission from the king. *Rex v. Gardner, 2 Camp. 513—Ellenborough.*

## II. PRIVATES.

The receiving pay as a soldier, subjects the

receiver to military jurisdiction. *Grant v. Gould, 2 H. Black. 69.*

A soldier is gifted with all the rights of other citizens, and is bound to all their duties, and he is therefore as much bound to prevent a breach of the peace or a felony as any other person. If it be necessary for the purpose for preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. *Burdett (Bart.) v. Abbott, 4 Taunt. 449. And see S. C. 5 Dow, 165; 14 East, 1, 154.*

By 1 Geo. 1, c. 47, upon an information filed in the court of K. B. for persuading soldiers to desert, and tried at the assizes, that court is the proper court to award punishment; and if they award imprisonment, besides the penalty of 40*l.*, they are bound also to award the pillory. *Rex v. Read, 16 East, 404. And see Rex v. Fuller, 1 B. & P. 180.*

Rule nisi for discharging an impressed soldier, made absolute, on the merits, but without costs. *Rex v. Kessel, 1 Burr. 637: S. P. Rex v. Dawes, 1 Burr. 636.*

Where A. applied to two soldiers, a drummer and a private, to enlist him, which they at first refused, but afterwards the drummer gave him a shilling for that purpose, on A.'s wanting to go away they detained him:—Held, that the drummer had no authority to enlist A., and therefore no right to detain him. *Rex v. Longden, R. & R. C. C. 228; 1 Russ. C. & M. 439.*

A person who has enlisted may be rendered by his bail in their own discharge. *Bond v. Isaac, 1 Burr. 339.*

An action will not lie for reducing a serjeant of the Guards to a common soldier, in Germany, the event having taken place out of the king's dominions. *Barwis v. Keppel, 2 Wils. 314.*

A justice, before whom a deserter is brought, and by whom committed to the county gaol, may, if the deserter be unable to bear the charges himself, direct the expenses of conveying him thither to be paid by the treasurer of the county to the constable of the parish who found and apprehended him in the parish, and conveyed him to the gaol. *Rex v. Pierce, 3 M. & S. 62.*

## III. MILITIA.

Under the militia acts, 42 Geo. 3, c. 20, and 47 Geo. 3, c. 71, if a person balloted be found at the time of enrolment to be unqualified for the service, and another be balloted in his place out of the same list; this is a continuance of the same ballot, and is a legal ballot. *Astley v. Ray, 2 Taunt. 214.*

An attorney is not privileged from serving in the militia, or paying for a substitute in his stead. *Gerrard's case, 2 W. Black. 1123.*

If A., in consideration of a premium, undertakes to insure B. against being drawn for the militia under a particular statute, until a certain day; and represents, that, on that day all balloting under the statute will be completely secured

by the insurance against the operation of the statute, A. is not thereby bound to indemnify B. in consequence of his being drawn for the militia under the statute, after the above-mentioned day: but, on account of the misrepresentation, the contract is void, and B. may recover back the premium, as money had and received. *Duffell v. Wilson*, 1 Camp. 401—Ellenborough.

A substitute must be considered as a militia-man. *Rez v. Aston*, 2 Burr. 1149.

A captain in the militia receiving his pay and contingent allowances before his qualification was properly authenticated, is not "executing any power" directed by the militia act of the 43 Geo. 3, c. 90, to be executed by captains, so as to bring him within the penalty of the fourteenth clause; the receipt of such pay and allowances not being provided for by that statute, even if any other than acts of military discipline were intended to be so prohibited. *Robinson v. Garthwaite*, 9 East, 296.

In an action of debt for a penalty, under 2 Geo. 3, c. 20, s. 16, for acting as a major of militia without being duly qualified, it is sufficient to aver that the defendant acted as such major, "not being in any manner qualified by the laws and statutes of the realm." *Roberts v. Irvine*, 3 Dougl. 194.

The parish to which the principal militia-man belongs is liable to reimburse the parish of the substitute the expenses of maintaining the substitute's family, though the substitute had more than one child when he was approved by the deputy-lieutenants, and inrolled. *Rez v. Willis*, 6 T. R. 179.

Seemle, that, if the substitute be sworn and actually serve, his family are entitled to be relieved within the meaning of the 26 Geo. 3, c. 107, s. 24, and 33 Geo. 3, c. 8, s. 3, though the substitute were not previously approved by two deputy-lieutenants, or inrolled. *Rez v. Ledbury*, 7 T. R. 558.

An order for reimbursement under the 33 Geo. 3, c. 8, s. 3, made upon the parish for which a substitute in the militia serves, to indemnify the parish in which such substitute's family shall have become chargeable and been relieved under an order of maintenance, must be made by the same magistrate, and at the same time as the first order of maintenance; and notice of such order of reimbursement ought to be served upon the parish to be affected by it, before they can be proceeded against criminally for disobedience to it. *Id.*

A substitute in the militia fraudulently and falsely declaring at the time of his inrolment, that he had no wife or family, when in fact he had a wife and one child, is not entitled to any parochial allowance for their relief under stat. 43 Geo. 3, c. 47, ss. 2, 5. *Rez v. Preston*, 13 East, 313.

Under 43 Geo. 3, c. 47 (militia act), it was the duty of the county treasurer who reimbursed payments made by overseers to the families of militia-men, to transmit an account of such reimbursements to the treasurer of the county for which such militia-men were serving. But it was not his duty to demand the amount or to take legal

proceedings for obtaining payment, or to notify to the justices of the sessions the transmission of such account, and neglect of payment, or to transmit to the justices of the sessions an account of similar payments made by himself to the treasurer of another county, that they might make orders for repayment upon the overseers of the parishes for which such militia-men were serving. *Farr v. Hollis*, 4 M. & R. 230; 9 B. & C. 315.

#### IV. VOLUNTEERS.

Members of volunteer corps inrolled under the regulations of the stat. 42 Geo. 3, c. 66, are entitled to resign on due notification of such their intention; not being restrained from such liberty of resignation by the rules of the corps, or its conditions of service; and this liberty is not taken away by statute 43 Geo. 3, c. 95 (the general defence act), which distinguishes between volunteer corps, and volunteers under that act; that is, such as offer themselves voluntarily to serve in lieu of the compulsory levy. And the statute 43 Geo. 3, c. 121, attaches only on corps of volunteers at the time of an actual invasion, and has also no retrospective operation on those who had ceased to bear that character before actual invasion. *Rez v. Dowley*, 4 East, 512; 1 Smith, 153.

#### V. BILLETING.

A deputy high constable, appointed by parol only, may billet soldiers, under the annual mutiny act. *Midhurst v. Waite*, 3 Burr. 1259; 1 W. Black. 350.

The foot guards may be billeted all over the kingdom, as well as the other troops. *Rez v. Calvert*, 7 T. R. 724.

Horses employed in drawing artillery are billeteable under the mutiny act, whether they belong to the ordnance or are furnished for the service by contract. *Read v. Willan*, 2 Dougl. 422.

Quere, whether alehouse keepers are bound to take in horses as well as soldiers. *Rez v. Dimpey*, 2 T. R. 96.

#### VI. COURTS-MARTIAL.

Courts-martial in this country have jurisdiction over all persons receiving pay as soldiers, but are liable to the controlling authority which the courts of Westminster shall from time to time exercise for the purpose of preventing them from exceeding their jurisdiction. *Grant v. Gould*, 2 H. Black. 69.

The court of C. P. will not grant a prohibition to prevent the execution of the sentence of a court-martial passed against A., who has received pay as a soldier (but assumed the military character merely for the purpose of recruiting in the usual course of that service), though the proceedings of the court-martial appeared to be in some instances erroneous. *Id.*

Courts-martial are bound by the same principles and rules of evidence as the courts of law; and their proceedings, where not otherwise regu-

lated by statute, must be in accordance therewith. *Ship Bounty*, 1 East, 313. *Stratford's case*, 1 East, 313.

Where the commander in chief directed a military inquiry to be held, to investigate the conduct of a commissioned officer in the army, who afterwards sued the president of such court of inquiry, for a libel stated to be contained in his report, and transmitted by him to the commander in chief:—Held, that such a report was a privileged communication, and properly rejected as evidence at the trial, and that an office copy thereof was also inadmissible. *Home v. Bentinck (Lord)*, 4 Moore, 563; 2 B. & B. 130. *And see S. C.* 1 B. & B. 514.

By the mutiny act, the king may make articles of war, and constitute courts-martial, with power to try and punish, as well in Great Britain, &c. as in Gibraltar, &c. By a subsequent clause no soldier shall, by such articles of war, be subject to the punishment of death, or loss of limb, within Great Britain, &c. (omitting Gibraltar) for any crime not expressed to be so punishable by the act. Then, by the articles of war, persons found guilty by a court-martial at Gibraltar, of theft, robbery, &c., or of having used violence, or committed any offence against the persons or property of others, "shall suffer death, or such punishment, according to the nature and degree of the offence, as by the sentence of such court-martial shall be awarded:"—Held, that a court-martial had a discretionary power by such words, and were not restricted to pass such sentence on a delinquent as would be warranted by the law of England. But, supposing they were, yet that a return to a habeas corpus, stating that upon a certain charge exhibited against the defendant before such a court, for certain offences alleged to have been committed by him at Gibraltar, such proceedings were had, that the court-martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named from the warehouse of W. (at G.) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for fourteen years, is good; for such a sentence would be warranted here by the stat. 4 Geo. 1, c. 11, if the principal were convicted of the felony, and the receiver were indicted as accessory after the fact. *Rex v. Suddis*, 1 East, 306.

It is not incident to the duty of the office of a commander in chief of a squadron to hold a court-martial on an inferior officer. *Johnstone v. Sutton (in error)*, 1 T. R. 493. Affirmed in *Dom. Proc.* 1 T. R. 784; 1 Bro. P. C. 76.

A declaration against a commander of a fleet, for delaying holding a court-martial for the trial of plaintiff, must aver that defendant had authority to hold a court-martial. *Id.*

The court granted a rule nisi for a habeas corpus, on behalf of an officer under military arrest for charges of misconduct, on an affidavit complaining that he had not been brought to trial, pursuant to the 23rd article of war, as soon as a court-martial could be conveniently assembled; but, it being stated upon the affidavit of the judge-advocate-general in answer, that proceedings were

instituted as soon as could conveniently be, and according to the course of office, and that the trial had been postponed partly on account of the absence of the prisoner's witnesses, the court discharged the rule. *Blake's case*, 2 M. & S. 428.

A purser in the navy is liable by 22 Geo. 2, c. 33, to be tried by a court-martial for fraudulently and unlawfully charging blankets against seamen to whom none had been issued, and in making in order to such charge, certain false entries in one of the ship's books, that being, within the thirty-sixth article of war, "an offence not capital, committed by a person in the fleet not before mentioned in the act," and for which no punishment is thereby to be inflicted. *Mann v. Owen*, 9 B. & C. 595.

## VII. ARMY AGENTS.

By the act 59 Geo. 3, c. 111, army agents are entitled to make the usual charge for passing accounts before that act; and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. *Drury v. Atkins*, 1 Tamlyn, 75.

An army agent is responsible for the price of commissions sold by him for an officer on foreign service. *Sturdy v. Ross*, 1 Esp. 450—Kenyon.

Where the plaintiff, who was not an authorized army agent, negotiated the sale and purchase of a commission between G. and the defendant, at a price above that allowed by his majesty's regulations, and the defendant, who was the purchaser of the commission, after having paid a sum exceeding the regulation price to G., retained 38*l.*, the remainder of the price agreed upon, with directions from G. to pay it over to the plaintiff for his agency, which he promised the plaintiff to do:—Held, that the plaintiff could not recover against the defendant the 38*l.* as money had and received to his use, for he could not be in a better situation than G., and by 48 Geo. 3, c. 15, s. 100, G. could not have recovered beyond the regulation price. *Davis v. Edgar*, 4 Taunt. 63.

Information, under 4 Geo. 3, c. 58, at the suit of the crown, against an army agent for a discovery and production of documents with a view to an account. Plea, 1st, that the accounts had been settled and closed at the war office, by the issuing of the clearing warrants, and setting out the warrants, and referring to them; 2nd, that the monies impressed in the agent's hands for the pay or arrears of pay of officers, were held by him as the banker or private agent of the officers by whom he was appointed; and that for such monies he was not accountable to the crown. The plea ordered by the court below to stand for an answer, with liberty to the attorney-general to except:—Held, by the House of Lords, that both parts of the plea were bad, for that the clearing warrants did not purport on the face of them to be a final settlement of accounts, and that an army agent was a public officer, and was accountable to the crown for monies received by him for the pay and arrears of pay of officers: that the

plea might have been overruled, but its being ordered to stand for answer was more favourable to the agent: and the orders of the court below affirmed. *Deare v. Att. Gen.*, 2 Dow & Clarke, 377.

### ARREST.

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#### VII. ARREST IN CRIMINAL CASES—See CRIMINAL LAW.

#### I. FOR WHAT AN ARREST MAY BE MADE.

##### 1. Cause of Action.

*Damages unliquidated.*—A defendant cannot be arrested where the cause of action arises from the breach of an agreement. *Waters v. Joyce*, 1 D. & R. 150.

But a defendant who has guaranteed the payment of money for goods to be sold to another person, and undertaken to pay for them if he should fail to do so, to the extent of a sum certain, may be held to bail for the amount of goods sold within that sum, on the common affidavit. *Cope v. Joseph*, 9 Price, 155.

And a debt sworn to be due for use and occupation, will support an arrest. *Lee v. Sellwood*, 9 Price, 322.

And upon an agreement between two tradesmen to deal with each other by way of barter; if the one refuse to state the account, the other may arrest him for the whole value of the goods which he has furnished. *Germain v. Burrows*, 5 Taunt. 259.

A man cannot be arrested for a penalty, but only for the sum thereby secured. *Hatfield v. Lingard*, 6 T. R. 217: *S. P. Edwards v. Williams*, 5 Taunt. 247.

Therefore, in debt upon a bond conditioned for an indemnification, the defendant ought not to be held to bail for the penalty, but only for the amount of the damage incurred. *Kirk v. Strickland*, 2 Dougl. 449.

A defendant may be arrested for sums paid by plaintiff as obligor of an indemnity bond, as for liquidated damages, if the sum the plaintiff has

been called on to pay can be ascertained. *Anderson v. Bell*, 2 Tyr. 732.

Upon a bond conditioned for paying a less sum by instalments and interest, though a part only of the instalments are due, the obligee may arrest for the aggregate amount of all the instalments, and the interest accrued due before the action brought. *Tulbot v. Hodson*, 5 Marsh. 527; 7 Taunt. 251.

No person shall be held to bail in an action of trover or detinue, without an order of a judge. *Reg. Gen. K. B. H. T.* 48 G. 3; 9 East, 325.

So also in C. P. 1 Taunt. 203.

Nor can a defendant be arrested in an action on a policy, where there has been no adjustment, although the plaintiff swear to a total loss, and the defendant has made an unqualified offer to pay a fixed sum per cent. *Lear v. Heath*, 2 Marsh. 19; 5 Taunt. 201.

If an underwriter be held to bail for the amount of his subscription to a policy of insurance, the court will order the bail bond to be cancelled, and the plaintiff to pay the costs. *Id.*

As the policy is only a contract of indemnity. *Lambe v. Dubois*, 1 Marsh. 21 n.; 5 Taunt. 202.

A defendant cannot be held to bail, on an affidavit stating him to be indebted to the plaintiff in respect of a certain sale of land in the possession of the defendant. *Sykes v. Ross*, 2 Y. & J. 2.

**On Judgments.**—Although formerly held, that, in an action on a judgment, though above the sum for which an arrest might be made, the defendant could not be held to bail, if the original demand was under that sum. *Anon. Cowp.* 128; *S. P. Palmer v. Needham*, 3 Burr. 1389. And see *Belither v. Gibbs*, 4 Burr. 2117.

A defendant may be arrested in an action on a judgment for a sufficient sum for damages and costs; though the original debt alone were under. *Lewis v. Pottle*, 4 T. R. 570.

But not in debt on a judgment in trespass, although the damages were above the sum. *Cressy v. Kell*, 1 Wils. 120.

A defendant may hold a plaintiff to bail, in debt on a judgment for the costs of a nonsuit. *Nightingale v. Nightingale*, 2 W. Black. 1274; *S. P. contra Bush v. Bates*, 5 Burr. 2660.

A defendant may be arrested in an action on a judgment where he was not held to bail in the first action. *Anon.* 1 Chit. 274, n.

Notwithstanding error brought and bail therein. *Kindal v. Carey*, 2 W. Black. 786.

Even where the judgment in the former action has been reversed. *Cartwright v. Keeley*, 7 Taunt. 192.

But, where a plaintiff, by his own acts, waves his bail in an original action, he shall not arrest in an action on the judgment. *Crutchfield v. Sneyd*, 2 Wils. 93.

A defendant having been arrested, but afterwards discharged, on account of the plaintiff declaring against him on a different cause of action from that mentioned in the writ and affidavit,

may be again holden to bail in an action on the judgment. *De la Cour v. Read*, 2 H. Black. 278.

Plaintiff having recovered judgment, and levied part under a fi. fa., arrested the defendant for the residue in an action on the judgment, he not having been arrested in the original action: and the court of C. P. refused to discharge him. *Hease v. Stevenson*, 1 N. R. 133; 2 Smith, 39.

So, if a fi. fa. on a judgment have been executed, but not returned, and the defendant be arrested in an action on the judgment, the court will not set aside the arrest. *Green v. Elgie*, 1 Dowl. P. C. 344.

If a defendant, being arrested upon process in K. B. give a warrant of attorney to confess judgment, and be afterwards holden to bail in C. P. in an action upon that judgment, the court will discharge him upon a common appearance. *Salkeld v. Lands*, 2 B. & P. 416.

**On Awards.**—Where a cause is referred to arbitration, defendant may be arrested on the award, though he was arrested on the original action. *Anon.* 1 Chit. 274, n.

And where a cause, in which the defendant has been holden to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding the amount allowed for arrest, the defendant may be holden to bail again, in an action upon the award. *Collins v. Powell*, 2 T. R. 756.

**Bail.**—There can be no arrest in an action of debt upon a recognizance of bail. *Anon.* 1 Tidd's Prac. 172.

Nor can the bail to the sheriff be arrested. *Brander v. Robson*, 6 T. R. 336.

Nor can a defendant who has given a bail bond be arrested in an action brought by the sheriff on that bond. *Mellish v. Petherick*, 8 T. R. 450.

But bail in the original action, after judgment recovered against them on the bail bond, may be arrested in an action on such judgment. *Prenndergast v. Davis*, 8 T. R. 85.

**Other Cases.**—The court will discharge a defendant from arrest where the action is manifestly vexatious. *Cox v. Chubb*, 2 W. Black. 809.

And will examine whether a cause be bailable, though removed by habeas corpus. *Hecklin v. Hartop*, 2 W. Black. 886.

A defendant cannot be arrested for goods bargained and sold, unless they have been delivered. *Hopkins v. Vaughan*, 12 East, 398; *S. P. Bell v. Thrupp*, 2 B. & A. 596; 1 Chit. 331.

Nor in C. P., in an action founded on the prothonotary's allocatur for costs. *Fry v. Malcolm*, 4 Taunt. 705.

But held contra, in K. B. *Powell v. Portherch*, 2 T. R. 55.

A defendant, arrested for money won at play, discharged on entering a common appearance in C. P. *Young v. Moore*, 2 Wils. 67.

Semble, that a defendant may be arrested on a wager which is recoverable at law. *Murray v. Kelly*, 2 Selw. N. P. 1376.

A defendant may be arrested on a contract made abroad, although the foreign law may not authorize an arrest. *De la Vega v. Vianna*, 1 B. & Adol. 284.

### 2. Amount.

By 7 & 8 Geo. 4, c. 71, no person shall be arrested upon any process issuing out of any court where the cause of action shall not have originally amounted to 20l. or upwards, over and above and exclusive of any costs, charges, and expenses that may have been incurred, recovered, or made chargeable in or about the suing for or recovering the same; where the cause of action is under that amount, they must be served with process, and all judgments contrary to the act are avoided—a. 1. See also 12 Geo. 1, c. 29; 5 Geo. 2, c. 27; 43 Geo. 3, c. 46; and 51 Geo. 3, c. 124, which fixed the amount to 10l. on bills and notes, and 15l. in other cases, which being a temporary act, was allowed to expire before the passing of 7 & 8 Geo. 4, c. 71.

On the statute 51 Geo. 3, c. 124, s. 1, it was held that it did not avoid the plaintiff's proceedings and judgment, by reason of his arresting for a sum exceeding 15l. and recovering less than 15l. *Spink v. Hitchcock*, 1 Moore, 131; 7 Taunt. 435. And see *Ball v. Swan*, 1 B. & A. 393.

Under that statute, where an attorney arrested a defendant, and held him to bail for a bill for 15l., which was afterwards reduced to less than that sum, the court refused to order the bail bond to be delivered up to be cancelled. *Thwaites v. Piper*, 4 D. & R. 194.

If a plaintiff after making an affidavit of debt, receive part of the debt, and the debt is thereby reduced to an amount insufficient to warrant an arrest, and the defendant is, notwithstanding, afterwards arrested for the whole debt, the bail bond will be ordered to be set aside with costs. *Short v. Cunningham*, 1 Dowl. P. C. 662.

### 3. Second Arrest.

#### (a) Generally.

In general, a defendant cannot be held to bail twice for the same cause; but, if he be discharged out of custody the first time for some act for which the plaintiff is not answerable—e. g. an alteration in the warrant to arrest by the sheriff's officer, without the plaintiff's knowledge—the defendant may be again arrested for the same cause of action. *Housin v. Barrow*, 6 T. R. 218.

A second arrest must be vexatious in order to induce the court to discharge the defendant. *Anon.* 1 Chit. 276.

A second action is always considered vexatious until the contrary be shewn. *Williams v. Thacker*, 4 Moore, 294; 1 B. & B. 514.

Where a defendant is let out of custody at his own request, in order that he may attend to his business, he may be again arrested on the same affidavit. *Penfold v. Maxwell*, 1 Chit. 275, n.: S. C. nom. *Puckford v. Maxwell*, 6 T. R. 52.

A. arrested B. and died: the executors of A. again arrested B. for the same cause of action:—

Held, that the second proceeding was not vexatious, and that the defendant was not entitled to be discharged out of custody on entering a common appearance. *Mellin v. Evans*, 1 C. & J. 82.

Where a plaintiff arrests a defendant, and on the trial recovers part of his demand and his costs, he cannot afterwards hold the defendant to bail for another part of the same demand, although he offered no evidence as to the other part. *Hamilton v. Pitt*, 1 Dowl. P. C. 209; 7 Bing. 230: S. C. nom. *Hamilton v. Jones*, 4 M. & P. 868.

Quere, whether a party can be arrested a third time for the same cause of action. *Wells v. Gurney*, 8 B. & C. 769.

Where a defendant had been twice arrested, in two different counties, for the same cause of action, and had put in bail to two writs, the court refused to grant a rule absolute for setting aside the proceedings in one of the two actions brought against the defendant, as there was in fact but one action, and the proper course was to move that an exoneretur might be entered on one of the bail-pieces. *Powell v. Henderson*, 1 Chit. 392.

#### (b) After Nonpros, Nonsuit, or Discontinuance.

*Leave of the Court.*—After nonpros, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a judge. *Reg. Gen. K. B., C. P., and Exchequer*, H. T. 2 W. 4; 1 Dowl. P. C. 184; 8 Bing. 269; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 169; 2 Tyr. 341; 4 Bligh. N. S. 594.

*In what Cases after Discontinuance.*—Before the rule a defendant might have been arrested a second time, where the plaintiff had discontinued the first suit by reason of a mistake. *Bates v. Barry*, 2 Wils. 381.

But not where the first arrest was before the cause of action accrued. *Wheelright v. Joseph*, 5 M. & S. 93.

As, where the credit was not expired. *Anon.* 1 Chit. 274.

In such cases, semble, the defendant had his remedy by action for damages. *Swancott v. Westgarth*, 4 East, 75.

It was for the plaintiff to shew that he discontinued on account of a mistake or misrepresentation, and that the second arrest was not vexatious. *Archer v. Champneys*, 3 Moore, 607.

The defendant was arrested in C. P. after a nonpros in the Exchequer, for the same cause of action:—Held, that he was entitled to be discharged on entering a common appearance, as the plaintiff did not shew that the second arrest was not vexatious. *Williams v. Thacker*, 4 Moore, 294; 1 B. & B. 514.

After a discontinuance the plaintiff could not arrest the defendant a second time, until the costs of the first action were taxed. *Anon.* 1 Chit. 161.

For, the discontinuance was not complete until the costs were taxed. *Molling v. Buckholtz*, 3 M. & S. 153. And see *Howarth v. Samuel*, 1 B. & A. 566; 1 Chit. 633.



But he might after the costs have been taxed and paid. *Anon.* 1 Chit. 274, n.

A defendant being in custody within a local jurisdiction, the plaintiff lodged a detainer against him, but discontinued the action for fear of a plea to the jurisdiction, and then arrested the defendant in K. B., without having paid his own costs of the first suit:—Held, that the defendant was not entitled to be discharged on filing common bail, the second suit not being vexatious. *Paine v. Gaudery*, 3 D. & R. 33.

**After Serviceable Process.**—Where the first action is not bailable, the court will not set aside an arrest in a subsequent action, though the first be still pending at the time. *Davidson v. Cleworth*, 1 Chit. 275, n.

And has not been discontinued. *Bishop v. Powell*, 6 T. R. 616.

But, if a plaintiff sues out serviceable process, and, without discontinuing, sues out bailable process for the same cause of action, the defendant may plead the pendency of the former suit, and the court will not relieve the plaintiff. *Prescott v. Stevens*, 1 Dowl. P. C. 57.

Where a plaintiff sued out serviceable process, and an order for particulars was made, and, two terms after suing out the serviceable process, he arrested the defendant:—Held, that the arrest was regular, although the order for particulars operated as a stay of proceedings in the first action. *Anon.* 1 Dowl. P. C. 59.

Where the defendant was arrested by an indorsee, on five promissory notes of 100*l.* each, payable one day after date, but was discharged out of custody on terms, one of which was the payment of two of the notes; and the indorsee afterwards served the defendant with process for the balance, but did not file a declaration; and eventually indorsed the three remaining notes, which were over-due, to J. S., who took them without making any inquiry, and held the defendant to bail:—Held, that he was entitled to be discharged out of custody as to the last action, on entering a common appearance; but not to a stay of proceedings until the two former actions should be discontinued. *McClure v. Pringle*, 11 Clev. 2; 13 Price, 8.

**After Nonsuit.**—Before the rule, there could not be a second arrest after a nonsuit on the merits. *Anon.* 1 Tidd's Prac. 175.

But after a nonsuit on the ground of a variance, the defendant might be again arrested for the same cause in a second action. *Kearney v. King*, 1 Chit. 273.

**Cassatur Bills.**—One of two partners on being arrested for a joint debt, pleaded the partnership in abatement, and the plaintiff entered a cassatur billa:—Held, that he might be arrested again for the same debt in a new action against both partners. *Salisbury v. Whiteall*, 1 Tidd's Prac. 175; S. P. 1 Chit. 274.

#### (c) After Supersedeas.

Where a defendant is arrested or detained in  
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custody after being superseded, or supersedeable, in a former action by the laches of the plaintiff, the court will discharge him on common bail, even though he be arrested on a note given subsequent to the supersedeas. *Cookson v. Foster*, 1 Tidd's Prac. 175; S. P. *Anon.* 1 Chit. 274, n.

A defendant could not be arrested where he was discharged for default of the plaintiff in not declaring against him in time, the first affidavit to hold to bail being adapted to a demand in trover for goods, and the second for money had and received, upon a supposition that the goods had been sold by the defendant for the plaintiff, and the money received to his use. *Inlay v. Ellefson*, 3 East, 309.

A defendant, superseded for want of being charged in execution, cannot be held to bail again upon bills given by him before he was rendered as a collateral security for the damages and costs recovered against him in the former action, and upon agreement for a stay of execution till default made in payment of the bills. *Daniel v. Dodd*, 1 East, 334.

A defendant superseded for want of being charged in execution within two terms after judgment, cannot be arrested in an action on the judgment; but he may be charged in execution after judgment obtained in the second action. *Blanford v. Foote*, Cowp. 72.

Where a defendant was arrested in the mayor's court at Hereford, and, by the practice of that court, a plaintiff was not bound to deliver a declaration without a rule to shew cause for that purpose, and the defendant, without conforming to the practice, superseded the action for want of a declaration, and was again arrested in London for the same cause of action; the court discharged him on filing common bail. *England v. Lewis*, 3 D. & R. 189.

#### (d) After Compromise.

Where the first action is compromised, and a second is brought for the same cause, the court will not set aside the bail-bond, unless the proceedings are vexatious. *Brown v. Davis*, 1 Chit. 161.

A party discharged from arrest, on giving security, cannot be arrested again if the security turn out to be worthless, unless he has been guilty of fraud. *Wilson v. Hamer*, 8 Bing. 54; 1 M. & Scott, 120; 1 Dowl. P. C. 248.

Though, in one case, where A., having been arrested by B., gave him a draft for part of the demand, and agreed to settle the remainder in a few days, and the draft was dishonoured; on which B. again arrested him on the same affidavit: it was held regular. *Puckford v. Maxwell*, 6 T. R. 52; S. C. nom. *Penfold v. Maxwell*, 1 Chit. 274, n.; 275, n.

#### (e) Proceedings in Foreign and other Courts.

**Foreign Courts.**—After an arrest in a foreign country upon a judgment obtained there, the defendant, having escaped, may be again arrested here in an action on that judgment. *Alison v. Furnival*, 1 Dowl. P. C. 614.

A defendant who had been arrested in America, may be again arrested here for the same cause of action. *Maule v. Murray*, 7 T. R. 470.

A defendant having given a bond conditioned for the payment of a sum of money, if a sentence of a vice-admiralty court should be affirmed on appeal, and the appeal having been dismissed for want of prosecution, the defendant was arrested; the appeal being restored upon petition, the action was suspended and the bail discharged; but being again dismissed, a new action on the bond was commenced, and the defendant was again arrested;—from this second arrest the defendant applied to be discharged; but the court rejected the application. *Woodmeston v. Scott*, 1 N. R. 13.

There is no objection to an arrest here, after an arrest in a foreign country, where it does not distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here. *Imlay v. Ellefsen*, 2 East, 453.

Semble, where under process from the supreme court of New South Wales (established by act 4 Geo. 4, c. 96), the goods of a defendant are attached and rendered to the plaintiff in execution, or bail are put in to pay the condemnation money, he cannot be arrested for the same cause of action in this country. *Naylor v. Eagar*, 2 Y. & J. 90.

In such a case, where a defendant applied to be discharged from custody on entering a common appearance, and deposed that by the practice of that court when process was issued, and a non est inventus returned, an attachment issued (which proceeding had been adopted by the plaintiffs against him in New South Wales) whereupon the defendant's goods were seized and rendered to the plaintiff in execution, unless bail were put in to pay the condemnation money; and that either the one or the other must have taken place against him at the suit of the plaintiffs, according to the practice of that court: the court refused to discharge him, being of opinion that the affidavit did not shew clearly that the plaintiffs had the same remedy in the colony which they might have in this country. *Id.*

*Other Courts.*—A defendant may be arrested a second time in a court which proceeds by different methods of redress from that in which the first action was brought. *Wood v. Thompson*, 1 Marsh. 395; 5 Taunt. 851: *S. P. Anon.* 1 Chit. 274, n.

A defendant may be arrested in an action in a court at Westminster, after having surrendered in discharge of a foreign attachment in an action in the mayor's court of London for the same cause. *Id.*

So, after having put in bail to a foreign attachment in an action in the mayor's court of London for the same debt. *Bromley v. Peck*, 1 Marsh. 397, n.; 5 Taunt. 852.

On the dissolution of a partnership between B. and C., the latter filed a bill in equity for an account. I. S. admitted that he owed a balance to both the partners, and was made a defendant in the suit. C. applied for a writ of *ne exeat regno* against I. S. for a much larger sum than that

admitted by him to be due to the partnership, alleging that sum to be the balance due to the partnership. The court of Chancery granted the writ for the smaller sum only; and I. S. was accordingly held to bail for its amount, which he paid into court. B. became bankrupt, and his assignees, of whom C. was one, arrested I. S. for the larger sum. The court of C. P. refused to discharge I. S. out of custody, on the ground that he could not be considered as having been twice arrested for the same cause of action; and as a rule to set aside proceedings on account of a suit pending in equity, had never been granted. *Musgrave v. Medex*, 8 Taunt. 24.

#### 4. Detainer.

When the sheriff arrests a defendant in one action, it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time; therefore, where the first arrest is, by the act of the sheriff, illegally made, the subsequent detainers founded thereon are illegal also. *Barratt v. Price*, 2 M. & Scott, 634; 9 Bing. 566; 1 Dowl. P. C. 725.

Nor does it make any difference that the writs upon which such detainers take place were lodged previously to the arrest. *Ex parte Ross*, 1 Rose, 260: *S. P. Ex parte Hawkins*, 4 Ves. jun. 691.

A defendant wrongfully (by the act of the party) arrested is not entitled to be discharged from subsequent detainers, unless there has been collusion between the plaintiffs in those causes and the person by whom the defendant was originally arrested. *Callaway v. Bond*, 1 Chit. 580.

Where a plaintiff arrested a defendant and discontinued the action and paid him the costs, but, before he was actually discharged out of custody, lodged a detainer against him for a larger debt arising out of the same cause of action:—Held, that such detainer was irregular, and that the defendant was entitled to be discharged out of custody on filing common bail. *White v. Gompertz*, 1 D. & R. 556. *But see S. C. contra*, 5 B. & A. 905.

A plaintiff may lodge a detainer against a defendant in custody upon mesne process, after his bail have justified, the defendant not having completed his discharge, but being still within the prison: and he is not entitled to his discharge upon an affidavit that the sum for which the detainer was lodged was due at the time of the first arrest. *Quin v. Reynolds*, 3 M. & S. 144.

A defendant, not privileged from arrest at the time, was arrested on an insufficient affidavit, and afterwards, on that ground, discharged out of custody; during his imprisonment, another creditor, without collusion with the former, lodged a detainer against him:—Held, that such detainer was properly lodged. *Barclay v. Faber*, 2 B. & A. 743; 1 Chit. 579.

Where the defendant had been arrested on process issued out of K. B. and was discharged on the ground of a defect in the affidavit of debt, and a new detainer for the same cause of action was lodged against him on the day of the discharge, in the Fleet prison, where he was then confined, and the action in K. B. had been disconti-

nued, but the costs not paid :—Held, that such detainer was irregular ; and the court ordered the defendant to be discharged out of custody. *Cloughton v. Farquharson*, 7 Moore, 312.

A defendant in custody at the suit of one plaintiff, is not privileged from arrest at the suit of another, unless there be some collusion, although the prior custody may be illegal. *Hovson v. Walker*, and *Crowden v. Same*, 2 W. Black. 823.

The Court of C. P. refused a detainer against a principal in custody. *Barking v. Waters*, 6 Bing. 423; 4 M. & P. 125.

## II. AFFIDAVIT OF DEBT.

### 1. When necessary.

By 12 Geo. 1, c. 29, s. 2, *when the cause of action is such as to warrant an arrest, an affidavit must be made and filed of such cause of action; it must be made before any judge or commissioner of the court out of which the process shall issue authorized to take affidavits in such courts, or else before the officer who shall issue such process, or his deputy.*

The writ cannot be issued before an affidavit filed. *Hawkins v. Baskerville*, 2 Ld. Ken. 374.

A latitat was a continuance of a bill of Middlesex, and therefore it was sufficient, to satisfy the statute, that an office copy of the affidavit, sworn in the bill of Middlesex office, was filed at the office of the signer of the writs, previously to issuing the latitat, without swearing a fresh affidavit. *Baker v. Allen*, 7 B. & C. 526; 1 M. & R. 232.

So, if a defendant put in bail to a special capias issued upon an affidavit sworn at the bill of Middlesex office, he waived the irregularity. *Dalton v. Barnes*, 1 M. & S. 230.

If a writ of capias be issued into one county, on an affidavit of debt, and no proceedings be taken, another original writ of capias may be issued into another county, on the same affidavit. *Rodwell v. Chapman*, 1 C. & M. 70; 1 Dowl. P. C. 634.

Where a first capias is issued on an affidavit of debt filed with the filacer of one county, if, instead of a testatum, a second capias is issued into another county, a new affidavit of debt must be filed with the filacer of the second county. *Dorville v. Whomwell*, 3 Bing. 39; 10 Moore, 318.

Where a plaintiff proceeds by a second original capias instead of a testatum capias, the omission of a second affidavit will not so far vitiate subsequent proceedings as to induce the court on motion to discharge a defendant from arrest. *Boyd v. Darand*, 2 Taunt. 161.

And where bailable process sued out previous to 37 Geo. 3, c. 45, was renewed four times without a new affidavit, and on the last writ the defendant was arrested subsequent to the statute; the court of C. P. held the affidavit was sufficient, though not according to the statute. *Crookes v. Houlditch*, 1 B. & P. 174.

Quære, whether in such a case it is necessary

to file an office copy of the affidavit with the filacer of the second county. *Id.*

A capias into Cambridgeshire issued on an affidavit filed with the filacer for that county; a testatum capias into Devonshire afterwards issued before the return of the capias, without a new affidavit or an office copy of the original affidavit, the same officer being filacer for both counties: the court refused to set aside the testatum. *Martin v. Bidgood*, 12 Moore, 236; S. C. nom. *Evans v. Bidgood*, 4 Bing. 63.

An affidavit of debt must not be defamatory or scandalous. *Anon. Lofft*, 433.

Two or more defendants in different actions cannot be held to bail upon one affidavit. *Gilly v. Lockyer*, 1 Dougl. 217. *And see Crooke v. Davis*, 5 Burr. 2690.

An affidavit to hold to bail continues in force for a year, and for that time only. *Pitches v. Davey*, and *Stewart v. Freeman*, 1 Tidd's Prac. 192.

### 2. How intitled.

Affidavits of debt sworn before a judge of any of the Courts of K. B., C. P., or Exchequer, shall be received in the court to which such judge belongs, though not intitled of that court; but not in any other court, unless intitled of the court in which they are to be used. *Reg. Gen. K. B., C. P., and Exchequer*, H. T., 2 Will. 4; 1 Dowl. P. C. 184; 8 Bing. 289; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 169; 2 Tyr. 341; 4 Bligh, N. S., 593.

By statute 1 W. 4, c. 70, s. 4, *every judge may transact such business depending in any of the courts, as relates to matters over which the courts have common jurisdiction.*

An affidavit, purporting to have been sworn "at the King's Bench Office, Inner Temple, London, before Thomas Chambre," was held sufficient, although not intitled in any court, as the court conceived themselves bound to notice that Thomas Chambre was an officer of the court, attending at the King's Bench Office, and authorized to take affidavits. *Hovell v. Wilkinson*, 7 B. & C. 783.

It is no objection to an affidavit that it is not intitled "in the King's Bench," or that it appears to have been taken before "A. B. a commissioner, &c." without adding "of the court of K. B.," if in fact he were a commissioner of that court. *Kennet and Avon Canal Comp. v. Jones*, 7 T. R. 451.

So, an affidavit not intitled in the court, but purporting at the foot to have been sworn before J. Y., deputy filacer, is sufficient. *Blend v. Drake*, 1 Chit. 165.

But, where a similar affidavit had only the words "by the court," written at the bottom of the jurat, it was held not sufficient. *Molling v. Poland*, 3 M. & S. 157.

An affidavit intitled "In the Common Place," held sufficient. *Rolfe v. Burke*, 4 Bing. 101; 12 Moore, 298.

Affidavits to hold to bail are not to be intitled

in any cause; nor read if filed so intituled. *Reg. Gen. K. B., T. T., 37 Geo. 3; 7 T. R. 454.*

So held in *C. P. Green v. Redshaw, 1 B. & P. 227.*

And if they be intituled "Plaintiff and Defendant," it is bad. *Hollis v. Brandon, 1 B. & P. 36.*

In one case, the defendant was discharged on common bail, because the affidavit was intituled; there being no cause then in court. *King, q. t. v. Cole, 6 T. R. 640.*

But afterwards the Court of K. B. refused to discharge a defendant out of custody, on the ground that the affidavit was intituled in the cause. *Clarke v. Cawthorne, 7 T. R. 321; S. P. Levi v. Ross, and Gaunt v. Marsh, 7 T. R. 321, n.*

### 3. By whom and how made.

#### (a) Who may make.

It is not necessary that the creditor should himself swear to the debt; it suffices for another person to swear positively that defendant is indebted to plaintiff, without shewing that deponent is the agent of, or connected with, plaintiff. *King v. Turner (Lord), 1 Chit. 58; S. P. Pieters v. Luytjes, 1 B. & P. 1; Lee v. Sellwood, 9 Price, 322; Brown v. Davis, 1 Chit. 161.*

Consequently, it is no objection that it states that the plaintiff resides in a foreign country, and that it does not appear how the deponent could know that fact. *Andrioni v. Morgan, 4 Taunt. 231.*

A plaintiff, convicted of a conspiracy, is not incompetent to make an affidavit to hold a defendant to bail. *Park v. Strockley, 4 D. & R. 144.*

Nor when convicted of perjury, unless such conviction was followed by judgment. *Lee v. Gansell, Cowp. 3.*

In an action by the assignees of a bankrupt, a positive affidavit made by the clerk to the plaintiff's attorney, is sufficient. *Anon. 1 Chit. 58, n.*

So, an affidavit by a bankrupt, for his assignees, is sufficient. *Tucker v. Francis, 4 Bing. 142; 12 Moore, 347.*

Where an affidavit made by A. in respect of a debt due to B. before his discharge under an insolvent act, whereby B.'s estate became vested in the clerk of the peace, negatived a tender in bank-notes to the knowledge or belief of A.: the court held, that it ought to have shewn that A. usually transacted B.'s business when out of town, and that, at the time when the affidavit was made, B. was out of town, and that an immediate arrest was necessary, as the defendant was about to sail on a voyage. *Lawson v. McDonald, 2 B. & P. 590.*

If an affidavit to hold to bail be made by a person prima facie incompetent to make it, quære, whether circumstances proving him to be competent can be shewn by affidavit for cause against a rule for discharging the defendant on a common appearance. *Bolt v. Miller, 2 B. & P. 420.*

#### (b) Deponent's Addition.

The addition of every person making an affida-

vit to hold to bail, must be inserted therein. *Reg. Gen. K. B. C. P., and Exchequer, H. T. 2 W. 4; 1 Dowl. P. C. 184; 8 Bing. 289; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 169; 2 Tyr. 341; 4 Bligh, N. S. 593.*

It ought to give the true place of abode of the party making it, as well as the addition. *D'Argent v. Vivant, 1 East, 334.*

Otherwise the defendant will be discharged on common bail. *Jarrett v. Dillon, 1 East, 18. But see Anon. 2 Smith, 207.*

The addition of "manufacturer" is sufficient. *Smith v. Younger, 3 B. & P. 550.*

Where the deponent described himself as of "Dorset Place, Clapham Road, Middlesex," and his true residence was "Dorset Place, Clapham Road, Surrey," the court ordered the bail-bond to be cancelled, and a common appearance entered. *Collins v. Goodyer, 4 D. & R. 44; 2 B. & C. 563.*

But if he be described as "of the city of London, merchant," it is sufficient. *Vaissier v. Alderson, 3 M. & S. 166.*

The residence of a clerk may be described to be at the office in which he is employed. *Anon. 2 Chit. 15.*

Thus, in an affidavit by an attorney's clerk, he may state the place of business of his employer as his residence. *Alexander v. Milton, 1 Dowl. P. C. 570; 2 C. & J. 424; 2 Tyr. 495.*

Or he may be described as residing with his employer, whose addition is stated. *Anon. 1 Chit. 464.*

Even though at night he sleeps at another place. *Haslope v. Thorne, 1 M. & S. 103.*

An affidavit, sworn by a clerk of the plaintiff, need not disclose the residence of the plaintiff. *Hague v. Levy, 2 M. & Scott, 729; 9 Bing. 595; 1 Dowl. P. C. 720.*

A foreigner, whose general residence is abroad, and who only landed here for a temporary purpose, viz. to make the affidavit, may properly describe his place of abode to be in his own country, and not at the place where the affidavit was sworn, within the meaning of the rule of court, *M. T. 15 Car. 2. Bouhett v. Kittoe, 3 East, 154.*

A description, as "late" of a place, is not sufficient under that rule. *Sedley v. White, 11 East, 528.*

But where a deponent had been a few days before discharged out of prison, but, by permission, had still continued to lodge there at night, having no other place of residence, his describing himself bona fide as "late" of such prison, was sufficient. *Id.*

There is no occasion to insert the addition and description of the defendant. *Anon. 1 Tidd's Prac. 179.*

#### 4. Before whom and where sworn.

*Made before Officers issuing Process.*—By 12 Geo. 1, c. 29, s. 2, it is provided, that an affidavit of debt shall be made before the officer who issues the process, or his deputy:—Held, that the deputy must be appointed for issuing process, and

not merely for taking affidavits. *Rogers v. Jones*, 7 B. & C. 86; 9 D. & R. 878.

The prothonotary of the Palace Court, being the officer whose duty it is to issue process, appointed A. B. his deputy, and gave him authority to employ other persons to assist him in discharging the duties; and the latter, it being impossible for him to discharge all the duties of the office, employed C. D. to assist him, but C. D. was not known even by name to the prothonotary:—Held, that C. D. was not a sufficient deputy of the prothonotary, and that an affidavit to hold to bail taken before him, was invalid. *Hughes v. Jones*, 1 B. & Adol. 388.

On an affidavit sworn before and filed with the filacer for Devon, a capias ad respondendum issued to the sheriff of that county against the defendant; and he not being found there, an office copy of such affidavit was filed with the filacer for London, upon which another capias issued, directed to the sheriffs of London, under which the defendant was arrested:—Held, that this was irregular, as an affidavit should have been sworn before the filacer for London; but, as the defendant had put in bail, he had waived the irregularity. *Anderson v. Haymen*, 2 Moore, 192.

So, it was irregular to issue a special capias on an affidavit sworn at the bill of Middlesex office; but the defendant waived the irregularity by putting in bail. *Dalton v. Barnes*, 1 M. & S. 230.

*Before the Attorney.*—Affidavits to hold to bail may be sworn before the attorney for the party, or his clerk, if they are authorized by commission to take affidavits. *Reg. Gen. K. B.*, C. P., and Exchequer, H. T. 2 W. 4: 1 Dowl. P. C. 184; 8 Bing. 289; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 169; 2 Tyr. 341; 4 Bligh, N. S. 593.

*Made Abroad.*—The court will take cognizance of affidavits sworn before foreign magistrates, if properly authenticated. *Dalmer v. Bernard*, 7 T. R. 251.

An affidavit of debt made by a plaintiff residing abroad, before a foreign magistrate, whose signature to the jurat, and his authority to administer oaths and take affidavits there, are verified by affidavit in this country, is a sufficient foundation for a judge's order to hold to bail. *Omealy v. Newell*, 8 East, 364.

The court refused to discharge on common bail a defendant held to bail on a judge's order granted upon the copy of an affidavit of debt made at Hamburg, authenticated by the magistrates of that city, and corroborated by persons here, to the credit of the party making the affidavit. *Bovara v. Bessessi*, 3 Dougl. 336.

And where an affidavit contained no place in the jurat, but purported to have been sworn before the Chief Justice of the King's Bench of Ireland, and was signed by him, and such signature was verified by affidavit here:—Held, that it was sufficient to arrest under a judge's order. *French v. Bellew*, 1 M. & S. 302.

Semble, that an affidavit made before a British

vice-consul abroad, in the absence of the consul, is sufficient. *Anon.* 1 Chit. 463, 721.

But quære, if a British consul in a foreign country has authority to administer an oath; the judges being equally divided in opinion. *Pickardo v. Machado*, 7 D. & R. 478; 4 B. & C. 886. And see *Ex parte Hutchinson (Lady)*, 4 Bing. 606; 1 M. & P. 599.

An affidavit made in this country, to verify the handwriting of the British vice-consul, before whom an affidavit of debt had been made abroad, must contain the addition of the deponent; and the defendant's obtaining a habeas corpus does not cure the omission. *Thurk v. Faber*, 1 Chit. 465, 721.

An affidavit, though made in Ireland, if made for the purpose of being used in this country, ought to contain all those requisites that are essential in an affidavit made in England. *Nesbitt v. Pym*, 7 T. R. 376, n.

### 5. Jurat.

The court will give credit to its own officers, that they have observed all proper forms in taking affidavits. Therefore, where the jurat to an affidavit of debt made by a foreigner, certified "that the affidavit was interpreted by F. C., of &c., professor of languages (he having first sworn that he understood the French and English languages), to the deponent, who was afterwards sworn to the truth thereof:"—Held, that the jurat was sufficient, though it did not appear thereby that the deponent understood the language in which the affidavit was interpreted, or that the interpreter was sworn truly to interpret. *Rose v. Solliers*, 6 D. & R. 514; 4 B. & C. 358.

Semble, that it is sufficient to state that a notary public was sworn to interpret, without stating that he actually did so. *Anon.* 1 Chit. 660, n.

Where an affidavit was sworn by an administrator, a Frenchman, and the jurat did not state that the interpreter understood the French and the English languages, and the plaintiff's attorney acted as interpreter; and the process described the plaintiff as suing in his own right, and the affidavit stated the debt to be due in his representative character; and, on search at the Prerogative Office, Doctors' Commons, but at no other ecclesiastical office, no letters of administration appeared to have been granted of the estate of the deceased to any one; but the jurat stated that the affidavit had been read over and explained to the deponent in the French language, and that the interpreter was sworn upon his interpretation: the affidavit was held sufficient, and the court refused to discharge the defendant out of custody on filing common bail. *Marzetti v. Comte Du Joffroy*, 1 Dowl. P. C. 41.

The court will not order the bail bond to be delivered up to be cancelled, because the place where the affidavit was sworn is not mentioned in the jurat. *Symmers v. Wason*, 1 B. & P. 105.

The jurat of an affidavit, sworn before a commissioner in the country, must state him to be a commissioner. *Howard v. Brown*, 4 Bing. 393; 1 M. & P. 22.

Such an affidavit was held insufficient, although

intituled in the court; and the court would not allow a supplemental affidavit, to aid the defect, to be filed. *Id.*

Affidavits made by illiterate persons must be certified to have been read to and understood by the deponent in the presence of the officer of the court or person administering the oath. *Reg. Gen. K. B., E. T., 31 Geo. 3, 4 T. R. 284; Exch. T. T. 1 Geo. 4, 8 Price, 501; H. T. 40 Geo. 3, 8 Price, 504.*

Where an affidavit is sworn by several deponents, the names of all must be specified in the jurat. *Houldon v. Fasson, 6 Bing. 236; S. C. nom. Holden v. Fasson, 3 M. & P. 559. Reg. Gen. K. B. M. T. 37 Geo. 3, 7 T. R. 82.*

#### 6. Under a Judge's Order.

Swearing to the belief of a debt due on promissory notes, &c., is sufficient to ground a judge's order to hold to bail. *Allen v. Barry, 1 Chit. 168.*

If a defendant be arrested under a judge's order, a material fact being concealed from the judge, which would probably have induced him to refuse the order; the court will on application discharge the defendant, even though there was a sufficient affidavit of debt, independent of the order. *Davies v. Chippendale, 2 B. & P. 282.*

But they will not discharge him from a detainer lodged against him by a third person, while in custody under the judge's order. *Id.*

When a defendant has been arrested in an action of trover by a judge's order, the court will not enter into the question of merits for the purpose of discharging him on filing common bail. *Brackenbury v. Needham, 1 Dowl. P. C. 439.*

The court will not make an order to hold a tenant to bail, under 11 Geo. 2, c. 19, s. 3, for double the amount of goods clandestinely and fraudulently removed from premises on which arrears of rent have accrued. *Sutton v. Oswald, 1 Dowl. P. C. 348.*

#### 7. Statement of Cause of Action.

##### (a) Positive Statement of Debt due.

*Generally.*—An affidavit to hold to bail must shew on what account the debt became due. *Polleri v. De Souza, 4 Taunt. 154; S. P. Cooke v. Dobree, 1 H. Black. 10.*

And the statement of the cause of action must be positive. *Van Mael v. Julian, 1 Wils. 231; S. P. Pomp v. Ludvigson, 2 Burr. 655; Champion v. Gilbert, 4 Burr. 2126.*

A mere statement of the circumstances under which it arose being of themselves insufficient. *Long v. Linch, 3 Wils. 154; 2 W. Black. 740.*

So, though concluding "by reason thereof the defendant stands indebted, which he hath refused and still refuses to pay." *Fowler v. Morton, 2 B. & P. 48.*

So, an affidavit, stating a promise made by the defendant, executor, &c., to pay a legacy of 100*l.* bequeathed by his testatrix, and confessing assets to the amount of 280*l.*; but "that plaintiff, not receiving the said sum, caused several applications to be made to the defendant without effect,

therefore that the defendant was indebted," &c., is not sufficiently positive. *Mackenzie v. Mackenzie, 1 T. R. 716.*

Stating that "the plaintiff, on &c., gave the defendant notice to quit on &c., and that the latter held over &c., by reason of which, and by force of the statute, an action has accrued to the plaintiff to demand of the defendant &c." (double rent), is not sufficient. *Wheeler v. Copeland, 5 T. R. 364.*

So, stating "that E. I. is indebted in 33*l.*, being the amount due to the informant from the said G. P. E. I. for his subscription as member of a certain reading-club, according to the rules and regulations of the same," is bad in form as well as in substance. *Waters v. Joyce, 1 D. & R. 150.*

In an affidavit made by plaintiff's agent, the plaintiff himself being abroad, if it be positively sworn that defendant is indebted on a judgment, a subsequent allegation, "which said judgment is still in force and unpaid, as this deponent believes," will not vitiate. *Bland v. Drake, 1 Chit. 165.*

An affidavit stating that the defendant is indebted "for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," is sufficient, without expressly stating that the debt is due from the defendant. *Symons v. Andrews, 1 Marsh. 317; 5 Taunt. 752.*

*Reference to Documents.*—An affidavit by a third person, that defendant is justly indebted to plaintiff in certain sums, and that the deponent is more strongly and better assured that the said sums of money are due, by means of deponent's having transmitted to him, and in his custody, certain documents:—Held insufficient. *Brown v. Pheop, 3 Dougl. 370.*

So, a statement that defendant "is indebted, as appeared by an account stated and under the defendant's own hand." *Anon. 1 Wils. 121.*

So, that he is indebted in a certain sum, as appears by the master's allocatur. *Powell v. Porterch, 2 T. R. 55. And see Fry v. Malcolm, 4 Taunt. 705.*

So, "that the defendant is indebted in 20*l.*, according to the bill delivered by the plaintiff to the defendant." *Williams v. Jackson, 3 T. R. 575.*

So, that defendant is indebted on a bill of exchange, as "appears by such bill." *Rollin v. Mills, 1 Wils. 279; S. P. Bright v. Purrier, 3 Burr. 1687.*

So, "as appears by the bond, and an acknowledgment by the defendant." *Kelly v. Devereux, 1 Wils. 339.*

So, "as appears by agreement." *Jennings v. Martin, 3 Burr. 1447.*

But a statement that defendant was indebted in such sum, as the deponent computes, was held sufficient. *Moulby v. Richardson, 2 Burr. 1032.*

*Executors.*—An affidavit by an executor, stating the debt to be due, "as appears by the tes-

tator's books," is not sufficient, without the words "and which the deponent believes to be true." *Garnham v. Hammond*, 2 B. & P. 298; *S. P. Sheldon v. Baker*, 1 T. R. 83.

So, "as appears from a statement made from the testator's books by an accountant employed by the deponent," is insufficient. *Rowney v. Dean*, 1 Price, 402.

So, if the clerk of a testator make the affidavit. *Ekhrington v. —*, 1 Tidd's Prac. 182.

**Bankrupt's Assignees.**—In an action by assignees, an affidavit made by a clerk of the bankrupt, stating that the defendant is indebted, as appears by the bankrupt's books, is bad, if it do not state the deponent's belief that the debt is due. *Love v. Farley*, 1 Chit. 92; *S. P. Ethrington v. —*, 1 Tidd's Prac. 182.

If an assignee and others sue jointly, the former may hold the defendant to bail, on an affidavit, "as appears by the bankrupt's books, and as the deponent believes." *Swayne v. Crammond*, 4 T. R. 176; *S. P. Torra v. Edwards*, 4 Burr. 2283.

Without alleging that the books are in the deponent's possession. *Hatten v. Bristow*, 11 Moore, 504.

So, an affidavit by assignees, stating "as appears to them by the last examination of the bankrupt, and as they verily believe, and that they have not received the debt or any part of it, but believe it to be still due," is sufficient where the bankrupt had refused to make the affidavit. *Berclay v. Hunt*, 4 Burr. 1992.

But in trover by assignees, "that the defendant possessed himself of the goods, and has refused to deliver them, and has converted them to his own use, as appears by the books of account of the bankrupts, and by the letters of S. (the agent), and letters of plaintiffs, as the deponent believes," was holden not to be sufficiently certain to shew a conversion. *Molling v. Buckholtz*, 2 M. & S. 563.

**Foreign Money and Claims.**—An affidavit on an Irish judgment must shew the value of Irish money. *Storie v. Ball*, 3 Chit. 16.

An affidavit made before a British consul in a foreign country, stated that the defendant was indebted to the plaintiff in a certain number of pounds sterling:—Held, by three justices, that the affidavit was insufficient, inasmuch as it did not appear with certainty, whether the defendant was indebted in British or Irish sterling money. *Abbott, C. J. diss.* It ought to have said "pounds sterling English." *Pickardo v. Machado*, 7 D. & R. 478; 4 B. & C. 886.

An affidavit stating that defendant was indebted to plaintiff, "as liquidator of an estate duly appointed by the law of France," is defective for not shewing that plaintiff, as liquidator, is by the law of France entitled to sue. *Tenon v. Mars*, 3 M. & R. 38; 8 B. & C. 638.

An affidavit stating that A. was indebted to B. for goods sold and delivered in Holland, and that the debt was assigned to C. according to the laws

of that country; concluding with a statement, that the assignee of a debt may sue the debtor according to the laws of Holland, "as deponent is informed and believes," is sufficient to hold the defendant to bail in this country. *Scuerhop v. Schmanuel*, 4 D. & R. 180.

### (b) Defendant's Benefit.

An affidavit for goods sold and delivered, and materials found and work done by deponent for the defendant, was held bad for not stating that the goods were sold and delivered to, and the work done for, the defendant. *Young v. Gatien*, 2 M. & S. 603; *S. P. Bell v. Thrupp*, 2 B. & A. 596; 1 Chit. 331.

But an affidavit, which stated that the defendant was indebted "for the hire of divers carriages of the plaintiff to and for the use of the defendant," was held sufficient without stating that they were hired of the plaintiff, or by whom they were hired. *Brown v. Garnier*, 2 Marsh. 83; 6 Taunt. 389.

And it is sufficient to state that the defendant is indebted "for money had and received on account of the plaintiff," without adding received "by the defendant." *Coppinger v. Beaton*, 8 T. R. 338.

An affidavit that defendant was indebted to plaintiff in 20l., for money lent on a bill of exchange, drawn by S., accepted by defendant, and overdue and unpaid, was held sufficient, without saying "lent to defendant." *Bennett v. Dawson*, 4 Bing. 609; 1 M. & P. 594.

An affidavit "for money paid, laid out, and expended, and lent and advanced, by the plaintiff to the defendant, and at his request," is bad, for not distinctly shewing that the money paid, laid out, and expended, was so paid, &c., to the use of the defendant, and at his request. *Fricks v. Poole*, 4 M. & R. 448; 9 B. & C. 543.

An affidavit, that "R. Sutton is indebted to plaintiff for money paid and laid out to the use of the said R. Jackson:"—Held, well enough. *Hughes v. Sutton*, 3 M. & S. 178.

It is a sufficient statement of the cause of action, that it is for the use and occupation of premises of the creditor, and if the statement proceeded to say, "as tenant thereof," it is no objection that there was not added, "to the creditor." *Lee v. Sellwood*, 9 Price, 322.

An affidavit, for work and labour done by the plaintiff for the defendant, as his servant, is sufficient. *Bliss v. Atkins*, 5 Taunt. 756; 1 Marsh. 317, n.

### (c) Defendant's Request.

Affidavits, to hold to bail, for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant. *Reg. Gen. K. B., C. P., & Ex.*, H. T., 2 W. 4, 1 Dowl. P. C. 184; 8 Bing. 289; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 170; 2 Tyr. 341; 4 Bligh, N. S. 594.

Since the rule, it has been held that an affidavit for money paid, &c. must allege that the money was so paid, &c. at the request of the defendant. *Reeves v. Hucker*, 2 C. & J. 44; 2 Tyr. 161; 1 Price's P. C. 137.

An affidavit "for money paid, laid out, and expended, to and for the use of the defendant," which did not state that the money was paid, &c. "at the request" of the defendant, was held bad. *Marshall v. Davison*, 2 Tyr. 315; S. P. contra, before the rule, *Eyre v. Hulton*, 5 Taunt. 704; S. C. nom. *Hulton v. Eyre*, 1 Marsh. 315.

So, in another case, in K. B., an affidavit for money lent, and for goods sold and delivered, and for work and labour done, is irregular if it omit to state that it was "at the instance and request of the defendant;" although it stated that it was "to and for his use, and on his behalf." *Durnford v. Messiter*, 5 M. & S. 446.

But in one case an affidavit for work done for the defendant, without adding "at his request," was held sufficient. *Anon.* 1 Chit. 331.

So, in another case, an affidavit for money paid, without adding "at his request," was held sufficient. *Pitt v. New*, 3 M. & R. 129; 8 B. & C. 654.

So, in C. P., of money advanced to defendant, as it was said that such request must be generally inferred. *Berry v. Fernandez*, 8 Moore, 332; 1 Bing. 338.

An affidavit stating that defendant was indebted to plaintiffs in 130*l.* and upwards for work and labour done, and for paper found by plaintiffs and their servants, in and about the printing of a certain book of defendant, and at his request, was held to be sufficient to shew that the work was done, and the materials found for the defendant at his instance. *Gale v. Leckie*, 6 M. & S. 228.

#### (d) Agreements.

*Ordinarily.*—An affidavit on articles of agreement should state the consideration. *Walker v. Gregory*, 1 Dowl. P. C. 24.

Stating "that the defendant was indebted in the sum of 1000*l.* upon and by virtue of a certain memorandum in writing, bearing date, &c. and signed by the defendant, whereby he promised the plaintiff, that, when he returned in the month of March or April then next, he would marry her; or pay her the sum of 1000*l.*," without shewing any mutual consideration on the part of the plaintiff to sustain the defendant's promise, is insufficient, as the court can take nothing by indentment in an affidavit of debt. *Macpherson v. Lovie*, 2 D. & R. 69; 1 B. & C. 108.

Stating that defendant was indebted upon breach of articles, bad, as too general. *Anon.* 1 Tidd's Prac. 183.

So, stating that the defendant is indebted in so much upon promises. *Cope v. Cooke*, 2 Dougl. 467.

An affidavit stating that defendant was indebted to plaintiff in a certain sum, under a deed by which defendant had covenanted to pay cer-

tain sums "at certain times and on certain events now past and happened"—was held sufficient. *Barnard v. Neville*, 3 Bing. 126; 10 Moore, 475.

But, an affidavit stating that defendant was indebted to plaintiff so much "for interest money, under and by virtue of an agreement," is not sufficient. *Brook v. Triest*, 10 East, 358.

It is not sufficient to state "that the defendant was indebted for money lent by plaintiff to defendant for the use of another, and for which the defendant promised to be accountable and to repay, or cause to be secured to the plaintiff," &c., it not appearing in the affidavit but that the money had been secured according to the agreement. *Jacks v. Pemberton*, 5 T. R. 552.

An affidavit that the defendant was indebted in 1000*l.* "under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c., which said balance is still due and unpaid," without stating that the balance was 1000*l.*, was held to be defective. *Hatfield v. Lingard*, 6 T. R. 217.

Stating that the plaintiffs had furnished goods to the amount of 2000*l.* to one N., for whom the defendant undertook to be answerable; that N. had since failed, and paid 4*s.* in the pound only; and that 1000*l.* remained due to the plaintiffs:—Held sufficient. *Collins v. Wallis*, 11 Moore, 248.

An allegation "that the defendant was indebted in a certain sum, upon and by virtue of a certain charter-party of affreightment, bearing date, &c. for and on account of the hire of a certain ship called the S., let to hire by the plaintiff to the defendant, and by him taken for a certain voyage from the port of L. to P.:"—was held sufficiently certain. *Skeen v. McGregor*, 8 Moore, 107; 1 Bing. 242.

Stating that the defendant was indebted to the plaintiff by virtue of certain articles of agreement, by which the latter agreed to sell, and the former agreed to purchase certain lands, and that the defendant had been let into possession in pursuance of the agreement, is insufficient, without stating that a conveyance had been tendered to the defendant. *Young v. Dowlman*, 2 Y. & J. 31.

An affidavit, that the defendant had undertaken to be answerable to the creditors of J. and W. M. for the amount of the debts of such creditors, on their, the creditors, undertaking not to issue a commission of bankrupt against J. and W. M. before the 16th of August; that J. and W. M. owed plaintiffs 1000*l.*; that neither plaintiffs, nor, as they were informed and believed, any other of the creditors of J. and W. M. sued out a commission of bankrupt against J. and W. M. before the 16th of August; that neither J. and W. M., nor defendant, paid plaintiffs the 1000*l.* due to them from J. and W. M.; and that defendant owed plaintiffs 1000*l.* upon his said undertaking:—Held insufficient, the undertaking by the creditors being a condition precedent, which ought to have been averred. *Elworthy v. Maunder*, 5 Bing. 295; 2 M. & P. 482.

Where a plaintiff seeks to hold a defendant to bail for a sum of money to which he alleges he



has rendered himself liable for the defendant, he must shew clearly that the liability has been incurred. *Thomson v. Barns*, 1 Dowl. P. C. 562; 2 C. & J. 468; *S. C.* not S. P. 1 C. & M. 177.

An affidavit stated that the defendant was indebted in 25*l.*, by virtue of an agreement, whereby the plaintiff agreed to procure a lease to be granted to the defendant, and the defendant agreed to pay the plaintiff, his solicitor, or agent, 25*l.* in full for his share or proportion of the costs and expenses of the agreement, and of the lease and counterpart, and of a proposal to be laid before a master in Chancery for a grant of the lease; the lease and counterpart being to be prepared by the plaintiff's solicitor; and that the plaintiff did procure a lease to be granted, which was prepared by the plaintiff's solicitor; but did not state that the plaintiff had paid the solicitor, or had himself borne or incurred the expenses:—Held, insufficient. *Id.*

*Where there is a Penalty.*—A party cannot be held to bail for a penalty, but only for the sum secured by the penalty. *Hatfield v. Linguard*, 6 T. R. 217.

If a tenant bind himself in a penalty of 100*l.* for performance of repairs within a certain time, the court will not permit him to be holden to bail for the 100*l.* upon an affidavit which does not shew in what respect, and to what amount he has violated his contract. *Edwards v. Williams*, 5 Taunt. 247.

And an affidavit for stipulated damages for non-performance of an agreement must state a breach of the agreement. *Stinton v. Hughes*, 6 T. R. 13.

So, an affidavit for a certain sum for the breach of an agreement, must shew that the sum demanded is stipulated damages, and not merely a penalty. *Willey v. Thornton*, 2 East, 409.

#### (e) Awards.

An affidavit of debt on an award ought to state the fact of the submission to, and the making of, the award, and that the money was due at a day now past. *Anon.* 1 Dowl. P. C. 5.

Where there was a submission to two arbitrators, with power to them to name an umpire, if they could not agree, so as the umpire made his award on or before a certain additional day, and the arbitrators having named an umpire who made an award in the plaintiff's favour, but after the time limited had expired, and the plaintiff held the defendant to bail, without stating in his affidavit the fact of the time having expired:—Held, that the defendant was not entitled to be discharged on filing common bail. *Masel v. Angel*, 6 D. & R. 15.

An affidavit on an award, directing money to be paid by defendant to plaintiff upon demand, not alleging a demand, is insufficient. *Driver v. Hood*, 1 M. & R. 324; 7 B. & C. 494.

But an affidavit "for damages awarded, and for costs and expenses taxed and allowed," is sufficiently certain; for, it will be inferred that

the award and taxation are such as will support the action. *Jenkins v. Law*, 1 B. & P. 365.

#### (f) Bills and Notes.

*Must state Tenor of Instrument.*—Affidavits on bills and notes must state the tenor of the instrument: therefore, a statement that the debt was due "upon a certain instrument called a bill of exchange," without further stating the tenor of the bill, was held bad. *Dewsbury v. Willis*, 1 M'Clel. 366.

So, stating "that defendant is indebted to plaintiff in 450*l.*, as indorsee of a promissory note made by defendant," without stating the date of the note, or that it was payable on demand, is insufficient. *Jackson v. Yate*, 2 M. & S. 148.

It is not necessary to express the sum for which the bill was drawn. *Hanley v. Morgan*, 1 Dowl. P. C. 322; 2 C. & J. 331; *S. P. Lewis v. Gompertz*, 1 Dowl. P. C. 319; 2 C. & J. 352; 2 Tyr. 317.

Stating "that defendant was indebted to plaintiff on a bill drawn by M. D. upon and accepted by defendant, and indorsed by M. D. to the plaintiff," without saying that the bill was drawn payable to order:—Held, sufficient. *Hughes v. Brett*, 6 Bing. 239; 3 M. & P. 566.

*Certainty required.*—Stating that the defendant was indebted to the plaintiff in a certain sum upon the balance of a bill of exchange, drawn by the plaintiff upon and accepted by the defendant, and due at a day past, is sufficient. *Walmsley v. Dibdin*, 4 M. & P. 10.

So, a statement that the debt arose "on a bill of exchange or order for, &c." drawn by A. upon, and accepted by the defendant, payable to the plaintiff, was sufficient. *Wilks v. Adcock*, 8 T. R. 27.

So, stating "that W. C. is justly and truly indebted in 44*l.* 11*s.*, being the amount of a certain inland bill of exchange drawn by the said W. C. on this deponent, and by him accepted for the honour of the said W. C., payable to the order of the said W. C. at a day now past, and which said bill of exchange was paid by this deponent," discloses a sufficient cause of action. *Brooks v. Clarke*, 2 D. & R. 148.

So, a statement that B. was indebted, "as the acceptor of a certain bill of exchange, bearing date, &c., drawn by A., for a valuable consideration on, and accepted by B., payable at two months after the date thereof, and due at a day now passed," was held sufficient. *Walmsley v. Macey*, 2 B. & R. 338; 5 Moore, 52.

So, affidavits by A. B. stating C. D. to be "justly and truly indebted to this deponent in a certain sum, as indorsee of bills of exchange drawn by E. F. upon, and accepted by C. D., payable to the order of the said E. F. at a certain day now passed, and indorsed to this deponent;" and by A. B. stating G. H. to be "justly and truly indebted to this deponent in a certain sum, as indorsee of a certain bill of exchange, drawn by E. F. upon, and accepted by the said G. H., payable to the order of the said E. F. at a certain

day now past:—Held, to contain a sufficient description of the respective debts of C. D. and G. H. *Lamb v. Newcombe*, 2 B. & B. 343; 5 Moore, 14.

Stating that R. S., H. A., R. R., and B. S. were jointly indebted to the plaintiff on a bill of exchange "accepted (in the name and firm of A. & Co.) by the said R. S., H. A., R. R., and B. S., or one of them:—Held, insufficient. *Harmer v. Ashby*, 10 Moore, 323.

*Must show that it is due.*—It is necessary to state when the bill or note is payable, or that it is overdue. *Kirk v. Almond*, 1 Dowl. P. C. 318; 2 C. & J. 354; 2 Tyr. 316; *S. P. Bill v. Rogers*, 12 Price, 194; *Jackson v. Yate*, 2 M. & S. 148.

An affidavit against the acceptor of a bill, must shew that the bill was due. *Holcombe v. Lambkin*, 2 M. & S. 475; *S. P. Edwards v. Dick*, 3 B. & A. 495.

So, held also, in C. P., upon an affidavit which also contained other causes of action; and the court refused a supplemental affidavit. *Sands v. Graham*, 4 Moore, 18.

But the actual day when due need not be stated. *Eltone v. Mortlake*, 1 Chit. 648.

Stating "that the defendant was indebted in a certain sum, as indorsee of a bill drawn by E. F. upon, and accepted by the defendant, payable to the order of E. F. at a day then past," is equally sufficient and certain. *Lamb v. Edwards*, 5 Moore, 14; 2 B. & B. 343.

In C. P., in one case, an affidavit which stated the defendant to be indebted as indorsee of a bill of exchange, without alleging the bill to have become due, was held sufficient. *Davidson v. March*, 1 N. R. 157.

*Must shew Title to sue.*—An affidavit on bills or notes must shew how the plaintiff became entitled to recover upon them. *Balbi v. Bailey*, 1 Marsh. 424; 6 Taunt. 25.

In an affidavit by an indorsee of a bill, it must be stated by whom the bill was indorsed; it is insufficient to state that the bill was duly indorsed. *Lewis v. Gompertz*, 1 Dowl. P. C. 319; 2 C. & J. 352; 2 Tyr. 317; *S. P. Woolley v. Escudier*, 2 M. & Scott, 392.

Thus, an affidavit which stated that the defendant was indebted to the plaintiff upon a promissory note for 10,000*l.*, drawn in favour of Inglis, Ellice, & Co., and duly indorsed to the plaintiff, was held insufficient, because it did not state any indorsement from the payee (the defendant) to the plaintiff. *M<sup>r</sup> Tuggart v. Ellice*, 4 Bing. 114; 12 Moore, 326.

So, an affidavit on a promissory note should state, that the holder is payee or indorsee. *Bill v. Rogers*, 12 Price, 194.

Stating that the defendant is indebted, as indorsee of a bill of exchange, drawn by one T. W. at a day now past, is not sufficient without stating in what character the defendant became liable. *Humphries v. Williams*, 2 Marsh. 231; *S. C. nom. Humphries v. Wiseloe*, 6 Taunt. 531.

Nor is a statement that the defendant is indebted "on a bill of exchange, drawn by the defendant, upon, and accepted by A. B.; and on another drawn by the plaintiff, upon, and accepted by the defendant;" without stating the dates of the bills, or that they were due and unpaid. Semble, that it is not necessary, in such case, to state the character in which the plaintiff is entitled to sue upon them. *Machu v. Fraser*, 2 Marsh. 483; 7 Taunt. 171.

But, in one case, an affidavit stating that the defendant was indebted to the plaintiff on a bill of exchange, payable to a third person at a day now past, was held sufficient, without shewing the connection between the payee and the plaintiff. *Eltone v. Mortlake*, 1 Chit. 648.

So, a statement that the defendant was "justly indebted to the plaintiff in 100*l.*, upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," was held sufficient, without stating in what character the bill was due to the plaintiff, whether as payee or indorsee. *Bradshaw v. Saddington*, 7 East, 94; 3 Smith, 117.

In an action by indorsee against drawer, the affidavit must allege the default of the acceptor. *Buckworth v. Levy*, 7 Bing. 251; 5 M. & P. 23; 1 Dowl. P. C. 211; *S. P. Cross v. Morgan*, 1 Dowl. P. C. 122; *Bunting v. Jadis*, 1 Dowl. P. C. 445.

#### (g) Bonds.

An affidavit on a bond must shew that the bond is due and payable at the time of the arrest. *Smith v. Kendal*, 7 D. & R. 232.

A statement "that defendant is indebted to plaintiff in 6000*l.* upon a bond, bearing date, &c. and made and entered into by defendant to plaintiff in the penal sum of 25,000*l.*," without shewing the condition of the bond, is insufficient. *Bosquet v. Fillis*, 4 M. & S. 330.

An affidavit, stating the defendant to be indebted to the plaintiff generally, on a bond conditioned for the performance of an award, which award directed one E. F. to pay a sum of money on demand: was held defective, as it did not appear how the defendant was indebted, and that no demand was expressed to have been made on E. F. for payment. *Armstrong v. Stratton*, 1 Moore, 110; 7 Taunt. 405.

But a statement that the defendant was indebted, "for principal and interest due on a bond," was held sufficient to express that such bond was conditioned for the payment of money, without setting forth the condition. *Dyland v. King*, 1 Moore, 24; 7 Taunt. 275.

A bond was given conditioned for the payment of bills of exchange drawn in England on A. in the East Indies, in case such bills should be returned to England protested for non-payment. The affidavit, after stating "that he was indebted to the deponent in a certain sum," stated also the condition of the bond, and "that the said bills were not paid to his knowledge or belief in India, or elsewhere; but that they were protest-

ed for non-acceptance in India, and were still unpaid." It was no objection in this affidavit, that it was stated that the bills were unpaid to the knowledge and belief of the plaintiff; but it was bad, because it introduced a new term, not mentioned in the condition of the bond, viz. a protest for non-acceptance. *Hobson v. Campbell*, 1 H. Black. 245.

The affidavit must shew that the number of defaults in payment amounts to 20l. *Chambers v. Ward*, 1 Dowl. P. C. 139.

#### (h) Goods.

An affidavit for goods sold must state that they were delivered as well as sold. *Loisada v. Morryseph*, 8 Moore, 366; S. C. nom. *Lascar v. Morryseph*, 1 Bing. 357.

Therefore a defendant cannot be held to bail on an affidavit stating, that he is indebted for goods "bargained and sold," without saying also "delivered." *Hopkins v. Vaughan*, 12 East, 398; *S. P. Bell v. Thrupp*, 2 B. & A. 596; 1 Chit. 331.

It must also state that they were sold by the plaintiff. *Perkes v. Severn*, 7 East, 194; 3 Smith, 339; *S. P. Taylor v. Forbes*, 11 East, 315; *Cathrow v. Hagger*, 8 East, 106. *Anon.* 1 Chit. 331.

It is not sufficient to state the debt to be for goods sold and appraised to the defendants, without saying "by the plaintiff." *Fenton v. Ellis*, 1 Marsh. 535; 6 Taunt. 192.

It is necessary to allege that the goods were sold and delivered to the defendant, as well as by the plaintiff. *Snell v. Anderson*, 3 M. & P. 269.

Stating that the defendant is indebted "for goods sold and delivered by the plaintiff to the defendant," has been held sufficient, though it omit to add "at his request." *Bowley v. Bayley*, 11 Moore, 383.

#### (i) Money.

In an affidavit for a certain sum of "money had and received," and "money lent," it is not necessary to distinguish how much is due on each account. *Hague v. Levi*, 1 Dowl. P. C. 720; 9 Bing. 595; 2 M. & Scott, 729.

Stating that the defendant is indebted in 1000l. "on balance of account for money paid, laid out, and expended by the plaintiff to and for defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest of monies due by the defendant to the plaintiff" is not sufficiently certain. *Visger v. Delegal*, 2 B. & Adol. 571; 1 Dowl. P. C. 333.

Stating "that B. owed to A. so much money, laid out and expended, and upon the balance of account," was held insufficient. *Eicke v. Evans*, 2 Chit. 15.

Stating that the defendant was indebted to the plaintiff "as secretary to a tontine society," for money had and received "to his use," was held bad for uncertainty. *Whitchurch v. Whiting*, 3 Anst. 797.

#### (j) Statutes.

Seemle, that an affidavit on a penal statute

should specify the nature of the offence, and aver that the defendant has incurred the forfeiture; but the offence need not be described circumstantially; nor is the plaintiff obliged to swear, that the defendant is indebted to him to the amount of the penalty. *Davis v. Mazzinghi*, 1 T. R. 705.

If an affidavit for a penalty on a statute mistake the year in which the statute was passed, it is a fatal objection, although the title of the act be properly set forth. *Watson v. Shaw*, 2 T. R. 654.

Cases of affidavit for penalties for unlawful insurances under the lottery act 27 Geo. 3, c. 1. *Davis v. Mazzinghi*, 1 T. R. 705; *Watson v. Shaw*, 2 T. R. 654; *Holland v. Bothmar*, 4 T. R. 228; *Pritchett v. Cross*, 2 H. Black. 17; *Rex v. Decker*, 3 Anst. 862.

#### (k) Trover.

In C. P. held that an affidavit that the defendant "was indebted to the plaintiff in trover," is bad. *Hubbard v. Pacheco*, 1 H. Black. 219.

So, stating "that the plaintiff's cause of action against the defendant was for converting and disposing of divers goods of the plaintiff of the value of 250l., which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant nor any person on his behalf had offered to pay to the plaintiff the 250l. or the value of the goods," was holden to be insufficient. *Woolley v. Thomas*, 7 T. R. 550.

So, "that the defendant had possessed himself of certain goods of the plaintiff, and of other persons," was held bad for uncertainty. *Anon.* 1 Tidd's Prac. 186.

So, an affidavit in trover for a bill of exchange, is bad, if it do not state that the bill remains unpaid. *Clarke v. Cawthorne*, 7 T. R. 321.

But held, "that the defendants have possessed themselves of divers goods belonging to the plaintiff, and have refused to deliver them up, and that they or some of them have converted and disposed of them to their own use," was sufficient. *Charter v. Jacques*, Cowp. 529.

So, an affidavit that defendant was indebted to plaintiff in 103l. for goods, which defendant converted to his own use, was held sufficient to hold a custom-house officer to bail in trover. *Emmerson v. Hawkins*, 1 Wils. 335.

#### (l) Assignment of Choses in Action.

An assignee of a bond may make an affidavit without joining the assignor. *Anon.* 1 Chit. 58; *S. P. Byland v. King*, 1 Moore, 24; 7 Taunt. 275.

A co-assignee of a debt arising out of bills of exchange in his own possession may hold the defendant to bail on his own affidavit; swearing positively as to all the facts required which are within his own knowledge, and to the best of his knowledge and belief, as to such as are within the knowledge of his principal and co-assignees. *Cresswell v. Lovell*, 8 T. R. 418.

An affidavit shewing that, "at the time of the assignment thereafter mentioned, the defendant was indebted to plaintiff on a bill, and that the latter afterwards assigned the debt by indenture to third persons in trust, one of whom then deposed, that, at the time of the affidavit being made, the defendant was indebted to the trustees as such trustees and assignees as aforesaid."—Held, insufficient, because it did not deny that the debt had been satisfied to the plaintiff between the assignment and the time of the affidavit being made. *Mann v. Sheriff*, 2 B. & P. 355.

But a supplemental affidavit was allowed. *Id.*

In an action on a bond at the suit of the obligee, for the benefit of the assignee, against the obligor, the affidavit was made jointly by the plaintiff (the obligee) and the assignee, the former swearing that a certain sum was due for principal and interest on the bond, and that he had assigned it to the latter; and the latter, that the sum due on the bond still remained unpaid, and due and owing to him as assignee:—Held, sufficient. *Fairman v. Farquharson*, 1 M. & P. 179.

### 8. Defects in.

**Clerical Errors.**—An affidavit was held good although the word "oath" was omitted, it being "maketh that B. is indebted," instead of "maketh oath." *Anon. Loft*, 85.

But considered bad where the mistake was "in" indebted, instead of "is" indebted. *Reeks v. Graeme*, 2 Wils. 224.

An affidavit under a judge's order disclosing circumstances which shew that the plaintiff has been damaged to such an amount, is sufficient, although it improperly states that the defendant was indebted to that amount, and disclose the special circumstances. *Imlay v. Ellefsen*, 2 East, 453.

**Taking advantage of.**—In K. B. the affidavit to hold to bail is part of the process to bring the defendant into court; any irregularity in it must be taken advantage of in the first instance; and is waived by the defendant's putting in bail. *D'Argent v. Vivant*, 1 East, 330.

Objections must be made in a reasonable time after the error committed. *Desborough v. Coppinger*, 8 T. R. 77; 1 East, 19, c.

Therefore not after plea. *Levy v. Dupont*, 7 T. R. 376, n.

Nor will the court admit any objection after notice of executing a writ of inquiry on a judgment by default. *Desborough v. Coppinger*, 8 T. R. 77; 1 East, 19, (c).

Nor after putting in bail. *D'Argent v. Vivant*, 1 East, 330.

Nor if bail above has been put in and perfected. *Chapman v. Snow*, 1 B. & P. 132; *S. P. Jones v. Price*, 1 East, 81; *Reeves v. Hucker*, 2 Tyr. 161; 2 C. & J. 44; 1 Price's P. C. 137.

Nor after the time for putting in bail above has elapsed. *Tucker v. Colegate*, 2 C. & J. 489; 2 Tyr. 496; 1 Dowl. P. C. 574.

Nor after the defendant has given bail to the sheriff, and bail to the action, who have rendered him. *Shapman v. Whalley*, 6 Taunt. 185.

If a defendant, on being informed that a bailable writ has been issued against him, voluntarily give a bail bond, he cannot afterwards object to the insufficiency of the affidavit. *Norton v. Danvers*, 7 T. R. 375.

But where several persons have separately incurred penalties for printing illegal schemes of the lottery, a separate affidavit must be made and filed against each of them; and if they be all joined in one affidavit, the irregularity is not waived by their putting in bail; but the court, on motion, will stay the proceedings against all of them. *Goodwin v. Parry*, 4 T. R. 577.

And taking steps in a cause does not waive the irregularity of joining as defendants two persons in one affidavit on one stamp, who are liable to the plaintiff in different capacities (as maker and indorser of a note). *Hussey v. Wilson*, 5 T. R. 254.

An affidavit stated that the debt arose on "a bill of exchange or order for," &c., drawn by A. upon, and accepted by the defendant, payable to the plaintiff; and upon the affidavit alone the court refused to order the bail bond to be delivered up: but the instrument declared upon, appearing not to be a bill of exchange, the court on reading the affidavit and the declaration, ordered the bail bond to be given up, on the defendant's filing common bail. *Wilks v. Adcock*, 8 T. R. 27.

If an affidavit state two sums of money to be due from the defendant to two plaintiffs, though only one writ be sued out on it, the court will set aside the proceedings on that one writ. *Exeter, (Dean, &c.) v. Seagell*, 6 T. R. 688.

Where an affidavit for several causes is defective as to some of them, it will be bad in toto, so as to entitle the defendant to be discharged out of custody on filing common bail. *Baker v. Wills*, 1 C. & M. 238; 1 Dowl. P. C. 631.

Thus, if an affidavit on several promissory notes is defective as to some of them, the court will discharge the defendant on filing common bail, and will not order bail to be taken to the amount of the note, as to which the affidavit is sufficient. *Kirk v. Almond*, 1 Dowl. P. C. 318; 2 C. & J. 354; 2 Tyr. 316.

### 9. Supplemental Affidavits.

It was the invariable practice in K. B. not to allow defects to be supplied by supplementary affidavits. *Jacks v. Pemberton*, 5 T. R. 552; *Molling v. Buckholtz*, 2 M. & S. 563.

But this rule was relaxed in C. P.; and supplemental affidavits were in many instances received in that court, when the court chose to exercise their discretion upon the subject, but they always said such discretion should be very sparingly exercised. *Armstrong v. Stratton*, 7 Taunt. 405; 1 Moore, 110.

Now, however, by a general rule of all the courts, no supplemental affidavit shall be allowed

to supply any deficiency in the affidavit to hold to bail. *Reg. Gen. K. B., C. P., and Exch. Hil. Term, 2 Will. 4; 1 Dowl. P. C. 184; 8 Bing. 289; 1 M. & Scott, 416; 3 B. & Adol. 375; 2 C. & J. 170; 2 Tyr. 342; 4 Bligh, N. S. 594.*

It will, therefore, be necessary in this place only to refer shortly to the cases which have been decided on the subject of the reception or rejection of supplemental affidavits:—

Allowed in *C. P.* in *Garnham v. Hammond*, 2 B. & P. 298; *Roche v. Carey*, 2 W. Black. 850; *Mann v. Sherif*, 2 B. & P. 355; *Hobson v. Campbell*, 1 H. Black. 245; *Lawson v. McDonald*, 2 B. & P. 590.

Refused in *Fenton v. Ellis*, 1 Marsh. 535; 6 Taunt. 192; *Machu v. Fraser*, 7 Taunt. 171; *Armstrong v. Stratton*, 1 Moore, 110; 7 Taunt. 405; *Howard v. Brown*, 4 Bing. 393; *Green v. Renshaw*, 1 B. & P. 227; *Sands v. Graham*, 4 Moore, 18.

### 10. Contradictory Affidavits.

A counter affidavit to contradict or do away the effect of an affidavit to hold to bail on the merits, is not allowed; but there have been cases in which the courts of law have permitted an explanation of the circumstances by the affidavit of the defendant, particularly between foreigners, and upon foreign transactions; and, where an abuse of the process appeared, they have directed common bail to be filed. *D'Carrieu v. Calonne*, 4 Ves. jun. 590.

But though such counter affidavit might be received to shew that the defendant had been before holden to bail for the same cause of action; yet it will not avail to shew that he was before so holden to bail in a foreign country. *Imlay v. Ellefson*, 2 East, 543.

A rule nisi to discharge the defendant out of custody on filing common bail, was granted by K. B. where the debt sworn to was 600*l.* on the balance of an account, and a counter affidavit had been made on the part of the defendant, that the account had been settled at a much smaller sum. *Jackson v. Tomkins*, 2 Chit. 20.

An affidavit that plaintiff is a transported felon, cannot be read in answer to an affidavit to hold to bail made by a competent agent. *Anon.* 1 Chit. 165.

Nor will a counter affidavit be allowed to lessen the bail in an action for an assault. *Smith v. Fraser*, 1 W. Black. 192.

In a recent case, an affidavit made and tendered by a defendant in support of a motion to set aside an affidavit of debt, stating that nothing was in fact due from him to the plaintiff, was altogether rejected as inadmissible. *Bill v. Rogers*, 12 Price, 194.

### 11. Negative of Tender.

By the statute for the resumption of cash payments, the bank restriction acts, by which a tender of notes of the Bank of England was made sufficient to prevent an arrest, were repealed; it is not now therefore necessary to negative a tender of the debt in Bank of England notes, as was the

case when the restriction acts were in operation. In consequence of the change effected by the statute, the cases decided upon the sufficiency of the tender have become nugatory; and it has been thought better to omit the substance of this class of cases, and quite sufficient to arrange them in a tabular form, so that they may be referred to if thought necessary.

If the affidavit of debt to hold to bail omitted wholly to negative the tender of the debt in bank notes, the defendant was entitled to be discharged upon filing common bail; but a mere slip or defect in the manner of denying such a tender was aided by the statute 43 Geo. 3, c. 18. *Wood v. Jenkins*, 2 Smith, 156: *S. P. 1 Chit. 161, n.*

#### Sum tendered.]—

*Maylin v. Townsend*, 2 East, 1.  
*Symons v. Andrews*, 1 Marsh. 317; 5 Taunt. 751.  
*Ford v. Lover*, 3 East, 110.  
*Jennings v. Mitchell*, 1 East, 17.  
*Anon.* 1 Tidd's Prac. 188.  
*Fowler v. Morton*, 2 B. & P. 48.

#### Person by or to whom Tender made.]

*Wyatt v. Smeed*, 1 B. & P. 344.  
*Armstrong v. Stratton*, 1 Moore, 110; 7 Taunt. 405.

*Allison v. Atkins*, 2 Chit. 18.

#### Person by whom Affidavit made.]

*Lee v. Selwood*, 9 Price, 322.  
*Brown v. Davis*, 1 Chit. 161.  
*Munro v. Spinks*, 8 T. R. 284.  
*London (Mayor) v. Dias*, 1 East, 237.  
*Cass v. Levy*, 8 T. R. 520.  
*Elliot v. Duggan*, 2 East, 24.  
*Smith v. Tyson*, 2 B. & P. 339.  
*Hammersley v. Mitchell*, 2 B. & P. 389.  
*Madox v. Abercromby*, cited 2 B. & P. 389; 1 East, 415.  
*Chatterley v. Finch*, } 2 B. & P. 390.  
*Hollings v. Same*, }  
*Bolt v. Miller*, 2 B. & P. 420.  
*Lawson v. McDonald*, 2 B. & P. 590.  
*Stacey v. Frederici*, 2 B. & P. 390.  
*Smith v. Barclay*, 3 B. & P. 219.  
*Martin v. Ranoe*, 8 T. R. 455.  
*Percy v. Powell*, 3 B. & P. 6.

### III. PRIVILEGE FROM ARREST.

#### 1. King's Household, &c.

The King's servants, taken in execution, are entitled to be discharged on motion, on account of privilege. *Bartlett v. Hebbes*, 5 T. R. 686.

A menial servant of his Majesty is not liable to arrest, although he publicly carries on trade, and the debt was contracted in the course of his trade. *King v. Foster*, 2 Taunt. 167.

Where the question of privilege is doubtful, the court will not, upon motion, discharge the party out of custody, but leave him to his writ of privilege. *Luntley v. Battine*, 2 B. & A. 234: *S. P. Whittingham v. De la Rieu*, 2 Chit. 53.

Quære, whether a gentleman of the King's privy chamber be privileged from arrest. *Id.*

The court refused to discharge a prisoner in execution for debt, claiming privilege from arrest on the ground that he was one of the gentlemen of the king's privy chamber, it appearing that he was not a menial servant, had no stated duties to perform, received no fees in virtue of his office, and had no writ of privilege. *Tapler v. Battine*, 1 D. & R. 79.

One of the King's yeomen of the guard having been arrested on process issued out of the Palace Court, without leave of the Lord Chamberlain, and that court having refused to discharge him out of custody on filing common bail, he removed the cause into K. B. and put in and perfected bail:—Held, that an exoneration could not be entered on the bail-piece, even supposing the defendant to be privileged from arrest. *Sard v. Forrest*, 2 D. & R. 250; 1 B. & C. 139.

The candle and fire lighter to the yeomen of the guard at St. James's palace is privileged from arrest on meane process. *Hutton v. Hopkins*, 6 M. & S. 271; *S. P. Forster v. Hopkins*, 2 Chit. 46.

But the court refused to discharge the major of the Tower out of custody, on the ground that he was arrested when returning from an attendance on the Prince Regent, it not appearing that he had been attending by command of his Royal Highness, although the defendant swore that he could not leave the Tower but on business connected with his official situation. *Batson v. McLean*, 2 Chit. 48.

So the deputy-governor of the Tower is not privileged as such. *Id.*

One of the wardens of the Tower was arrested, and informed at the time that the plaintiff would be satisfied if he would enter an appearance. He, however, claimed his privilege, but afterwards executed a bail bond. The court refused to order the bail bond to be delivered up to be cancelled. *Bidgood v. Davies*, 6 B. & C. 84; 9 D. & R. 153.

An indictment will not lie against an officer of the Palace Court for arresting a person not of the King's household, against whom a writ has issued out of that court, though no leave to make the arrest has been obtained from the Board of Green Cloth. *Rea v. Stobbs*, 3 T. R. 735.

## 2. Peers and Members of Parliament.

An Irish peer who has voted in the election of representative peers, cannot be arrested. *Coates v. Hawarden (Lord)*, 1 M. & R. 110; 7 B. & C. 388.

Defendant having voted at the election of Scotch peers:—Held, as a Scotch peer, entitled to be discharged from arrest, although his vote had been protested against, his claim to the title disputed, and never recognised by the House of Lords, or at court. *Digby v. Stirling (Lord)*, 8 Bing. 55; 1 M. & Scott, 116; 1 Dowl. P. C. 248.

The court will not order a bail bond given by a person claiming privilege from arrest as being an Irish peer, to be cancelled on motion, unless his peerage be clearly proved. *Storey v. Birmingham*, 3 D. & R. 418; 1 M. & P. 111, n. And see *Wade v. Birmingham*, 1 M. & P. 111, n.

The statute 10 Geo. 3, c. 50, takes away the privilege from arrest from servants of peers, though necessarily employed about their persons and estates, and therefore the court refused to discharge the defendant on common bail, who was employed as surveyor on the estate of a peer. *Connelley v. Smith*, 1 Chit. 83.

Privilege from arrest continues to those who have been members of the House of Commons for a reasonable time after a dissolution of parliament. *Barnardo v. Mordaunt*, 1 Ld. Ken. 125.

## 3. Ambassadors' Domesticities.

*Statute.*—By 7 Anne, c. 12, s. 3, (which is considered as merely declaratory of the common law), No ambassador or public minister of any foreign state, nor any of their domestic servants, shall be arrested, or their goods distrained, seized on, or attached; provided, s. 5, that no merchant or trader within the bankrupt laws, who may be such domestic servant, shall be protected; and that the name of such domestic servant be registered in the office of one of the secretaries of state, and by him transmitted to the sheriffs of London and Middlesex, to be hung up in their respective offices.

A person claiming privilege as servant to an ambassador, must be really and bona fide his menial and domestic servant at the time of the arrest. *Flint v. De Loyant*, 1 Tidd's Prac. 193; *S. P. Heathfield v. Chilton*, 4 Burr. 2015; *Positier v. Croza*, 1 W. Black. 48.

And must also shew the nature of his service, and swear to the actual performance of it. *Fountainier v. Heyl*, 3 Burr. 1731.

Although an ambassador's servant may be privileged as to his person, it does not follow that all his goods are privileged also, so as to enable the sheriff to apply to set aside a fi. fa. issued against them: and a clear case of privilege must be made out to the satisfaction of the court, or else they will not interfere, either on behalf of the sheriff or the person privileged. *Fisher v. Begrez*, 1 Dowl. P. C. 588; 1 C. & M. 117.

On an application by the sheriff to quash a rule to return a writ of fi. fa. it is not sufficient to shew that the defendant's name is in the list transmitted by the secretary of state to the sheriff's office, of persons privileged as attached to an embassy, in pursuance of the statute, but it must be clearly shewn that the defendant is in the actual and bona fide service of the ambassador. *Id.*

And in an action against the sheriff for a false return, the plaintiff may shew that the appointment was merely colourable. *Delvalle v. Plummer (Knt.)*, 3 Camp. 47—Ellenborough.

The statute does not extend to consuls, who are therefore liable to arrest. *Vivcash v. Becker*, 3 M. & S. 284. And see *Clarke v. Cretica*, 1 Taunt. 106.

Proceedings are not to be stayed because the plaintiff is protected as the servant of a foreign

ambassador. *Davies, q. t. v. Solomon*, 1 Tidd's Prac. 580.

*Who are Servants.*—A land waiter at the custom-house cannot claim protection as such domestic servant. *Masters v. Manby*, 1 Burr. 401.

Privilege denied to a domestic physician to a public foreign minister, where it appeared to be a mere scheme to screen him from his debts. *Lockwood v. Coysgarne*, 3 Burr. 1676.

The chaplain to an ambassador is not protected from arrest if he do no duty in the house. *Seacombe v. Bowdoin*, 1 Wils. 20.

Nor is an ambassador's interpreter, who does not live in the house. *Malachi Carolino's case*, 1 Wils. 78.

Protection to the English secretary of an ambassador was disallowed, because it appeared he was purser of a ship of war. *Durling v. Atkins*, 3 Wils. 33.

But in another case it was allowed, although formerly he had been a trader, and the case arose under very suspicious circumstances. *Triquet v. Bath*, 3 Burr. 1478; 1 W. Black. 471.

The secretary of a foreign minister is privileged from arrest, though his name be not registered at the office of either of the secretaries of state. *Hopkins v. De Roebuck*, 3 T. R. 79.

Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the court refused to quash the writ, though the husband swore that before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him, in writing despatches and other official documents. *English v. Caballero*, 3 D. & R. 25.

A British born subject employed as first chorister at the Portuguese ambassador's chapel, is not protected by the statute. *Novello v. Toogood*, 2 D. & R. 833; 1 B. & C. 554.

But semble, that a chorister, bona fide employed by an ambassador in the performance of religious worship in his chapel, is privileged. *Fisher v. Begres*, 1 C. & M. 117; 1 Dowl. P. C. 588.

#### 4. Persons attending Judicial Proceedings.

##### (a) Generally.

The privilege from arrest extends to all persons who have any relation to a cause which calls for their attendance in court, whether compelled by process or not, and whether parties, attorneys, witnesses, or bail, &c. And in general, the courts will discharge them on motion, without suing out a writ of privilege or filing common bail. *Walpole v. Alexander*, 3 Dougl. 45; 1 Tidd's Prac. 198, 199, 213; *S. P. Ex parte King*, 7 Ves. jun. 312.

A witness coming from abroad without subpoena is privileged. *Id.*

The protection extends to their going, staying, and returning. *Anon. Loft*, 434.

A defendant when discharged from legal cus-

tody, has no privilege from arrest in returning home. *Anon. Dowl. P. C. 157.*

A party coming up on habeas corpus, is protected from seizure during his return, as well as during the coming and staying. *Rez v. D'Laval*, 1 W. Black. 416.

##### (b) What an Attendance.

A party who has attended his cause all day in court, and retires in the evening to dine with his attorney and witnesses at a tavern, is privileged from arrest, *causa redeundi*. *Lightfoot v. Cameron*, 2 W. Black. 1113.

Therefore trespass will not lie where the plaintiff was arrested by legal process, but at a time when privileged *redeundo* from attending the court. *Id.*

So, a plaintiff is protected, who, whilst attending the sittings in expectation of his cause being tried, is waiting at a coffee-house in the vicinity, before the day of trial. *Childerston v. Barrett*, 11 East, 439.

Seemle, if a trial be over in the afternoon, and a witness stay in the town till eleven o'clock the next morning, his home being distant only twelve miles, his subpoena is no protection to him from arrest in the town. *Anon.* 1 Smith, 355.

But, where an attorney, who had been attending a cause which was put off, went with his witnesses to a coffee-house, and was arrested three hours after the rising of the court, on an attachment for non-payment of money:—Held, that he was properly arrested, not being allowed so long a time to speak to his witnesses on such an occasion before he went home. *Rez v. Pridde*, 1 Tidd's Prac. 198.

A person who is served with a subpoena in London, and is at the time resident there, is not protected from arrest in the interval between the service of the subpoena and the day appointed for his examination. *Gibbs v. Phillipson*, 1 Russ. & Mylne, 19.

Seemle, a witness, who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London bona fide for the purpose of giving evidence. *Id.*

A witness is not protected in going, three days before the day appointed by the examiner for his examination, to the solicitor's office to look at the interrogatories, with a view to prepare himself to give his evidence accurately. *Id.*

A witness from Gravesend having attended the court of bankruptcy, pursuant to a summons, being arrested for debt in Pancras Lane, City, while waiting for the conveyance home, was discharged; although he had, on leaving the court, gone to Catherine Street, Strand. *Ex parte Clarke*, 2 Deac. & Chit. 99.

But without costs, as against the officer, he not having been shewn the summons to attend the court. *Id.*

##### (c) Attendance before Commissioners of Bankrupt.

Commissioners of bankrupt were considered

a court of justice, for the purpose of protecting witnesses before them. *Ex parte Russell*, 19 Ves. jun. 165.

A witness attending before commissioners in order to tender his testimony on a subject of inquiry then before them, without having been summoned for that purpose, is privileged from arrest during such attendance, and returning; but, quære, if he is protected *eundo*? *Ex parte Byrne*, 1 Rose, 451; 1 Ves. & B. 316.

Though having left the room by order, for the purpose of separate examination. *Id.*

A creditor, attending to prove his debt before commissioners of bankruptcy, is privileged from arrest. *List's case*, 2 Ves. & B. 373; 2 Rose, 24; *S. P. Ex parte King*, 7 Ves. jun. 312.

So, any person attending under a summons of commissioners of bankrupt, is privileged from arrest. *Id.*

A person arrested on his return from proving a debt at Guildhall, discharged, with costs of application. *Ex parte Bryant*, 1 Madd. 49.

A petitioning creditor attending the commissioners for the purpose of watching the progress of the commission, and proposing himself as assignee, is protected from arrest *eundo*, *morando*, et *redeundo*; and it is for the party who seeks to oust him of his privilege, to shew an unreasonable delay, or an improper deviation from his course home. *Selby v. Hills*, 1 Dowl. P. C. 257; 1 M. & Scott, 253; 8 Bing. 166.

The court will not discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into K. B., because he was arrested while attending commissioners of bankrupt to prove a debt. *Kinder v. Williams*, 4 T. R. 377.

#### (d) Attendance before Arbitrators.

A party in a cause attending an arbitrator to be examined under a rule of court, is privileged from arrest *eundo*, *morando*, et *redeundo*. *Spence v. Stuart*, 3 East, 89.

The summons of an arbitrator, to whom a cause has been referred by order of the court of Chancery, protects a party from arrest under process of K. B., when acting in bona fide obedience to such summons. *Moore v. Booth*, 3 Ves. jun. 351.

But, where a party residing in L. was summoned to attend an arbitrator at E., and was required to bring with him certain papers then at C., and he went to the latter place, where all his papers were, to make a selection, and having staid there more than twenty-four hours for that purpose and necessary refreshment, was arrested; the majority of the court held that he was not entitled to be discharged out of custody, having no right to stop and sort his papers. *Randall v. Gurney*, 1 Chit. 679; 3 B. & A. 252.

But held by the majority of the court of Exchequer, that a defendant was, under similar circumstances, privileged from arrest; and that the application might be made either to the court, under whose process the privilege is claimed, or

to the court out of which the process issued upon which the party was arrested. *Ricketts v. Gurney*, 1 Chit. 682; 7 Price, 699.

A witness attending arbitrators under an order of court, is protected from arrest. *Ex parte Temple*, 2 Ves. & B. 395.

And the protection exists during the attendance, though there is an interval of an adjournment to another period of the same day, at the same place. *Id.*

#### (e) Other Cases.

Barristers upon the circuit are protected from arrest. *Meekins v. Smith*, 1 H. Black. 636.

So are bail when attending to justify. *Rimmer v. Green*, 1 M. & S. 638.

A person attending the insolvent debtors' court, for the purpose of opposing the discharge of a debtor, is privileged from arrest, in the same manner as when in attendance upon any other court. *Willingham v. Matthews*, 2 Marsh. 57; 6 Taunt. 356.

A witness is not privileged from being arrested by his bail, for the purpose of being surrendered, on his return from giving evidence in a cause; as a person who has given bail is always supposed to be in the custody of his bail. *Ex parte Lyne*, 3 Stark. 132—Abbott.

A witness attending to give evidence in a court of justice, who has absconded from his bail, may be retaken by the bail in the court; and he is not protected by his subpoena. *Horn v. Swinford*, 1 D. & R. N. P. C. 20—Richarda.

A capital Burgess of a borough, attending an election of co-burgesses, under a summons from the mayor, issued, in obedience to a mandamus, directing the corporation to proceed to such election, is not privileged from arrest during his attendance there for that purpose. *Nixon v. Burt*, and *Reed v. Same*, 1 Moore, 413; 7 Taunt. 662.

This privilege extends to a person going to make an affidavit before a master. *List's case*, 2 Ves. & B. 373; 2 Rose, 24.

A defendant who had been attending a warrant before the master to produce papers, and was arrested on leaving the master's office, discharged from the arrest. *Franklyn v. Colquhoun*, 1 Madd. 580; *S. P. Sidgier v. Birch*, 9 Ves. jun. 69.

So a solicitor arrested in his returning from attending the master, was discharged in the original action and subsequent detainers. *Ex parte Ledwich*, 8 Ves. jun. 598.

#### (f) Proceedings to Liberate.

The application to discharge on the ground of the party being privileged as attending a judicial proceeding, must be to the court of which the proceeding is a contempt. *List's case*, 2 Ves. & B. 373; 2 Rose, 24.

A defendant arrested by *quo minus*, while protected by the privilege of C. P. as a suitor there, may be discharged by that court or the court of Exchequer. *Walker v. Webb*, 3 Anst. 941.



If a party coming to attend the trial of his cause be arrested, the judge at Nisi Prius will grant a habeas corpus to discharge him, and will put off the trial until he be released, without payment of costs, if any collusion can be shewn to exist between the opposite party and the creditor who arrested him; otherwise only on payment of costs. *Solomon v. Underhill*, 1 Camp. 223—Ellenborough.

A country witness, who is arrested upon his arrival in town to attend a cause, should obtain a habeas corpus returnable before a judge at chambers. *Ex parte Tillotson*, 1 Stark. 470—Ellenb.

If a plaintiff, while attending the execution of a writ of inquiry in an action brought by him in C. P. against the defendants, who had suffered judgment by default, be arrested on a quo minus at the suit of a third person; the under-sheriff, before whom such inquiry is executed, cannot discharge him; but the court will do so on motion. *Walters v. Rees*, 4 Moore, 34.

A plaintiff in his return from attending a motion against him in the cause was arrested, and a detainer lodged against him in another action: he was discharged from both; the Court of Chancery examining the parties personally, not by affidavit. *Bromley v. Holland*, 5 Ves. jun. 2.

A solicitor arrested on his way from his residence to Lincoln's Inn Hall, without deviation, for the purpose of attending a bankrupt petition as solicitor, was discharged upon personal examination by the Lord Chancellor: the oath being administered by the registrar. *Castle's case*, 16 Ves. jun. 413.

In another case, a solicitor was discharged upon examination viva voce of him and the officer taken, and the oath administered personally by the Lord Chancellor sitting in bankruptcy, the registrar therefore not present. *Gascogne's case*, 14 Ves. jun. 183.

A person having been taken in execution upon a ca. sa. within the outer door of the Vice-Chancellor's court in Lincoln's Inn, while the court was sitting; the Lord Chancellor ordered the officer to attend with his prisoner forthwith, and having examined the officer, discharged the prisoner immediately. *Orchard's case*, 5 Russ. 159.

## 5. Other Persons.

### (a) Soldiers and Seamen.

By 11 Geo. 4, c. 20, s. 80, no petty officer, seaman, non-commissioned officer of marines, or private marine, shall be arrested for any debt, unless contracted before entering the service. And see 44 Geo. 3, c. 13.

Seemle, that the privilege from arrest for any demand under 20*l.*, given to soldiers by the mutiny act, is confined to civil actions. *Rex v. Archer*, 2 T. R. 270. And see *Rex v. Bowen*, 5 T. R. 156; Nolan, 186.

Volunteer drill-serjeants, &c., though under the mutiny act, according to stat. 44 Geo. 3, c. 54, s. 21, are not privileged from arrest for debts under 20*l.* as regular soldiers. *Rickman v. Studwick*, 8 East. 105.

But a serjeant in the guards is. *Goodall's case*, 1 Wils. 216.

Generally, a serjeant is privileged from arrest, as well as a private man. *Lloyd v. Wooddall*, 1 W. Black. 29.

A soldier voluntarily enlisting is not privileged from arrest, within the 30 Geo. 2, c. 8. *Turner v. Turner*, 1 Burr. 466.

If a non-commissioned officer have been arrested and given bail, the court will not, after judgment recovered against the bail, set aside the proceedings and cancel the bail-bond. *Bryan v. Woodward*, 4 Taunt. 557.

An action lies upon the stat. 44 Geo. 3, c. 13, s. 4, by a common informer, suing for himself and the king, to recover a penalty against the sheriff for the misconduct of his bailiff in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer: the statute which speaks of sheriffs, jailors, or other officers, arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "other officers," such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for wrongfully and wilfully permitting the escape. *Sturmy, q. t. v. Middlesex (Sheriff)*, 11 East, 25.

### (b) Public Officers.

If an officer be privileged from arrest by his warrant or commission, such warrant should be shewn to the court. *Batson v. McLean*, 2 Chit. 48.

One who had been appointed consul-general from the Porte, but was dismissed several months before from his employment, and another person resident here appointed in his room, is not privileged from arrest; though at the time of the arrest he had not received any official notification of his dismissal, or the appointment of the other to succeed him. *Marshall v. Cretico*, 9 East, 446.

Quære, whether a consul is privileged from an arrest. *Clarke v. Critico*, 1 Taunt. 106.

A resident merchant of London, who is appointed and acts as consul to a foreign prince, is not now exempted from arrest upon mesne process. *Viveash v. Becker*, 3 M. & S. 284.

### (c) Insane Persons.

The court will not discharge a defendant out of custody on filing common bail, on the ground that he has become insane since the arrest. *Ker not v. Norman*, 2 T. R. 390.

Even where it appeared that he was insane at the time of the arrest. *Nutt v. Verney*, 4 T. R. 121.

And the court of Common Pleas will refuse to discharge him even where a commission of lunacy has issued. *Steel v. Alan*, 2 B. & P. 362.

The court will not discharge the bail on the ground of the defendant's having become a lunatic since the commencement of the action. *Ibbotson v. Galway (Lord)*, 6 T. R. 133.

#### IV. DISCHARGE FROM ARREST.

##### 1. No Debt due.

If a defendant be held to bail for a debt which is clearly and manifestly not due, it seems the court will discharge him out of custody; but in general they will not try the merits on affidavit. *McGinnis v. McCurling*, 6 D. & R. 24.

The court will not set aside an arrest upon the merits, unless it be clear from the affidavits that the plaintiff could not have had any cause of action. *Burton v. Haworth*, 1 Nev. & M. 318.

Seemingly, that the circumstances of the action being brought for purposes of intimidation, would not be a ground for such interference. *Id.*

The court will not discharge a defendant on common bail, merely on the ground that an affidavit in contradiction to the affidavit of debt, which was upon a note, states that the note has been satisfied, unless it be conclusively shewn that the defendant is not indebted to the plaintiff. *McGinnis v. McCurling*, 6 D. & R. 24. And see *Masel v. Angel*, 6 D. & R. 15.

Where a plaintiff, shortly before his making an affidavit of debt, had written a letter stating that the defendant was a creditor of his, the court interfered summarily to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having negatived the writing of such letter by him, or alleged that the debt due to him had arisen subsequently to it. *Nisetich v. Bonacich*, 5 B. & A. 904.

A defendant ordered to be discharged upon the performance of a prior agreement with the plaintiff for the arrangement of the debt. *Anon. Lofft*, 546.

If a plaintiff be in execution at the suit of a defendant for costs, alleged to have been paid to the latter by the Treasury, the court of C. P. will not discharge such plaintiff out of custody on an affidavit of that fact, unless it be also sworn that the costs have been paid for the plaintiff. *Butt v. Conant*, 6 Moore, 65; 3 B. & B. 3.

Where it appeared by affidavit, that a defendant had been taken under a ca. sa., and had in order to procure his liberation paid the undersheriff the amount; that he did not know the plaintiff, and had never had any dealings with any person of his name, nor been applied to by him, nor been ever served personally or otherwise with any process, or received any notice of the cause of action till he was taken in execution, the court ordered the sheriff to repay the money so levied, and the plaintiff to pay the costs occasioned by the levy. *Morgan v. Short*, 4 Bing. 147.

If there be probable ground to suspect that the securities, upon which the defendant is held to bail, are illegal, the court will discharge him upon filing common bail. *Wightwick v. Banks*, Forrest, 153.

Where the defendant was held to bail on a bill, the court refused to order the bail bond to be delivered up to be cancelled, on an affidavit that the bill was founded and given on an usurious transaction. *Isaacs v. Silvester*, 11 Moore, 348.

Where a defendant is arrested on a contract, the legality of which is doubtful, and which may eventually subject the plaintiff to a penalty, the Court of C. P. will discharge him on entering a common appearance. *Sumner v. Green*, 1 H. Black. 301.

Where the affidavit to hold to bail was regular, and the defendant did not swear that he was unacquainted with the plaintiff, the court refused to cancel the bail bond on the ground that the defendant could not find the plaintiff. *Brown v. Moore*, 4 Bing. 148; 12 Moore, 361.

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#### ARTICLES OF THE PEACE—

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#### ARTICLES OF CLERKSHIP—

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## I. WHEN MAINTAINABLE.

1. *Generally*.

Assumpsit lies to recover the balance of a banker's account, however voluminous it may be; and the plaintiff in such case is not obliged to bring account. *Tomkins v. Wiltshire*, 1 Marsh. 115; *S. C. nom. Tomkins v. Willshear*, 5 Taunt. 431. But see *Scott v. McIntosh*, 2 Camp. 238.

General indebitatus assumpsit will lie for tolls. *Seward v. Baker*, 1 T. R. 616.

And copyhold tolls and fines. *Whitefield v. Hunt*, 2 Dougl. 727.

So for goods and chattels. *Falmouth (Earl) v. Penrose*, 6 B. & C. 385.

And for petit customs. *Exeter (Mayor) v. Trinlet*, 2 Wils. 95.

It lies also for the breach of an agreement to arbitrate, which arises from a revocation of the submission before award made. *Brown v. Turner*, McClel. & Y. 465; 1 C. & P. 651.

But it will not lie to recover money promised for doing an illegal act; nor if the money be paid, will it lie to recover it back. *Webb v. Bishop*, Bull. N. P. 132.

Where a plaintiff fails in proving a special agreement count in assumpsit, if his evidence be sufficient to warrant an action on the general counts, he may resort to them. *Harria v. Oke*, Bull. N. P. 140; *S. P. Payne v. Bacomb*, 2 Dougl. 651.

Where plaintiff sued for breach of an agreement, which was void by the statute of frauds, being for an interest in land, and not being in writing:—Held, that he might recover on the count for an account stated, having proved a distinct promise of defendant's to pay plaintiff the expenses he had been put to in consequence of the breach of agreement. *Seago v. Deane*, 4 Bing. 459; 1 M. & P. 227; 3 C. & P. 170.

To support a plea that the trustees under a private act of parliament did not "allow or permit" the defendant to have the exclusive privilege of collecting dust and ashes in a certain place, it is necessary to prove some positive act of obstruction on their part; and it is not enough to prove that a third party took it away, having a right to it. *Thomson v. Green*, 2 C. & P. 110—Abbott.

And it seems that this fact is no answer to an action on a written contract to pay a certain sum for the dust of the parish, but the party must seek relief in equity. *Id.*

A. pays a sum of money into a banker's hands for a specific purpose; the banker's clerk, by mistake, pays the money to B.:—Held, that A. could not maintain an action against B. to recover it back. *Rogers v. Kelly*, 2 Camp. 123—Ellenborough.

Where a bill of exchange, payable at the house of A. the defendant, had been presented there for payment, and dishonoured, and the acceptor on the following day remitted a sum to A. for the purpose of paying that bill and another; and A. in answer stated that the bill had been dishonoured, but added, that the money received should be carried to the acceptor's account, and afterwards paid the other bill:—Held, that the holder of the original dishonoured bill could not maintain an action against A. for money had and received, unless some agreement had taken place between them. *Yates v. Bell*, 3 B. & A. 643.

A. being indebted to B. in 700*l.*, applied to C. to lend him that sum, who agreed so to do, provided A. would allow him to deduct therefrom 80*l.* due from B. to himself from stock-jobbing transactions; accordingly C. advanced 620*l.*, and A. gave him a promissory note for 700*l.*; A. then paid over to B. the 620*l.*, who gave him a discharge for the whole 700*l.*; the promissory note for 700*l.* given by A. being paid when due, B. brought an action against C. to recover 80*l.* as money had and received by C. to his use:—Held, that B. could not maintain the action, but that it must be brought by A. if by any one. *Shooley v. Daniel*, 2 B. & P. 540.

## 2. In respect of Special Contract.

### (a) Contract rescinded.

Where there is a special agreement, which is conditional, the plaintiff must declare specially; and if he affirm that the agreement was cancelled, he must prove the acquiescence of the defendant. *Davis v. Nichols*, 2 Chit. 320.

And if the contract be broken, assumpsit for money had and received will not lie to recover money paid under it, the remedy being a special action for the breach of contract, unless it has been wholly rescinded or put an end to. *Davis v. Street*, 1 C. & P. 18—*Park*. And see *Damer v. Langton*, 1 C. & P. 158.

Assumpsit for money had and received lies when a payment has been made on a contract which is put an end to. *Twvers v. Barrett*, 1 T. R. 133; *S. P. Weston v. Downes*, 1 Dougl. 23.

But if it continue open, the plaintiff can only recover damages, and then he must state the special contract and the breach of it. *Id.*

The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, as where by the original terms of the contract no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie; but if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of it; and then he must declare specially. *Id.*

Where some act is to be done by each party under a special agreement, and the defendant, by his neglect, prevents the plaintiff from carrying the contract into execution, the plaintiff, in an action for money had and received, may recover

back any money paid under it. *Giles v. Edwards*, 7 T. R. 181.

Where money has been paid under a written agreement, but which agreement one party is unable to perform, the other may maintain an action for money had and received generally, and is not bound to declare on the special agreement. *Farrer v. Nightingal*, 2 Esp. 639—*Kenyon*.

A contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo, as before the contract. *Hunt v. Silk*, 5 East, 449; 2 Smith, 15.

In an action by the vendee, on an agreement for the purchase of a public-house, with mutual stipulations, and liquidated damages for non-performance:—Held, both parties having made default under the agreement, that the plaintiff was entitled to recover his deposit. *Clarke v. King*, R. & M. 394; 2 C. & P. 286—*Best*.

Where the master and part-owner of a vessel agreed to purchase the remaining moiety of his partner, and having paid the purchase money, and received the title-deeds, which he deposited with a third person as a security, required entire possession of the ship, but his partner afterwards refused to execute a bill of sale or refund the money:—Held, that assumpsit for money had and received would not lie to recover the purchase-money, as the parties could not be restored to their original situation. *Reed v. Blandford*, 2 Y. & J. 278.

The plaintiff, having declared upon an agreement to deliver soil or breeze, with a count for money had and received, proved that the defendant having agreed to deliver soil, he, the plaintiff, paid 2*l.* 5*s.* for earnest, but that the defendant refused to deliver the soil:—Held, that he could not recover the 2*l.* 5*s.* upon the second count, because the agreement was still in force. *Cooke v. Munstone*, 1 N. R. 351: *S. C. nom. Clarke v. Manstone*, 5 Esp. 239; 1 Chit. 60, a.

Plaintiff engaged to let defendant land on building leases, and to lend him 4000*l.* to assist him in the erection of twenty houses, the money to be repaid by June, 1828. Defendant agreed to build the houses, to convey them as security for the loan, and repay the money. When six houses were built, and 1168*l.* had been advanced, plaintiff requested defendant not to go on with the other fourteen houses; defendant deisted:—Held, that, after June, 1828, the plaintiff might recover the 1168*l.* on a count for money lent; and that it was not necessary to sue on the agreement, which was rescinded by consent. *James v. Cotton*, 7 Bing. 266; 5 M. & P. 26.

By an agreement between A. and B. made on the 31st of March, the former agreed to grant a lease to the latter of a public-house for the term of twenty-one years, to run from the 29th of September then next, in consideration of 1000*l.*, of which 10*l.* was immediately paid down, 90*l.* was to be paid on the 13th of April, and the residue on having possession of the premises. B. being required to pay the 90*l.*, called upon A. to prove his title, which being refused, he gave notice that he would rescind the contract, and

brought an action to recover the 10*l.* which he had paid:—Held, that he had a right so to do, and that he was not bound to wait until the 29th of September, from which time the lease was to run. *Roper v. Coombes*, 9 D. & R. 562; 6 B. & C. 534.

An agreement in writing may be dissolved by parol. *Coles v. Trecothick*, 9 Ves. jun. 25.

A parol dispensation of the performance of a contract, in respect to the times of the delivery of goods, is not within the statute of frauds; and the defendant was held liable for not accepting the residue within a reasonable time afterwards. *Cuff v. Penn*, 1 M. & S. 21.

### (b) Exchange of Goods.

Upon an agreement between two traders to supply each other on the footing of goods for goods; after a balance struck between them, such balance is to be paid in money, and may be sued for on the general counts. *Ingram v. Shirley*, 1 Stark. 185—Ellenborough.

Plaintiff agreed to exchange his horse, warranted sound, with defendant, for another horse and a sum of money: the horses were exchanged, but defendant refused to pay the money, alleging that plaintiff's horse was unsound. In assumpsit on the special agreement, with indebitatus counts for horses sold, held that plaintiff might recover the money on the common counts, though he failed to prove the agreement as stated in the special count. *Selden v. Cox*, 5 D. & R. 277; 3 B. & C. 420.

If trefoil be sold, to be paid for partly in goods and partly in money, the seller must declare specially on the contract, and not generally for goods sold and delivered. *Talver v. West*, Holt, 178—Gibbs.

B. agrees to purchase of A. a gun, for the sum of forty-five guineas; but it is stipulated that A. shall take a gun of B.'s, valued at thirty guineas, in part payment: B. having refused to deliver his gun and complete the contract, A. is entitled to recover in indebitatus assumpsit the sum of forty-five guineas as the stipulated price. *Forsyth v. Jervis*, 1 Stark. 437—Ellenborough.

If A. and B. agree to exchange horses, and B. give a sum of money to A. to bind the bargain, A. may maintain an action against B. for not delivering his horse, without alleging any delivery of, or offer to deliver his own to B.; for the payment of earnest money vests the property of the plaintiff's horse in B. *Back v. Owen*, 5 T. R. 409.

But in such an action A. must allege a demand on B. for his horse; stating that B. did not deliver, "though often requested so to do," is not sufficient, and such a defective allegation may be taken advantage of on a general demurrer. *Id.*

### (c) Other Cases.

The plaintiff purchased stock, which the defendant agreed to transfer on a given day. In consequence of a rise, the loss on the sale amounted to 45*l.*, which the defendant refused to pay.

The plaintiff afterwards paid that sum to another broker, by whom the transfer was made:—Held, that the plaintiff could not recover in an action for money paid, but that he should have declared specially on the contract with the defendant, as his claim was in the nature of unliquidated damages. *Lightfoot v. Creed*, 2 Moore, 255; 8 Taunt. 268.

A contract to satisfy a debt, by providing a cargo of wine, must be declared upon specially; and an action will not lie for the old debt. *Hoppe v. Symonds*, 2 Chit. 324.

A. delivers to B. a quantity of cordage as the consideration for a special undertaking by B., A. is not precluded by the special contract from recovering, under the common counts, for the excess of cordage delivered beyond the quantity stipulated for as the consideration (provided that amount be adjusted), although it may be necessary to give in evidence the terms of the special contract. *Dunn v. Body*, 1 Stark. 220—Ellenb.

Under an agreement between A. and B. that B. should take an assignment of a lease of a farm from A. and the fixtures and crops at a valuation, B. entered and took possession of the fixtures, and the crops were valued to him, but the lease was never assigned:—Held, that indebitatus assumpsit would not lie for the price of the fixtures and crops, and that his only remedy was a special action on the agreement. *Neal v. Viney*, 1 Camp. 471—Ellenborough.

A. agreed with B. to let him land rent-free, on condition that A. should have a moiety of the crops; while the crop was on the ground it was appraised for both parties: A. declared in indebitatus assumpsit for a moiety of the value of the crop sold to B., without stating the special agreement; and held that he might well do so, as the special agreement was executed by the appraisal, and the action arose out of something collateral to it. *Poulter v. Killingbeck*, 1 B. & P. 397.

A. was indebted to B. in a sum of 868*l.*, for which he was arrested. C., who was clerk to B.'s attorney, directed him to be discharged on paying 700*l.* only. B. threatened to complain to C.'s employers, to prevent which C. advanced 100*l.*, B. agreeing that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the death of B. and C. the balance was recovered:—Held, that the representatives of C. might recover the 100*l.* from the representatives of B. on a count for money had and received to their use, and that there was no necessity to declare specially. *Platts v. Lean*, 3 C. & P. 561—Tenterden.

Indebitatus assumpsit for goods sold and delivered. Plea, plene administravit. It appeared that the goods were sold to be paid for on the marriage of the plaintiff, which did not happen till fifteen years after the sale. Objection at the trial, that this, being a special contract, could not be given in evidence under this form of declaration. Verdict for plaintiff. On motion for new trial:—Held, that whether the form of declaration was right or not, the court would look to the merits; and as no injustice had been done, they

would not grant a new trial. *Stokes v. Saunders*, 3 Dougl. 401.

## II. CONSIDERATION TO SUPPORT.

### 1. What sufficient generally.

Any act which is a detriment to the plaintiff is a sufficient consideration for a promise to pay money. *Williamson v. Clements*, 1 Taunt. 523.

In order to facilitate the making of an agreement, for which there was sufficient consideration between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became party thereto:—Held, that as the agreement was such as the plaintiff would not have made unless the defendant had acceded, there was a sufficient consideration for the defendant's promise. *Bailey v. Croft*, 4 Taunt. 611.

A moral obligation is a good consideration for a promise to pay, and therefore may be the ground of an action of assumpsit. *Lee v. Muggeridge*, 5 Taunt. 36. And see *Smith v. Jameson*, 5 T. R. 603.

Where there is a moral obligation to pay, and a distinct promise, it is binding, even though the original contract is void. *Seago v. Deane*, 4 Bing. 459; 1 M. & P. 227; 3 C. & P. 170.

Therefore, where defendant agreed to pay plaintiff in consideration of her becoming his tenant, 20*l.* to repair the house, and to make certain alterations, and plaintiff became tenant under a lease in which this agreement was not stated, and did the repairs, and the defendant promised to repay her:—Held, that defendant was liable on this promise on the account stated, though plaintiff could not recover on his special count, on account both of the lease and the agreement being void by the statute of frauds. *Id.*

Seemingly, that a moral obligation is not in every case a sufficient consideration for a promise. *Littlefield v. Shee*, 2 B. & Adol. 811.

A person borrowed a sum of money in the year 1807; in the year 1815 he stated by parol to the attorney of the party entitled to it, that he had made provision by his will, and had directed his executors to pay it at his death. He died in 1825, without making such provision:—Held, in an action against the executor, that the promise was good, and the money recoverable; that neither the statute of frauds, nor the statute of limitations, applied to the case, and that a moral obligation to pay was a sufficient consideration for the promise. *Wells v. Horton*, 2 C. & P. 383—Bost. Rule nisi discharged after argument.

So, the defendant's having received a benefit by the permission of the plaintiffs, is a good consideration. *Davis v. Morgan*, 6 D. & R. 42; 4 B. & C. 8.

A. having paid to B. the whole of a demand claimed by B., but part of which was due to C., B. afterwards engaged to indemnify A. against any claim by C.: this promise was held to be supported by a sufficient consideration, although

it was made after the payment of the money. *Suffield (Lord) v. Bruce*, 2 Stark. 175—Ellenb.

The plaintiff had agreed with J. C. for the purchase of certain houses; the defendant, in writing, agreed to give the plaintiff 40*l.* for his bargain; the houses were afterwards, at plaintiff's request, conveyed to the nominee of the defendant:—Held, that the transfer of the bargain was a sufficient consideration for the promise of the defendant. *Price v. Jeaman (in error)*, 7 D. & R. 14; 4 B. & C. 525; R. & M. 195.

Any five or more trustees, under a turnpike act, being authorised to make turnpikes, with such suitable out-buildings and conveniences as they should think necessary, on the intended line of road: the owner of the soil next adjoining a toll-house (erected in pursuance of the act), contracted with one of the trustees, on behalf of the rest, to sink a well for the convenience of the toll-house, the expense to be borne by each party equally:—Held, in an action to recover a moiety of the expense of the well, brought in the name of the clerk of the trustees, that their consent through the medium of one, that the well should be sunk, was a good consideration to support the action. *Newman v. Fletcher*, 1 D. & R. 202.

A mere accord, not being a ground of action, is not a sufficient consideration to support assumpsit. *Lynn v. Bruce*, 2 H. Black. 317.

There must be a good consideration for a promise in writing to pay the debt of another, as well as for any other promise. *Barrett v. Trussell*, 4 Taunt. 117.

The defendant promised to pay the plaintiff 5*l.* if he would provide a tenant for certain premises, and get him 350*l.* for his lease. The plaintiff procured one S., with whom the defendant entered into an agreement, and received 50*l.* as a deposit; but afterwards consented to release him from the further performance of it, but retained the 50*l.*; the court held, that this was a substantial performance of the condition on the part of the plaintiff, and that he was therefore entitled to recover the 5*l.* *Horford v. Wilson*, 1 Taunt. 12.

On an agreement to pay 100*l.* if the plaintiff would not send herrings for a twelvemonth to the London market, and particularly to the house of J. S.; and the plaintiff proved he had sent no herrings during the twelvemonth to that house:—Held, sufficient to entitle him to recover, no proof being given by the defendant that the plaintiff had sent herrings within the year to the London market. *Calder d. Rutherford*, 7 Moore, 158; 3 B. & B. 302.

### 2. Contracts of Forbearance.

[For the extent to which Contracts for the abandonment of Legal Proceedings are valid, see CONTRACT.]

A promise by the defendant to pay a judgment debt obtained against him, in consideration that the plaintiff would stay execution thereon, is no ground to raise an assumpsit. Otherwise, if the promise be by a third person. *Anon. Cowp.* 129.

Where the plaintiff declared that A., since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, would forbear and give day of payment of the debt (not stating to whom he was to forbear), the defendant promised, &c.:—Held, on demurrer, to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant, or of detriment to the plaintiff; and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. *Jones v. Ashburnham*, 4 East, 455; 1 Smith, 188.

A., having recovered judgment against B., and a *fi. fa.* being delivered to the sheriff; in consideration that A., at the special instance and request of C., had requested the sheriff not to execute the writ, C. promises to pay A. the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges: on a judgment by default, and error brought, the promise was held to be binding on C., though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c., was, nor that the defendant had notice of such amount. *Pullin v. Stokes* (in error), 2 H. Black. 312.

Declaration stated, the plaintiff, at the request of E. B. and M. B., sold and delivered to them goods of a certain value, and that in consideration thereof, and also in consideration that the plaintiff, at the request of the defendant, would forbear and give day of payment of the said sum of money, defendant by a certain note or memorandum in writing signed by him, undertook to pay him the money, and then alleged, that plaintiff, relying on the promise of defendant, did forbear and give day of payment of the said sum, &c. After verdict for plaintiff, the court refused to arrest the judgment, on the ground of the declaration not stating to whom the forbearance was given. *Marshall v. Birkenshaw*, 1 N. R. 172.

Where the cause of action is to recover any costs or expenses which have been incurred in a cause, as the existence of such cause is the foundation of the action, it is a material averment in the declaration. *Herbert v. Jones*, 1 Esp. 422—Eyre.

Assumpsit; in consideration that plaintiff, at defendant's request, would consent to suspend proceedings against another person, defendant promised to pay the debt on a certain day; averment, that plaintiff did suspend the proceedings. The agreement proved was in writing as follows:—"The plaintiff having, at my request, consented to suspend proceedings, &c."—Held, that as the request must have preceded the consent to suspend proceedings, the contract was properly declared on as an executory contract; secondly, that the consideration for the promise was good, as it must be taken as a consent to suspend proceedings, at least until the day defendant was to pay the debt; thirdly, that, after verdict, the averment that "plaintiff had suspended proceedings" was sufficient, without specifying for what pe-

riod. *Payne v. Wilson*, 7 B. & C. 423; 1 M. & R. 708.

Declaration that C. K. was indebted to the firm of B. and S.; that plaintiff had been appointed, by the court of Chancery, receiver of the debts of the firm, whereby C. K. became liable to pay plaintiff when requested; that, in consideration of the premises, and that the plaintiff, as such receiver, would give C. K. two months' time to pay, defendant promised to pay, in case C. K. omitted to do so within that time. Breach; that C. K. omitted, and that defendant never paid:—Held, on arrest of judgment, that sufficient authority appeared for the plaintiff to contract and sue, and sufficient consideration for the defendant's promise. *Willatts v. Kennedy*, 8 Bing. 5; 1 M. & Scott, 35.

Forbearance by plaintiff, at defendant's request, to enforce a *fi. fa.* against the goods of a third person for 60*l.*, is a valid consideration for defendant's promise to pay plaintiff 107*l.* in seven days. *Smith v. Algar*, 1 B. & Adol. 603.

The abandoning a suit, instituted to try a question in respect of which the law is doubtful, is a good consideration for a promise to pay a stipulated sum: therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damages; and the former vessel was detained until bail was given; and, pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damages sustained, to indemnify them, and to pay a stipulated sum by way of damages:—Held, that there being contradictory decisions as to the point, whether ship-owners were liable for an injury done while their ship was under the control of a pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge v. Dorville*, 5 B. & A. 117. And see 1 B. & P. 306, and 2 Esp. 659.

And an agreement between parties to a suit in Chancery, binding themselves, their executors, and administrators, made an order of that court, and acted upon therein as such, may be the ground of an assumpsit at law. *Smith v. Whalley*, 2 B. & P. 482.

### 3. Agreements which are *Nuda Pacta*.

As to promises within the doctrine of nudum pactum, see *Rann v. Hughes*, 7 T. R. 350, n.; 4 Bro. P. C. 27.

There is a distinction between a mere voluntary promise, which is nudum pactum, that will not maintain an action, and a promise upon the faith of which another does some act, as entering into engagements, or paying money; the latter forms a consideration that will support an action. *Crosbie v. McDoual*, 13 Ves. jun. 148.

Where A., after drawing a bill of exchange on B., who accepted it, indorsed it to C., who re-

indorsed it to A., in pursuance of an agreement (without consideration) that he should do so as a security for the payment of it by the acceptor, and for the purpose of rendering the bill more negotiable; on demurrer to a declaration against C. upon the bill, in the usual form, alleging the special circumstances under which the defendant became the indorser:—Held, that the agreement to indorse was void, for want of consideration. *Britten v. Webb*, 3 D. & R. 650; 2 B. & C. 483.

So, where A. agreed in writing, that, in consideration that B. would appoint him to receive a sum of money for a lace machine (agreed for between B. & C.), he would take the machine, and pay the balance, should there be any default on the part of C.; and C. did make default:—Held, that this agreement or promise was void for want of consideration, and, consequently, that an action of assumpsit could not be maintained thereon. *Bates v. Cort*, 3 D. & R. 676; 2 B. & C. 474.

C., in consideration of a loan of 400*l.*, mortgaged lands in fee to W. & Co., in trust, to sell the same, and, after repaying themselves the money advanced, to pay over the surplus to his executors or administrators: before any sale was effected, C. died, having devised all his real and personal estates to trustees, whom he also appointed his executors, in trust, to sell the same, and pay debts and discharge incumbrances: in the lifetime of these trustees, W. & Co., the original mortgagees sold the estate, and paid over the surplus into the hands of the attorney or agent of the testator's trustees and executors: before the money was disposed of, the trustees and executors, and also their attorney, died, the latter leaving the defendant his executor. The plaintiffs took out administration de bonis non, with the will of C. annexed, and sued the attorney's executor in assumpsit for money had and received:—Held, that an express promise by the defendant to pay the plaintiffs the money in question was a nudum pactum, they having no title to it in a court of law; and that the action was not maintainable, as the money in the defendant's hands was equitable and not legal assets. *Clay v. Willis*, 2 D. & R. 539; 1 B. & C. 364.

Where the defendant having purchased certain shares of an East Indiaman, commanded by the plaintiff, and chartered by the East India Company for four voyages, proposed to the plaintiff that he should resign the command in favour of the defendant's nephew, upon receiving in exchange the command of another ship, then chartered for one voyage, and to which the plaintiff assented, and the company acceded to the exchange; and it was agreed that, in case the defendant's nephew died, or resigned, before the expiration of the four voyages, the plaintiff should succeed him: and, as a further inducement to the plaintiff to resign the command of the ship, chartered for the four voyages, the defendant undertook to procure a beneficial alteration in the destination of the other, chartered for one voyage only; and the person who negotiated the affair on the part of the plaintiff, undertook, with-

out the plaintiff's knowledge, to pay the defendant a certain sum, if the plaintiff should refuse to resign; and the exchange was ultimately approved of by the company, and the destination of the latter vessel altered; and the plaintiff and defendant's nephew sailed on their respective voyages, and the former became bankrupt on his return from his voyage, and the nephew died in the course of his second voyage; and the defendant, having refused to appoint the plaintiff to succeed him, was sued in assumpsit for a breach of the agreement, and the jury found a verdict for the plaintiff:—Held, that, after verdict, there was a sufficient consideration for the defendant's agreement, whereon to found such an action. *Richardson v. Mellish*, 9 Moore, 435; 2 Bing. 229; 1 C. & P. 241; R. & M. 66.

The statement of a consideration that A., at his own expense, would procure an administration, and furnish evidence to enable B. to receive certain dividends, will not support a promise to pay over the dividends when received. *Parker v. Bayliss*, 2 B. & P. 73.

### III. FOR MONEY PAID.

#### 1. Request and Payment.

[See *Spragg v. Hammond*, 4 Moore, 431; 2 B. & P. 59.]

*Request.*—Assumpsit lies to recover money paid for another at his request. *Alcinbrook v. Hall*, 2 Wils. 309.

But in such an action, the plaintiff must prove some authority, either express or implied, from the defendant to make the payment on his account. *Tappin v. Broster*, 1 C. & P. 112—*Hullock*.

Assumpsit for money paid, laid out, and expended, will not lie, when the money has been paid against the express consent of the party for whose use it is supposed to have been paid. Where two parishes had been a long time united, and had jointly paid one sexton, but afterwards one of them, upon claiming a right of electing a separate sexton, gave notice to the other of their intention, and did so elect:—Held, that they could not maintain an action for money paid, laid out, and expended, to the use of the other parish for their quota of the sexton's salary. *Stokes v. Lewis*, 1 T. R. 20.

*What is a Payment.*—One of the makers of a joint and several note, after it had become due, gave his bond to the holder for the amount, but before the commencement of the action no money had been paid upon the bond:—Held, that until he had paid money upon the bond, he could not maintain assumpsit for money paid, in order to recover contribution against any of the other makers of the note. *Maxwell v. Jameson*, 2 B. & A. 51.

If a party give a promissory note for the debt of another, which the creditor accepts in payment, it is a payment of money to the debtor's



use, and may be recovered as such. *Barclay v. Goeck*, 2 Esp. 571—Kenyon.

If the indorser of a dishonoured bill promise the indorsee, that, if he will sue the acceptor, he (the indorser) will pay the expenses; to entitle the indorsee to recover on this promise, it is not necessary for him to prove that he paid the attorney, he being liable to do so is sufficient. *Bullock v. Lloyd*, 2 C. & P. 119—Abbott.

The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his the plaintiff's name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity. The plaintiff afterwards gave his attorney a promissory note for the amount of the costs so paid, but which was not paid at maturity when he sued the defendant on his promise:—Held, that the payment of such costs by the plaintiff's attorney was equivalent to a payment by the plaintiff himself, as the attorney might be considered his agent for the purpose of making such payment. *Adams v. Denzey*, 4 M. & P. 245; 6 Bing. 506.

## 2. On Distresses.

Where a man by compulsion of law is obliged to pay a debt, he has a remedy against those who by law were bound to pay, but did not. *Esall v. Partridge*, 8 T. R. 308; 3 Esp. 8.

The goods of a stranger on the premises of another were distrained by the landlord for the rent in arrear, and the stranger was obliged to pay the rent to redeem them:—Held, that the stranger might maintain assumpsit for money paid to the use of the original lessees, who were bound by their covenant to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. *Id.*

An under-tenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, cannot immediately maintain assumpsit against him for money paid; for, on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant. *Moore v. Pyrke*, 11 East, 52.

A tenant under a lease cannot maintain assumpsit on an implied promise for money paid under a distress by a superior landlord, being excluded by the express contract. The remedy is on the covenant. *Schlenker v. Mosey*, 5 D. & R. 747; 3 B. & C. 789; 1 C. & P. 178.

A tenant, shortly after he had paid half-a-year's rent to his landlord, due at Lady-day preceding, was called upon by the agent of the ground landlord for ground-rent due previously to Lady-day, and which the landlord had refused to pay:—Held, that the payment of such ground-rent by

the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose. *Carter v. Carter*, 2 M. & P. 723; 5 Bing. 406.

By an act of the 41 Geo. 3, for draining lands in the county of Lincoln, it was declared, "that the taxes to be charged and assessed by virtue of the same, should be paid by the tenants of the lands, &c. charged with the same respectively, who might deduct and retain the same out of the rents payable to their respective landlords;" and also, that, in case of neglect to pay, the tax might be levied by distress on the goods and chattles which should be found on the lands charged with the tax in arrear; and that, "if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a security for the payment thereof, and might be taken possession of, and let in discharge of the tax." Where, therefore, a tenant had quitted lands liable to a drainage tax under this act, and, after he had left, the collector levied the tax in arrear upon property which he had left in the possession of the succeeding tenant:—Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenant for the time being; and, therefore, that the plaintiff might maintain assumpsit against the landlord for money paid to his use. *Darsson v. Linton*, 1 D. & R. 117; 5 B. & A. 521.

## 3. Damages and Costs.

If the indorser of a bill is compelled by the holder to pay him part of the amount, he may recover it back from the acceptor in an action for money paid to his use. *Pownall v. Ferrand*, 9 D. & R. 603; 6 B. & C. 439.

The drawer of an accommodation bill is liable to the acceptor for the amount of the costs of an action on the bill, defended by the acceptor, although there was no express request by the drawer to defend the action. *Jones v. Brooke*, 4 Taunt. 464—Per Mansfield, J. sed quære.

A. defends an action at the desire of B., in which action B. is concerned, and may be benefited by the event, and A. has a verdict against him. B. is liable to pay the expenses of the defence. *Hovos v. Martin*, 1 Esp. 162—Kenyon.

Where an annuity has been made void by reason of a defect in the memorial, and the attorney who prepared the conveyances is sued by the grantee for negligence, and a verdict recovered against him to the amount of the consideration money paid for the annuity, which he pays, he cannot recover it over against the grantor as money paid to his use. *Burden v. Webb*, 2 Esp. 527—Kenyon.

A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorized by him to defend. *Gillett v. Rippon*, M. & M. 406—Tenterden.

Quære, whether the drawer of a bill of exchange, which he was obliged to pay, after an action brought against him, may not sue the ac-

indorsed it to A., in pursuance of an agreement (without consideration) that he should do so as a security for the payment of it by the acceptor, and for the purpose of rendering the bill more negotiable; on demurrer to a declaration against C. upon the bill, in the usual form, alleging the special circumstances under which the defendant became the indorser:—Held, that the agreement to indorse was void, for want of consideration. *Britten v. Webb*, 3 D. & R. 650; 2 B. & C. 483.

So, where A. agreed in writing, that, in consideration that B. would appoint him to receive a sum of money for a lace machine (agreed for between B. & C.), he would take the machine, and pay the balance, should there be any default on the part of C.; and C. did make default:—Held, that this agreement or promise was void for want of consideration, and, consequently, that an action of assumpsit could not be maintained thereon. *Bates v. Cort*, 3 D. & R. 676; 2 B. & C. 474.

C., in consideration of a loan of 400*l.*, mortgaged lands in fee to W. & Co., in trust, to sell the same, and, after repaying themselves the money advanced, to pay over the surplus to his executors or administrators: before any sale was effected, C. died, having devised all his real and personal estates to trustees, whom he also appointed his executors, in trust, to sell the same, and pay debts and discharge incumbrances: in the lifetime of these trustees, W. & Co., the original mortgagees sold the estate, and paid over the surplus into the hands of the attorney or agent of the testator's trustees and executors: before the money was disposed of, the trustees and executors, and also their attorney, died, the latter leaving the defendant his executor. The plaintiffs took out administration de bonis non, with the will of C. annexed, and sued the attorney's executor in assumpsit for money had and received:—Held, that an express promise by the defendant to pay the plaintiffs the money in question was a nudum pactum, they having no title to it in a court of law; and that the action was not maintainable, as the money in the defendant's hands was equitable and not legal assets. *Clay v. Willis*, 2 D. & R. 539; 1 B. & C. 364.

Where the defendant having purchased certain shares of an East Indianman, commanded by the plaintiff, and chartered by the East India Company for four voyages, proposed to the plaintiff that he should resign the command in favour of the defendant's nephew, upon receiving in exchange the command of another ship, then chartered for one voyage, and to which the plaintiff assented, and the company acceded to the exchange; and it was agreed that, in case the defendant's nephew died, or resigned, before the expiration of the four voyages, the plaintiff should succeed him: and, as a further inducement to the plaintiff to resign the command of the ship, chartered for the four voyages, the defendant undertook to procure a beneficial alteration in the destination of the other, chartered for one voyage only; and the person who negotiated the affair on the part of the plaintiff, undertook, with-

out the plaintiff's knowledge, to pay the defendant a certain sum, if the plaintiff should refuse to resign; and the exchange was ultimately approved of by the company, and the destination of the latter vessel altered; and the plaintiff and defendant's nephew sailed on their respective voyages, and the former became bankrupt on his return from his voyage, and the nephew died in the course of his second voyage; and the defendant, having refused to appoint the plaintiff to succeed him, was sued in assumpsit for a breach of the agreement, and the jury found a verdict for the plaintiff:—Held, that, after verdict, there was a sufficient consideration for the defendant's agreement, whereon to found such an action. *Richardson v. Mellish*, 9 Moore, 435; 2 Bing. 229; 1 C. & P. 241; R. & M. 66.

The statement of a consideration that A., at his own expense, would procure an administration, and furnish evidence to enable B. to receive certain dividends, will not support a promise to pay over the dividends when received. *Parker v. Baylies*, 2 B. & P. 73.

### III. FOR MONEY PAID.

#### 1. Request and Payment.

[See *Spragg v. Hammond*, 4 Moore, 431; 2 B. & P. 59.]

*Request*.—Assumpsit lies to recover money paid for another at his request. *Alcinbrook v. Hall*, 2 Wils. 309.

But in such an action, the plaintiff must prove some authority, either express or implied, from the defendant to make the payment on his account. *Tappin v. Broster*, 1 C. & P. 112—*Hullock*.

Assumpsit for money paid, laid out, and expended, will not lie, when the money has been paid against the express consent of the party for whose use it is supposed to have been paid. Where two parishes had been a long time united, and had jointly paid one sexton, but afterwards one of them, upon claiming a right of electing a separate sexton, gave notice to the other of their intention, and did so elect:—Held, that they could not maintain an action for money paid, laid out, and expended, to the use of the other parish for their quota of the sexton's salary. *Stokes v. Lewis*, 1 T. R. 20.

*What is a Payment*.—One of the makers of a joint and several note, after it had become due, gave his bond to the holder for the amount, but before the commencement of the action no money had been paid upon the bond:—Held, that until he had paid money upon the bond, he could not maintain assumpsit for money paid, in order to recover contribution against any of the other makers of the note. *Maxwell v. Jameson*, 2 B. & A. 51.

If a party give a promissory note for the debt of another, which the creditor accepts in payment, it is a payment of money to the debtor's

use, and may be recovered as such. *Barclay v. Gosch*, 2 Esp. 571—Kenyon.

If the indorser of a dishonoured bill promise the indorsee, that, if he will sue the acceptor, he (the indorser) will pay the expenses; to entitle the indorsee to recover on this promise, it is not necessary for him to prove that he paid the attorney, he being liable to do so is sufficient. *Bullock v. Lloyd*, 2 C. & P. 119—Abbott.

The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his the plaintiff's name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity. The plaintiff afterwards gave his attorney a promissory note for the amount of the costs so paid, but which was not paid at maturity when he sued the defendant on his promise:—Held, that the payment of such costs by the plaintiff's attorney was equivalent to a payment by the plaintiff himself, as the attorney might be considered his agent for the purpose of making such payment. *Adams v. Denney*, 4 M. & P. 245; 6 Bing. 506.

## 2. On Distresses.

Where a man by compulsion of law is obliged to pay a debt, he has a remedy against those who by law were bound to pay, but did not. *Exall v. Partridge*, 8 T. R. 308; 3 Esp. 8.

The goods of a stranger on the premises of another were distrained by the landlord for the rent in arrear, and the stranger was obliged to pay the rent to redeem them:—Held, that the stranger might maintain assumpsit for money paid to the use of the original lessees, who were bound by their covenant to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. *Id.*

An under-tenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, cannot immediately maintain assumpsit against him for money paid; for, on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant. *Moore v. Pyke*, 11 East, 52.

A tenant under a lease cannot maintain assumpsit on an implied promise for money paid under a distress by a superior landlord, being excluded by the express contract. The remedy is on the covenant. *Schlenker v. Maxey*, 5 D. & R. 747; 3 B. & C. 789; 1 C. & P. 178.

A tenant, shortly after he had paid half a year's rent to his landlord, due at Lady-day preceding, was called upon by the agent of the ground landlord for ground-rent due previously to Lady-day, and which the landlord had refused to pay:—Held, that the payment of such ground-rent by

the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose. *Carter v. Carter*, 2 M. & P. 723; 5 Bing. 406.

By an act of the 41 Geo. 3, for draining lands in the county of Lincoln, it was declared, "that the taxes to be charged and assessed by virtue of the same, should be paid by the tenants of the lands, &c. charged with the same respectively, who might deduct and retain the same out of the rents payable to their respective landlords;" and also, that, in case of neglect to pay, the tax might be levied by distress on the goods and chattles which should be found on the lands charged with the tax in arrear; and that, "if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a security for the payment thereof, and might be taken possession of, and let in discharge of the tax." Where, therefore, a tenant had quitted lands liable to a drainage tax under this act, and, after he had left, the collector levied the tax in arrear upon property which he had left in the possession of the succeeding tenant:—Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenant for the time being; and, therefore, that the plaintiff might maintain assumpsit against the landlord for money paid to his use. *Dawson v. Linton*, 1 D. & R. 117; 5 B. & A. 521.

## 3. Damages and Costs.

If the indorser of a bill is compelled by the holder to pay him part of the amount, he may recover it back from the acceptor in an action for money paid to his use. *Pownall v. Ferrand*, 9 D. & R. 603; 6 B. & C. 439.

The drawer of an accommodation bill is liable to the acceptor for the amount of the costs of an action, on the bill, defended by the acceptor, although there was no express request by the drawer to defend the action. *Jones v. Brooke*, 4 Taunt. 464—Per Mansfield, J. *sed quære*.

A. defends an action at the desire of B., in which action B. is concerned, and may be benefited by the event, and A. has a verdict against him. B. is liable to pay the expenses of the defence. *Howes v. Martin*, 1 Esp. 162—Kenyon.

Where an annuity has been made void by reason of a defect in the memorial, and the attorney who prepared the conveyances is sued by the grantee for negligence, and a verdict recovered against him to the amount of the consideration money paid for the annuity, which he pays, he cannot recover it over against the grantor as money paid to his use. *Burdon v. Webb*, 2 Esp. 527—Kenyon.

A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorized by him to defend. *Gillett v. Rippon, M. & M.* 406—Tenterden.

*Quære*, whether the drawer of a bill of exchange, which he was obliged to pay, after an action brought against him, may not sue the ac-

ceptor for the costs of the action. *Stoom v. Taylor*, 1 Nev. & M. 250. See *Dawson v. Morgan*, 9 B. & C. 618.

The plaintiff had accepted a bill for 148*l.*, for the accommodation of T., who gave it to N. for a particular purpose; N. borrowed 10*l.* of the defendant, and gave him this bill as a security. This sum of 10*l.* was repaid by N., but the bill was not given up, and the defendants indorsed it for value to K., who, when it was dishonoured, caused both the plaintiff and T. to be arrested, and the plaintiff paid the amount of the bill, and the costs of both arrests:—Held, that the plaintiff was entitled to recover the amount of the bill from the defendant, but not the costs of the two arrests. *Roach v. Thompson*, 4 C. & P. 194—Tenterden.

If money be paid after judgment signed, it cannot be considered as a voluntary payment. *Gerratt v. Hooper*, 1 Dowl. P. C. 28.

Declaration that plaintiff at the request of defendant, and upon defendant's undertaking to indemnify, defended an action for the recovery of money in which the defendant claimed an interest; that judgment was given against the plaintiff for 42*l.*; and that he was imprisoned and paid the money under a ca. sa.:—Held, that he might recover against the defendant this sum under this count, upon proof of the judgment, without proof of the capias; or even on a count for money paid to the defendant's use; the defendant having taken out a summons to be permitted to pay such sum in discharge of plaintiff's demand. *Williamson v. Henley*, 6 Bing. 299; 3 M. & P. 731.

#### 4. Contribution.

##### (a) Of Damages.

If a plaintiff recover in an action of tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution. *Merryweather v. Nisen*, 6 T. R. 186.

Otherwise, where the recovery against the two was in assumpsit. *Id.*

But held at Nisi Prius, that if a party recover damages in case against one of two joint co-proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened. *Wooley v. Batte*, 2 C. & P. 417—Park.

If one of two parties to a warrant of attorney has paid the whole of the money, and sues the other for contribution, he may prove the circumstances of the case and payment of the money, without the production of the warrant of attorney. *Bayne v. Stone*, 4 Esp. 13—Kenyon.

The plaintiff and defendant entered into a joint and written contract with the owner of a vessel, to supply her with colonial produce at Jamaica by a given time. The contract not being complied with, the owner made a demand on the plaintiff alone, who agreed to refer the amount of the damage sustained by such owner to arbitra-

tion, without the knowledge or consent of the defendant. The arbitrator having awarded a certain sum to be due to the owner, the plaintiff paid the amount, and brought an action for money paid against the defendant, for a moiety thereof:—Held, that he was entitled to recover. *Burnell v. Minot*, 4 Moore, 340.

Bail being fixed, if one of them, having paid the debt, bring his action against his co-bail for contribution, he must prove the judgment as well as the execution. *Belldon v. Tankard*, 1 Marsh. 6.

##### (b) Without legal Proceedings.

Generally, one joint contractor, who pays money for another under an equitable claim may recover it from the other as money paid to his use. *Hutton v. Eyre*, 1 Marsh. 603; 6 Taunt. 289.

But in all cases of partnership in illegal transactions, one partner cannot recover back money paid for the other, unless he has received express directions for such payment. *Webb v. Brooke*, 3 Taunt. 11. And see *Simpson v. Bloes*, 2 Marsh. 542; 7 Taunt. 245.

If two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker the whole sum, with the privity and consent of the other, he may recover a moiety of such sum in an action for money paid, notwithstanding the 7 Geo. 2, c. 8. *Petrie v. Hannay*, 3 T. R. 418. But see *Aubert v. Maze*, 2 R. & P. 371. See also *Steers v. Lashley*, 6 T. R. 61; 1 Esp. 166; *Brown v. Turner*, 7 T. R. 630; 2 Esp. 631; and *Child v. Morley*, 3 T. R. 610.

Twenty parishioners joined at a vestry in signing an order for the repairs of the church, and one of them, a churchwarden, paid the artificers, but the rate for reimbursing him was quashed:—Held, that he could not sue for contribution from the persons who signed the order. *Lanchester v. Freuer*, 2 Bing. 361; 9 Moore, 688. See *Sprott v. Powell*, 3 Bing. 478.

Where plaintiff and defendant were two of a committee, appointed at a vestry meeting, for the purpose of prosecuting nuisances on the waste lands and highways of the parish, which committee appointed an attorney, who prosecuted and obtained a verdict, and afterwards sued plaintiff for his bill of costs, which was referred to arbitration, and 235*l.*, with costs of the action, were awarded against plaintiff:—Held, that plaintiff might maintain assumpsit against the defendant for contribution. *Holmes v. Williamson*, 6 M. & S. 158.

A. and B. being joint prize agents, A. is imposed on by persons falsely pretending to be sailors, to whom he pays a sum of money, which he is subsequently compelled to pay again to the persons really entitled. B. is not bound to contribute to the sum so paid. *McIlreath v. Margaretson*, 4 Dougl. 278.

##### 5. Money paid by Sheriffs.

No cause of action can arise out of a breach of

duty; therefore, if an officer permit a prisoner to go at large on his promise to pay the debt, and in consequence he is himself obliged to pay it, he cannot recover the money from the debtor. *Pitchee v. Bailey*, 8 East, 171.

If a sheriff voluntarily permit an escape, and be afterwards obliged to pay the debt, he may maintain an action for money paid against the debtor. *Morris v. Berkeley*, 8 East, 172, n.; *Peake*, 144, n.

But if the warden of the Fleet have been guilty of suffering an escape, and pay the debt, he cannot afterwards maintain an action against the debtor for money paid to his use. *Eyles v. Feikney*, 8 East, 172, n.; *Peake*, 144, n.

And where a bailiff pays money in consequence of an attachment against the sheriff, it is doubted whether he can maintain an action against the defendant, whom he has liberated on the attorney's undertaking. *Griffin v. Roberts*, 1 Esp. 383—Eyre.

A sheriff's officer, who discharges a defendant on payment of the sum sworn to, and is afterwards obliged to pay the residue of the debt, may recover it from the defendant as money paid to his use. *Cordron v. Masserene (Lord)*, *Peake*, 143—Buller.

An action for money paid to the use of the defendant may be maintained by a sheriff's officer who has paid the debt and costs on an attachment against the sheriff, bail above not having been put in, through the misconduct of the defendant in imposing insufficient bail upon the sheriff, and the defendant having promised to indemnify the officer, both before and after the payment; but the officer cannot recover above the debt. *White v. Leroux, M. & M.* 347—Tenterden.

Assumpsit will not lie upon an implied promise to repay a sheriff the expenses incurred in seizing and keeping possession under a fi. fa. at the request of the party suing out the writ, although they were not sold, on account of his refusing to give an indemnity against the claims of third persons. *Bilke v. Haveleck*, 3 Camp. 374—Ellenborough.

A levy is made on the goods of a trader after he has committed an act of bankruptcy, and the money levied is paid over to the party; an action of trover is afterwards brought by the assignees against him, the sheriff, and the bailiff, in which damages are recovered, and these, together with the costs, are paid by the bailiff:—Held, that there is no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might maintain money had and received, to recover back the levy money paid over. *Wilson v. Milner*, 2 Camp. 452—Ellenborough.

#### 6. Expenses of Bail.

Where a person becomes bail above for another, he is entitled to recover all the expenses he has been put to by reason of it, and may, therefore, recover his expenses in sending after the principal to take him, in order to render

him; but not the expenses of a suit improperly defended. *Fisher v. Fallows*, 5 Esp. 171—Ellenb.

But not for trouble and loss of time in going to a place to become bail. *Reason v. Wirnam*, 1 C. & P. 434—Parks.

But, prima facie, the charges of the bail for putting in bail above are due from the bail to the sheriff. *Hector v. Carpenter*, 1 Stark. 190—Ellenborough.

The court will not interfere in a summary way, upon the breach of a parol promise, to save bail harmless. *Beal v. Langstaff*, 2 Wils. 371.

Assumpsit will not lie on a promise to bail to render a defendant, according to the course of practice, made by a third person, when the bail are proceeded against pending a writ of error. *Bayley v. Tucker*, 2 N. R. 458.

#### IV. FOR MONEY LENT.

Indebitatus assumpsit will lie for a loan to the wife at the request of the husband. *Stevens v. Hardie*, 2 W. Black. 679.

But it will not lie against a defendant for money lent to a third person; and a judgment that it would, was held bad, even after a verdict and award of judgment. *Marriott v. Lister*, 2 Wils. 141.

A party may recover the amount of an I. O. U. on a count for money lent. *Childers v. Boulton*, 1 D. & R. N. P. C. 8.

So, upon an account stated. *Payne v. Jenkins*, 4 C. & P. 324—Tenterden.

It is not evidence of itself to establish a loan of money by plaintiff to defendant, to prove that the defendant received cash for a draft or check drawn by the plaintiff on his bankers, and payable to him by name, out of money of the plaintiff's then in the bank. *Cery v. Gerriah*, 4 Esp. 9—Kenyon.

To prove the payment of a check for 100*l.*, the loan of which constituted the petitioning creditor's debt, it was shewn that the check was in the hands of the drawer, and that on the day after the date of the check his bankers had paid to the bankers of the bankrupt 100*l.* on his account. The petitioning creditor was one of the assignees of the bankrupt, and in that character had possession of all his papers:—Held, that, under these circumstances, the mere fact of his having this check was not evidence of its payment. *Bleasby v. Crossley*, 11 Moore, 327.

If there is a loan of money by A. to B. it is not to be inferred from the bare fact that A. delivered a sum of money to B., which A. had borrowed from another. *Welch v. Seaborn*, 1 Stark. 474—Ellenborough.

An instrument in the following terms, "nine years after the date hereof, I promise to pay to, &c., with lawful interest, provided D. M. shall not return to England, or his death be duly certified, in the mean time," is no evidence of money lent, either on a special or indebitatus count. *Morgan v. Jones*, 1 C. & J. 162; 1 Tyr. 21.

The words "value received with interest,"

occurring in an instrument, which is not negotiable as a promissory note or bill of exchange, do not of themselves import a money consideration, so as to satisfy an averment that money was lent by plaintiff to defendant. *Morgan v. Jones*, 1 C. & J. 162; 1 Tyr. 21.

Upon an allegation of a loan of lawful money of G. B. it is no variance that the loan is proved to have been of foreign coin, as pagodas. *Harrington v. Macmorris*, 5 Taunt. 228; 1 Marsh. 33.

#### V. FOR MONEY HAD AND RECEIVED.

##### 1. Generally.

The action of assumpsit for money had and received is a liberal action, in which the party waves all tort, trespasses, and damages. *Anon. Loftt*, 320. And see *Cowp.* 419; and *Lee v. Shore*, 2 D. & R. 198; 1 B. & C. 94.

It will lie for one who has subscribed money into a public fund, and the Christian name of another person has been inserted as a subscriber by mistake. *South Sea Company v. Curren*, 2 Bro. P. C. 502.

But it will not lie for East India Stock. *Nightingale v. Devesme*, 5 Burr. 2589; 2 W. Black. 684.

In an action for money had and received, the plaintiff must prove to what specific sum he is entitled. *Harvey v. Archbold*, 5 D. & R. 500; 3 B. & C. 626; R. & M. 184.

The rule of law, that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of land are in question. *Monypenny v. Bristow*, 2 Russ. & Mylne, 117.

Money had and received will not lie where the plaintiff upon the same transaction would be liable to a cross action to recover damages to an equal amount. *Simpson v. Swan*, 3 Camp. 291—*Ellenborough*.

Where a factor, selling goods, takes a security, payable to himself, from the purchaser, and gives his own security to his employer for the net proceeds, without disclosing the name of the purchaser; if the latter become insolvent before payment of his security, the factor cannot compel the principal to refund the money received by him as the price of the goods. *Id.*

General indebitatus assumpsit for money had and received will lie for the assignee of a respondentia bond; the obligor having before-hand engaged, by an indorsement, to pay the same to any assignee. *Fenner v. Meares*, 2 W. Black. 1269.

A. having money due to him from B., who was also indebted to other persons, took a warrant of attorney for the whole amount of the several debts, in the usual terms. A. afterwards assigned his interest in the warrant of attorney to C. for a valuable consideration, who entered up judgment, and took out execution against B.'s effects; and the money was levied by the sheriff, who paid it over to B.'s assignees (he having become bankrupt), upon an indemnity.

Seemle, that an action of assumpsit, for money had and received to the bankrupt's use, would lie at the suit of C. against the assignees. *Cooper v. Wrench*, 1 D. & R. 482.

In an action for money had and received, if the defendant shew a deed of assignment of the money to himself, and a receipt for the consideration money indorsed, it is a good discharge, though there is pregnant evidence of suspicion that the consideration is falsely recited, and that the money never was paid. *Rowntree v. Jacob*, 2 Taunt. 141.

The relief on the ground of imposition is in equity. *Id.*

##### 2. To try the Right to an Office.

The action of assumpsit for money had and received to recover fees was introduced in lieu of an assize. *Boyer v. Dodsworth*, 6 T. R. 681.

Money given to A., and claimed by B., as perquisites of office, cannot be recovered by B. in an action for money had and received, unless such perquisites be known and accustomed fees. *Id.*

It will not lie by the nominee of a perpetual curacy for the profits thereof, against a defendant who was in possession and claimed likewise to be curate. *Powell v. Milbank*, 1 T. R. 399, n.

But it does lie in the case of a donative, because the party is in full possession immediately on the nomination. *Rex v. Chester (Bishop)*, 1 T. R. 396, 403.

But, seemle, where a donative has been twice augmented, the nominee cannot maintain this action without the bishop's license. *Id.*

It lies to try the right to the office of under-sharper and cryer of the court of K. B. *Green v. Hewitt*, Peake, 182—*Kenyon*.

##### 3. For Foreign Money and Securities.

Indebitatus assumpsit for money had and received, &c. will not lie to recover the value of foreign securities paid to the defendant, where it appears that he had no opportunity of converting such securities into British money. *McLachlan v. Evans*, 1 Y. & J. 380.

But a debt incurred in foreign coin is recoverable, as for lawful money of Great Britain. *Harrington v. Macmorris*, 1 Marsh. 33; 5 Taunt. 228.

In an action brought in England to recover the value of a given sum, Jamaica currency, upon a judgment obtained in that island, the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. *Scott v. Brown*, 2 B. & Adol. 78.

##### 4. To recover Money paid.

###### (a) On moral Obligation.

Where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. *Bise v. Dickson*, 1 T. R. 265.

Nor where a man has paid a debt which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though not compellable by law, can he call on the payee to refund; but where money is paid under a mistake which there was no ground to claim in conscience, the party may recover it back again by this kind of action. *Id.*

Money paid voluntarily cannot be recovered back in assumpsit for money had and received. *Cartwright v. Rowley*, 2 Esp. 723—Kenyon.

A. in consideration of advancing 45l. for which he takes the borrower's note of hand, payable on demand, stipulates to have half of the profits upon a re-sale of certain goods intended to be purchased by the borrower with the money; two hours after the purchase, A. demands payment of the note, and the same night puts a person in possession jointly for himself and the borrower. The net profits upon the re-sale were 5l. The bargain is unconscionable, and therefore A. shall not recover his share of the profits in an action for money had and received. *Jestons v. Brooke*, Cowp. 793.

A voluntary payment is conclusive both in equity and at law, on the principle that litigation is not to be multiplied. *Goodman v. Sayers*, 2 J. & W. 263.

(b) To recover Money paid on compulsion of Law.

A voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity, (as to redeem or preserve your person or goods), is not the subject of an action for money had and received. *Fulham v. Down*, 6 Esp. 26, n.—Kenyon.

Where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. *Marriott v. Hampton*, 7 T. R. 269; 2 Esp. 546.

But held in C. P. that the action for money had and received lies, to recover back money which has been obtained by compulsion under colour of process, by an excess of authority, although it has been paid over. *Snowdon v. Davis*, 1 Taunt. 359.

Where money has been paid under compulsion of legal process, the party paying it knowing the cause of action for which the process was sued out before he paid the money, and there being no fraud on the part of the payee, the money so paid cannot be recovered back in an action for money had and received; although it may afterwards be discovered to have been not really due. *Hamlet v. Richardson*, 2 M. & Scott, 811; 9 Bing. 644.

Where a party, sued on a claim which he knows to be unfounded, pays it voluntarily and with notice, it is not recoverable; he cannot recover it back in assumpsit, though at the time he pays it, he declares he pays it without prejudice to his right to recover. *Brown v. McKinnally*, 1 Esp. 279—Kenyon.

There is no remedy in equity for the recovery of money paid on compromise of an action, where the party had full knowledge of the facts, and the means of proving them at the trial. *Goodman v. Sayers*, 2 J. & W. 249.

But assumpsit may be maintained to recover back money paid upon a compromise, after another action had been brought for it by the defendant against the plaintiff, and an interlocutory judgment had, and a writ of inquiry executed thereon; where it appeared that there was no real consideration for the payment, and the money had in fact been paid under a compromise, and not under the judgment of a court. *Cobden v. Kendrick*, 4 T. R. 432, n.—Kenyon.

Where a party threatened with a distress for rent pays money where he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back, nor set off against another demand. *Knibbs v. Hall*, 1 Esp. 84: *S. C.* not *S. P.* Peake, 210—Kenyon.

But it will not lie to recover back money paid for the release of cattle damage feasant, though the distress were wrongful. *Lindon v. Hooper*, Cowp. 414.

Held, that where goods, distrained by the plaintiff, are delivered by him to the defendant on his promising to pay the rent, an action for money had and received will not lie for the value of the goods, though the defendant do not pay the rent. *Leery v. Goodson*, 4 T. R. 687.

Where a broker who had distrained on a tenant for rent was requested not to sell, and promised his charges in consideration of such forbearance, and time was given and the charges paid, but the tenant objected to the amount of the charges:—Held, that this was not a voluntary payment; and that if the charges were irregular, they might be recovered back in an action for money had and received. *Hills v. Street*, 5 Bing. 37; 2 M. & P. 96.

The payment of illegal fees cannot generally be considered as voluntary, so as to preclude a plaintiff from recovering them back in assumpsit for money had and received. *Morgan v. Palmer*, 4 D. & R. 283; 2 B. & C. 729: *S. P.* *Dew v. Parsons*, 2 B. & A. 562; 1 Chit. 295.

Plaintiff paid the sheriff the amount of a forfeited recognizance, in order to prevent a sale of his goods; the sessions afterwards mitigated the recognizance to a small sum, for which alone the sheriff rendered an account to the Exchequer:—Held, that as the sessions were not authorized in mitigating the recognizance, the plaintiff could not recover against the sheriff for the surplus of the money, though he had made an express promise to repay it. *Haynes v. Hayton*, 7 B. & C. 293; 2 C. & P. 621.

Assumpsit for money had and received, lies against an overseer, to recover money which had been levied on a conviction which was afterwards quashed. *Feltham v. Terry*, 1 T. R. 387, n.; *B. N. P.* 24; Cowp. 419: *S. C.* nom. *Felpham v. Tyrrell*, Lofft, 207, 261.

If one person obtain possession of goods intrusted to another to be sold at a fixed price, and at the time when the goods are to be delivered, or the price accounted for, refuse to do either, and

the person to whom they were intrusted, being threatened with an action, pays the fixed price to the owner, such person may recover against him who took possession in an action for money had and received, perhaps for money paid. *Longchamp v. Kenney*, 1 Dougl. 137.

(c) *To recover Money paid on Claim of Lien.*

Money paid, as the only means of recovering possession of property to which the party is entitled, constitutes a compulsory payment, and may be recovered back. *Shaw v. Woodcock*, 9 D. & R. 889; 7 B. & C. 73.

Therefore, a party may recover money paid to obtain possession of property on which the party in possession claims a lien, though he had no pressing necessity to obtain possession of the property, and the right of lien was doubtful. *Id.*

If a man buy property which is in the hands of a third person, who sets up an unfounded claim, and who will not deliver unless that claim is paid, and the purchaser several months afterwards go and pay the demand, he is bound to give notice to the seller; and if he does not, he cannot recover the money so paid from the seller. *Bewan v. Waters*, 3 C. & P. 520—Best.

(d) *To recover Money paid under Mistake of Facts.*

Money paid by one, with full knowledge, or the means of such knowledge in his hands, of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law. *Bilbie v. Lumley*, 2 East, 469; *S. P. Brisbane v. Dacres*, 5 Taunt. 143; *Dew v. Parsons*, 2 B. & A. 562; 1 Chit. 295.

Quære, where the knowledge of the facts is uncertain. *Chatfield v. Paxton*, 2 East, 471. And see *Lovrie v. Bourdieu*, 2 Dougl. 467; and *Stevens v. Lynch*, 12 East, 38.

Money paid under a mistake of facts, there being no laches on the part of the payee in not availing himself of means within his power of knowing those facts, may be recovered. *Milnes v. Duncan*, 6 B. & C. 671; 9 D. & R. 731.

Therefore, where the indorser paid the holder the amount of a dishonoured bill (but which he had neglected to present in due time), under the idea that it was void for want of a proper stamp, and it afterwards appeared to have a proper stamp, being drawn in Ireland, but which did not appear on the face of the bill:—Held, that the indorser might recover back the money. *Id.*

A bill bearing several indorsements was dishonoured, but was taken up for the honour of one of the supposed indorsers by plaintiff, who struck out the subsequent indorsements. The plaintiff having discovered that the signatures of the drawer, the acceptor, and the supposed indorser to the bill were forgeries, communicated the same to defendant, and demanded the money back; notice of the dishonour was in time to have been sent to the prior indorsers by the same day's post. In assumpsit for the amount of the bill:—Held, that the erasure of the indorsements did not deprive the defendant of his remedy against the prior indorsers, and that the plaintiff, having paid

the money in mistake, was entitled to recover it back from the defendant. *Willkinson v. Johnston*, 5 D. & R. 403; 3 B. & C. 489.

Where the captain of a king's ship brought home in her public treasure, upon the public service, and treasure of individuals for his own emolument; and received freight for both, and paid over one third of it, according to the usage heretofore established in the navy, to the admiral under whose command he sailed; discovering that the law does not compel captains to pay to admirals one third of the freight, the captain brought an action for money had and received, to recover it back from the admiral's executrix:—Held, that he could not recover back the private freight, because the whole of that transaction was illegal, nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it. *Brisbane (Knt.) v. Dacres*, 5 Taunt. 143.

Where a defendant received from his principal abroad a bar of silver, and took it to plaintiff, who melted it, and sent a piece to an assayer to be assayed at defendant's expense, and paid a price for the bar to defendant, as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number:—Held, that plaintiffs might, after having offered to return the bar, have money had and received against defendant for the price thus paid to him under a mistake, although defendant had forwarded his account to his principal, and in it had placed the price received to the credit of his principal. *Ces v. Prentice*, 3 M. & S. 344. And see *Gomery v. Bond*, 3 M. & S. 378.

Where the agents for the grantor and grantee of an annuity rendered an account to the latter, in which they gave him credit for instalments due from the former, stating at the same time that the money had not been received, and allowed the grantee to draw upon them for the amount; and the agents having, in about twelve months afterwards, become bankrupts, and neglected to apprise the grantee in the interval that the instalments still remained unpaid by the grantor, who had become insolvent:—Held, that the money so advanced to the grantee was not recoverable back by the assignees of the agents. *Shaw v. Pictou*, 7 D. & R. 201; 4 B. & C. 715.

So, army agents, who had allowed an officer to draw for what they conceived were increased allowances due to him in the shape of pay, (but which allowances were not in fact intended by government to be given to officers in that situation), and had sent in an account admitting the receipt of the full amount, were not allowed after a lapse of time, when they found out the mistake, to retain the surplus from the representatives of the officer. *Skyring v. Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 C. & P. 517.

If a bill is filed to compel the performance of a contract and payment of money, and the defendant puts in no answer, and is obliged to pay the money; if he afterwards discover that he was deceived in the contract, he shall not be barred from



his action by having paid the money, if he comes recently after discovering the fraud. *Jendwine v. Slade*, 2 Esp. 573—Kenyon.

(c) To recover Money paid on illegal Contracts.

[What Contracts are illegal, see CONTRACT.]

Assumpsit for money had and received will not lie to recover back money paid for doing an illegal act. *Webb v. Bishop*, Bull. N. P. 132. And see *Clarke v. Shee*, Cowp. 197, 334; 2 Dougl. 698, n.; *Browning v. Morris*, Cowp. 790; *Leary v. Bourdieu*, 1 Dougl. 451; *Mitchell v. Cockburn*, 2 H. Black. 379.

And if a party knowingly engage with another in an illegal transaction, the money advanced by him in such business is not recoverable in assumpsit: aliter, where a party has been ignorantly drawn in by the craft or imposition of such person. *Drummond v. Deey*, 1 Esp. 152—Kenyon.

But where A. had received money to the use of B., on an illegal agreement between B. and C.:—Held, in an action of assumpsit brought by B. for money had and received, that he could not be allowed to set up the illegality of the contract as a defence. *Tennant v. Elliott*, 1 B. & P. 3.

If A. receive money of B., to the use of C., it may be recovered by C. in an action for money had and received, though the consideration on which B. paid it be illegal. *Farmer v. Russel*, 1 B. & P. 296.

Quere, whether the case would be varied if A. were a party to the contract between B. and C. *Id.*

The plaintiffs, a Frenchman and a Swiss, carrying on trade at Lisbon under the name of the defendant, a Portuguese, shipped a cargo from thence for a port of France, which cargo being captured by a British cruiser, and labelled for condemnation in the court of Admiralty, as French and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiff's privity and consent, a claim to it as his own property:—Held, that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the true question, by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent. *De Metton v. De Mello*, 12 East, 224; 2 Camp. 420.

A testator having borrowed money on a respondentia contract prohibited by the laws of this country, his executors refunded the money to the lenders:—Held, that the executors could not maintain an action for money had and received to recover back this money, notwithstanding the lenders could not have compelled them to pay it. *Mearns v. Stokes*, 4 T. R. 561.

But where A., in consideration of 910*l.* paid by B., gave a bond for the payment of an annuity to the latter of 100 guineas, till the hop duties should amount to a certain sum: before this event had taken place, B. brought an action for money had and received, to recover back the 210*l.* of A.:—

Held, that the action was maintainable. *Tupenden v. Randall*, 2 B. & P. 467.

(f) To recover Money paid on Failure of Consideration.

In an action for money had and received, to recover back money paid to the defendant on failure of consideration, it is not necessary to shew that he was not entitled to receive it. *Robinson v. Anderton*, Peake, 94—Kenyon.

Where money is advanced to A. as the manager of an institution, for the purpose of purchasing shares therein, and there is no proof of a misapplication of the money by him, the person advancing it cannot recover it back from A. on the failure of the institution: to enable the person advancing to recover from A., he must shew either fraud in the receipt of the money, or a misapplication of it. *Lloyd v. Sandilands*, Gow, 13—Dallas.

Money being advanced for procuring a commission in the marines, and the purchaser, after six months, being discovered to have been a livery-servant, was discharged, the money was decreed to be refunded with interest. *Morris v. McCulloch*, Amb. 432; 2 Eden, 190.

The plaintiff remitted to defendant the price of some hay he had sold for defendant, before the money had been paid by the purchaser, and then sent defendant's servant with the hay to the purchaser. The servant having been cheated of the hay before he arrived at the purchaser's:—Held, the defendant was liable to refund the money remitted. *Gingell v. Glascock*, 8 Bing. 86; 1 M. & Scott, 125.

Rent paid by A. to B., claiming as devisee, the amount of which A. is afterwards compelled to pay to the heir, may be recovered back by A. as money had and received to his use, B. setting up no title to the lands when the action is brought, or at the trial. *Newsome v. Graham*, 5 M. & R. 64; 10 B. & C. 237.

A defendant supposing himself the legal representative of lessee for years, sold the term, and delivered the lease to plaintiff, but without any assignment or formal conveyance, saying "the premises were his, and if any thing happened, he would see the plaintiff righted":—Held, the plaintiff may maintain an action against him for money had and received, the rightful administrator of the tenant for years having ousted the plaintiff by ejectment. *Cripps v. Reade*, 6 T. R. 606.

A., by will, devised to B., C., D., and E. two parcels of land upon trust, to sell and divide the money among his brother's and sister's children: B., C., D., and E., the latter being one of twenty-four persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first trustees, and the twenty-three other persons entitled to the money, that E. should become the purchaser of the two parcels of land, paying 300*l.* for one, and 700*l.* for the other: a conveyance was accordingly prepared and executed by B. and C. only, upon which E. took possession of the lands, and paid the purchase money, which was divided among the several per-

sons entitled under the will: *E.*, being afterwards evicted from the smaller parcel in consequence of a defect in the title derived under the will, brought an action for money had and received against one of the twenty-three persons, to recover the share of the 300*l.* received by him, at the same time refusing to give up the parcel of land for which 700*l.* had been paid:—Held, that he was entitled to recover. *Johnson v. Johnson*, 3 B. & P. 162.

Assumpsit will lie to recover the expenses of the conveyances, and interest of the money procured to purchase an annuity, where the grantor has misrepresented the charges affecting the estate to be charged with the annuity. *Richards v. Barton*, 1 Esp. 267—Kenyon.

*A.*, a loan contractor, in October, 1822, delivered to *B.* certain scrip receipts, stating that *B.* had paid him 10*l.* per cent. deposit in respect of a certain quantity of Neapolitan stock, and that on payment of the balance before the 1st February, 1823, the bearer would be entitled to certificates for that amount of stock. *B.* transferred the receipts to *C.* for a valuable consideration, *A.*, by advertisement, offered the holders of the receipts, upon certain conditions, an extension of time for payment of the balance due on them: requiring also that the receipts should be left at his office for the purpose of being marked, as holden under the new conditions. The receipts transferred by *B.* to *C.* were by him sent to *A.*'s office, when indorsed by *A.* with *C.*'s name. The latter having failed to comply with the new conditions, *A.* refused to deliver the certificates or return the deposit. *C.* claimed the return of the deposit as being retained by *A.* without consideration:—Held, that *C.* was not entitled to recover the same, because *B.* had full consideration for the deposit in the option which the scrip receipts gave him to become the proprietor of so much stock, by payment of the balance of the price, on the day named. *Rothschild v. Hennings*, 9 B. & C. 470, overruling *S. C. nom. Hennings v. Rothschild*, 4 Bing. 315; 12 Moore, 559.

Assuming that *C.* had any right of action against *A.*; quære, if money had and received could have been maintained. *Id.*

(g) To recover Money Obtained by Fraud.

If money have been obtained by fraud, an action for money had and received lies to recover it back, to which it is no answer that the defendant is really entitled to the money, if his right to it depend upon a question which is not of common law jurisdiction. *Crockford v. Winter*, 1 Camp. 124—Ellenborough.

So, if one recover money mala fide, by suit in an inferior court, assumpsit for money had and received will lie in *K. B.* to make him refund. *Moses v. Macpherlan*, 2 Burr. 1005; 1 W. Black. 219.

Where the defendants, knowing a check to be post dated, and that the drawers were insolvent, presented it for payment to the plaintiffs, who were bankers, and who, without knowledge of these facts, paid it, although they had no funds of the drawers in their hands at the time, but ex-

pected some in a few days:—Held, that they were entitled to recover it back in assumpsit for money had and received. *Martin v. Morgan*, 3 Moore, 635; 1 B. & B. 289; Gow, 122.

An action for money had and received will lie against an infant, to recover money which he had embezzled. *Bristow v. Eastman*, 1 Esp. 172; Peake, 223—Kenyon.

If a person undertake to procure for another an appointment, which he knows at the time he is unable to do, and receive in consideration a sum of money to be paid back in three months if he failed in his undertaking; the other person may immediately commence an action to recover it back without waiting till the end of the three months. *Hogan v. Shee*, 2 Esp. 522—Kenyon.

A sale of goods effected by fraud does not change the property in them; therefore, where the defendant fraudulently induced the plaintiff to sell goods to *I. S.*, who could not pay for them, and on a nominal re-sale of those goods by *I. S.*, in which the defendant was concerned, obtained the money paid on such re-sale:—Held, that the plaintiff might recover from the defendant the value of the goods unpaid for by *I. S.* in an action for money had and received. *Abbotts v. Barry*, 5 Moore, 98; 2 B. & B. 369.

If *A.* fraudulently procure a bill of exchange from *B.* and afterwards become bankrupt, and his assignees receive the money for the bill, *B.* may recover it from them in an action for money had and received. *Harrison v. Walker*, Peake, 111—Kenyon.

The plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker amounting to 1330*l.* Six days after the date of the cheques the defendants, acting bona fide, gave cash for them to a third person (who had not given value for them), presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money:—Held, that the cheques could not be treated as bills over-due, and therefore taken by the defendants at their peril, but that the real question in the cause was, whether the defendants had acted bona fide and with due caution. *Rothschild v. Corney*, 9 B. & C. 388.

(h) To recover Money paid on Forgery of Securities.

If a forged bill be accepted and paid by the drawee, he cannot recover the money back from the indorsee to whom he paid it. *Price v. Neale*, 3 Burr. 1354; 1 W. Black. 390.

If the banker of a supposed acceptor of a forged bill discount it for the agent of one of the indorsers; on the discovery of the forgery, he may recover back the sum paid on the bill, in an action for money had and received; notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his handwriting. *Fuller v. Smith*, 1 C. & P. 197; R. & M. 49—Abbott.

A person who discounts a forged navy bill for another, who passed it to him without knowledge of the forgery, may recover back the money as had and received to his use, upon the failure of

the consideration. *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157.

So, a person who receives forged bank notes in payment. *Id.*

So of a victualling bill, although the full apparent amount has been paid by the office on presentment. *Bruce v. Bruce*, 1 Marsh. 165; 5 Taunt. 495, n.

A bill of exchange with a forged acceptance, purporting to be payable at the house of A. and Co., bankers, in London, with whom the supposed acceptor keeps cash, is indorsed to B. for a valuable consideration: B. indorses it to his agent in London, who presents it on the 23rd of April at the house of A. & Co. for payment; A. & Co. pay it, and send it on the 30th of April to the supposed acceptor, who disavows it: A. & Co. immediately give notice of the forgery to B. and demand repayment, which B. refuses; all parties are ignorant of the fraud:—Held, that A. & Co. by paying the bill, without ascertaining that the acceptance was genuine, were precluded from recovering the amount from B. *Smith v. Mercer*, 1 Marsh. 453; 6 Taunt. 76.

Where a check was so carelessly drawn as to be easily altered by the holder to a larger sum, so that the bankers, when they paid it, could not distinguish the alteration:—Held, that the loss must fall on the drawer, as it was caused by his negligence. *Young v. Grote*, 4 Bing. 253; 19 Moore, 484.

A customer drew upon his banker a check for 3*l.*, and paid it away. The amount of the check was altered by the holder to 200*l.*, in such a manner that no one, in the ordinary course of business, could have observed it, and presented, and the 200*l.* paid by the banker:—Held, that the banker was liable to the customer for 197*l.*, the difference between the amount of the genuine and the altered check. *Hall v. Fuller*, 8 D. & R. 464; 5 B. & C. 750.

Fauntleroy being one of three co-trustees, proprietors of stock, and also one of three co-partners in a banking-house, forged the names of his co-trustees to a power of attorney, under which he sold the stock, and paid the money into his banking-house. Neither of his co-trustees were privy to the transaction. Fauntleroy was executed for forgery. The surviving trustees sued the surviving partners for the money. On an issue from Chancery, directing that no objection should be taken that Fauntleroy had been interested both as a trustee and a partner in the banking-house:—Held, that the money constituted a debt due from the bankers to the trustees. *Stone v. Marsh*, 9 D. & R. 643; 6 B. & C. 551; R. & M. 364; 8 D. & R. 71.

### 5. By Owners of lost Securities.

An action for money had and received will lie by the true owner of money or notes against a third person, into whose hands they have come *mala fide*; provided their identity can be traced and ascertained. *Clarke v. Shee*, Cowp. 197, 334; 2 Dougl. 698, n.

But bank-notes cannot be followed into the

hands of bona fide holders for valuable consideration without notice. *Lowndes v. Anderson*, 13 East, 130; 1 Rose, 99.

For possession is prima facie evidence of property in negotiable instruments. *King v. Milson*, 2 Camp. 5—Ellenborough.

Therefore, in trover for a bank-note, it is not a prima facie case for the plaintiff to prove that the note belonged to him, and that the defendant afterwards converted it; and the defendant will not be called upon to shew his title to the note, without evidence from the other side that he got possession of it *mala fide*, or without consideration. *Id.*

A bank-note, though stolen, becomes the property of him who gives valuable consideration for it, having no notice or knowledge of the robbery. *Miller v. Rice*, 1 Burr. 452; 2 Ld. Ken. 189.

The plaintiff having lost a check five days after it bore date, which was taken by the defendants for value, but under such circumstances as ought to have excited their suspicion:—Held, that the plaintiff might maintain an action for money had and received against them for the amount of it, though he gave no evidence of how he lost it, or how it got out of his possession. *Quære*, whether such evidence would have been necessary, if the check had been received by the defendants on the day it bore date. *Downe v. Halling*, 6 D. & R. 455; 4 B. & C. 330; 2 C. & P. 11. And see *Gill v. Cubitt*, 1 C. & P. 163, 487; 5 D. & R. 324; 3 B. & C. 460.

In actions for money had and received, brought by the owners of lost bank-notes, against those who may have got them into their hands without giving value; it is not absolutely necessary for the plaintiff to give direct evidence of the loss; it is sufficient if such circumstances are shown as satisfy the jury of the fact of the loss. *Holiday v. Sigil*, 2 C. & P. 176—Abbott.

A party taking a bank-note in payment of a bet from a stranger on a race-course is not bound to use the same precaution as would be requisite if the note were taken by a tradesman. *Snow v. Sadler*, 11 Moore, 506; 3 Bing. 610.

Defendant, according to one witness, having admitted taking "from his banker's, or at Doncaster," and according to another, "from a stranger at Doncaster races, for bets won," a 30*l.* bank of England note, without inquiring or taking any account of the number of the note, and the jury, in an action by the plaintiffs, who had lost the note and duly published their loss, having found a verdict for them, the court granted a new trial. *Id.*

A bank-note for 500*l.* was stolen from a servant of the plaintiff. The fact of the robbery was advertised in the *Hue and Cry Gazette*, and in another paper. Some time afterwards the note was received at the banking house of the defendants in the country, where it had been presented for change by a stranger, of whom no questions were asked as to the manner he became possessed of it. In trover, to recover the value, the judge left it to the jury to say whether or not

due notice had been given by the plaintiffs, and whether or not, under the circumstances, due caution had been observed by the defendants in taking the note:—The jury thought defendants had not exercised due caution, and accordingly found for the plaintiffs. The court held that this direction was proper, and refused to disturb the verdict. *Snow v. Peacock*, 11 Moore, 286.

The plaintiff was robbed of a pocket-book, containing, amongst other things, a bill of exchange. In advertising the loss he merely stated that the pocket-book contained "papers of no use to any but the owner." The bill was shortly afterwards presented at the banking-house of the defendants by a stranger, who stated that he was the son of the indorser; the defendants discounted it. In an action the judge left to the jury to say, first, whether they thought that the plaintiff had done all that his duty required of him, in advertising and making known his loss; secondly, if due diligence had been used in this respect, whether the defendants had acted bona fide, and used due caution in receiving the bill; telling them, that, if they were of opinion that the plaintiff had failed in giving proper notice of the robbery, the defendants were entitled to a verdict. The jury having found for the defendants, the court refused to disturb the verdict, holding the direction proper. *Beckworth v. Corral*, 11 Moore, 335.

The plaintiff, coming from Tonbridge to London, placed a 100l. bank post bill in her reticule on her arm; arrived at Smithfield, she left the reticule in a hackney-coach. Upon discovering her loss, she made application at the hackney-coach office in Essex-street, and caused handbills to be circulated at all the coach-stands, and at the adjoining public-houses; and also once advertised the loss in a daily paper. On the morning of the day on which the last-mentioned advertisement appeared, the bill in question was cashed by the defendant, a banker at Brighton, for a stranger, of whom no questions were asked, except his name and address, which he wrote on the back of the bill in a vulgar manner, and which afterwards proved to be fictitious. It was left to the jury to say, first, whether the plaintiff had used due and proper caution in her mode of conveying the bill; secondly, whether she had exercised a due and proper degree of diligence in the steps she had taken to make known to the world her loss; thirdly, whether the defendant himself had exercised proper caution in receiving a bill of such large amount from a total stranger without making some inquiry as to where he put up, or whether he was known to any person at Brighton. The jury found for the plaintiff; the court refused to disturb the verdict. *Strange v. Wigney*, 4 M. & P. 470; 6 Bing. 677.

A bank of England note, which had been feloniously stolen in England in February, 1826, was remitted in May, 1827, by a foreign merchant to his correspondent in this country, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment; the bank refused to pay, on the ground that the note had been stolen. At the time when

the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note:—Held, first, that, in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could therefore recover upon his title only; secondly, that, in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to shew that the foreign merchant had given full value for it. *De la Chaussette v. Bank of England*, 9 B. & C. 208.

#### 6. To recover Money from Stakeholders and others.

*Stakeholders.*—Assumpsit will not lie between two parties who have by consent deposited money with a stakeholder, unless it be proved that the defendant refused to permit the plaintiff to receive the money. *Robson v. Hall*, Peake, 127—Kenyon.

In order to recover a share of a stake from a stakeholder, the plaintiff must shew his exact proportion of the sum deposited. *Robson v. Andrade*, 2 Chit. 263; 1 Stark. 372.

Where money in litigation between two parties has by mutual consent been paid over to a trustee in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted, though he agreed to waive all objections to form. *Ker v. Osborne*, 9 East, 378. And see *Edwards v. Hodding*, 1 Marsh. 377; 5 Taunt. 815.

A. took from the Board of Works a piece of ground at Westminster for the erection of galleries at the king's coronation, and underlet part of it to B. on the same terms. The rent was paid by B. to A., who deposited it in the hands of his bankers, with a condition, that, if the coronation did not take place, and the rent was in consequence remitted by the Board of Works, the money was to be returned to B. The coronation took place; but, in consequence of the speculation being unprofitable to the parties, the crown remitted the whole rent to A., who refused to return the money paid him by B.:—Held, that B. might maintain an action of assumpsit for money had and received against the bankers as stakeholders. *Truscott v. Marsh*, 2 D. & R. 712.

*Trustees.*—Where money is paid into the hands of a trustee for a specific purpose, it cannot be recovered back in assumpsit for money had and received, until it be shewn that the trust is closed, and that a balance is left. *Case v. Roberts*, Holt, 500—Burroughs.

If the indorsee of a bill of exchange, who has received a navy bill assigned to the drawee, as security to him (the indorsee) till the bill of exchange be accepted, deposit such navy bill with the drawee, and the drawee receives the money upon it, he is answerable for the amount in an action for money had and received to the use of the indorsee, though he may have done nothing that amounts to an acceptance of the bill of exchange. *Pierson v. Dunlop*, Cowp. 571.

**Other Persons.**—The brokers to a ship charged their employers certain sums of money for work done to their ship under the head of stevedore. The labour of a stevedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the ship-owners were aware that the brokers charged them more than they paid the workmen, but made no objection on account of their zeal and diligence:—Held, that one of the workmen under such circumstances could not maintain an action for the larger sums received by the brokers, as money had and received to his use. *Wilson v. Coles*, 2 C. & P. 363—Gaselee.

Three ship-brokers agreed in writing with a ship-owner to freight his vessel at a certain commission, dividing profits of commission. One of the brokers alone paid and received money on account of the ship; and delivered to the owners an account, charging a liquidated sum for commission. The owner acquiesced in the accuracy of the account, but objected to the charge for commission, but which the broker retained in his hands. There was no adjustment of account between the brokers:—Held, that money had and received would not lie by the two brokers against the third for their share of the commission. *Bevill v. Hammond*, 9 D. & R. 186.

Where agents in England effected a policy of insurance for a correspondent abroad, on which a loss happened, and he drew a bill upon them, which was presented for acceptance by an indorsee, but they said they could not accept it, having no funds in hand, but that on a settlement taking place with the underwriters it should be paid:—Held, that after they had received a sum from the underwriters less than the amount of the bill, it might be recovered from them by the indorsee as money had and received to his use. *Lange v. Corney*, 4 Camp. 176—Gibbs.

Assumpsit will not lie for money paid by the tenant of the bankrupt to the defendant, as grantee of an annuity granted by the bankrupt after an act of bankruptcy, and charged on the estate of which the payer of the money was tenant. *Amon. Woodf. L. & T.* 507.

A. (Wharton), B. (Thompson), and C. (Craven), being separate traders, agreed to a joint speculation in importing corn. The agent for buying the corn abroad knew that the speculation was on the joint account of A., B., and C., and was to consign to A., drawing on him at two or three months. Corn was bought, and bills for the value drawn on and accepted by A., payable at a banker's in London, the correspondents of the plaintiffs who were bankers at Hull. A. had a banking account with the latter, who, being in the habit of paying his acceptances at the house of their London correspondents, paid the above among other acceptances, not then knowing of the joint speculation of A., B., and C. A., by way of part security to the plaintiffs, indorsed to them two accommodation bills drawn by himself on B., these were unpaid, and A. and B. became bankrupts; C. had contributed his third of the purchase, but did not appear to have known

from what source A. obtained his funds for that purpose:—Held, that the Hull bankers could not recover against C., as for money lent, or had and received, the amount of the bills drawn by A. on B., though they had given A. credit for them in his account, as partly liquidating their advances to pay for the corn bought for A., B., and C., at their joint profit or loss. *Smith v. Craven*, 1 Tyr. 308.

#### VI. ON ACCOUNT STATED.

The defendant's admission of something being due, without specifying how much, does not entitle the plaintiff to a verdict for nominal damages on an account stated. *Kirton v. Wood*, 1 M. & Rob. 253—Tindal.

On that count the amount must be shewn. *Bernasconi v. Anderson*, M. & M. 123—Tenterden.

Plaintiff demanded 40l. upon an agreement by defendant, an incoming tenant, to pay for growing crops; the defendant offered to pay 17l.:—Held, no evidence to support a count upon an account stated. *Wayman v. Hilliard*, 7 Bing. 101; 4 M. & P. 729.

A verbal agreement having been made for the purchase of some turnips growing in a field; after the purchaser had removed the principal part of them, the seller said to him, "You owe me 3l.;" the purchaser answered, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the 3l.:—Held, that it was recoverable on the account stated. *Pinchon v. Chilcott*, 3 C. & P. 236—Best.

A qualified acknowledgment of a sum due to the plaintiff will not entitle the plaintiff to recover upon a count on an account stated. *Evans v. Venty*, R. & M. 239—Littledale.

Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed in support of an assumpsit, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before. *Hall v. Odber*, 11 East, 118.

An admission by a defendant that he has received 300l. from a bankrupt, after an act of bankruptcy, will not support the count on an account stated with the assignee. *Stafford v. Clark*, 2 Bing. 377; 2 C. & P. 403.

Under the general issue in assumpsit, a judgment recovered for the same cause of action may be given in evidence. *Id.*

Proof of the acknowledgment of one item of debt only is good to support a count upon an account stated. *Highmore v. Primrose*, 5 M. & S. 65; 2 Chit. 333.

An admission by a defendant, that so much was agreed to be paid to the plaintiff for the sale

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## ATTACHMENT.

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## I. WHEN GRANTED.

1. *Against Officers of the Court.*

Where the process of the court has been abused, and undue means have been used in its execution, an attachment, and not an information, is the proper remedy. *Anon.* 2 Ld. Ken. 372.

But, where the officer who executes process has behaved improperly, as well as those who resisted him, the court will not in general grant extraordinary process for contempt. *Gregory v. Onslow*, Loft, 35.

An attachment was granted for arresting the plaintiff while attending arbitrators under a rule of court, on purpose to prejudice his cause. *Rez v. Hall*, 2 W. Black. 1110.

But altering a sheriff's warrant is no ground for an attachment, unless an ill use be made of it. *Hale v. Castleman*, 1 W. Black. 2.

The sealer of writs is not guilty of a contempt in refusing to seal a writ on St. Luke's day, being one of the holidays appointed by statute 5 & 6 Edw. 6, c. 3, to be observed; and the Court of C. P. will not grant an attachment for such refusal. *Martin v. Bold*, 7 Taunt. 182; 2 Marsh. 487.

2. *For contempt of Process.*

The court will not grant an attachment where there is a remedy by action, and the matter is doubtful. *Hanington v. Jennings*, Loft, 188.

In one case, the court refused an attachment in the first instance for not obeying a rule of court, but granted a rule to go before the master, otherwise an attachment nisi. *Anon.* Loft, 159.

A defendant being served with a copy of a *capias* tore it in pieces, and threw it at the officer:—Held, not to amount to a contempt of court for which an attachment might be granted. *Myers v. Wills*, 4 Moore, 147.

So where a person, on being served with process, collared and shook the officer serving it, and ordered him to quit his presence:—Held, that this did not amount to a contempt of court and obstruction of its process, for which an attachment might be granted. *Adams v. Hughes*, 1 B. & B. 24.

Although an attachment may issue against a peer for refusing to obey the process of the court of K. B.; quære, whether in ecclesiastical affairs, the writ should not be moved against the chancellor, commissary, or official, instead of the bishop. *Rez. v. St. Asaph (Bishop)*, 1 Wils. 332.

Service of all processes intended to bring a party into contempt should be personal, if possible; but if it can be made appear to the court of Exchequer that service cannot be effected personally, and that there was probable cause to suspect that the party kept out of the way for the purpose of avoiding such personal service, that court will grant a rule nisi for an attachment; and order that service, by leaving the rule at the dwelling-house, shall be efficient. *Weston v. Faulkner*, 2 Price, 2.

Where a mandamus had been granted for the election of a mayor, under the 11 Geo. 1, c. 4, s. 2, and a rule made that public notice should be affixed in the market-place, which had been done accordingly, the court granted an attachment for disobedience of the mandamus, against a member of the corporation who was served with a copy of the rule, notwithstanding neither the original mandamus nor the rule was shewn him at the time; for the public notice directed by the act is *prima facie* sufficient. *Rez v. Edycoan*, 3 T. R. 352.

But the application for the attachment would be well answered, if the party could shew that he had no notice of the mandamus. *Id.*

Where a rule had been granted for an information in the nature of a *quo warranto* against A., to shew by what authority he claimed to be mayor of G., on the relation of some of the corporators, and another rule in that cause for inspecting all the corporation books, papers, &c. directed to the town-clerk; an inspection of such only as related to the election and office of mayor, was held to be a sufficient compliance with the rule, so as to protect the town-clerk from an attachment as for a contempt of the court, it appearing that he had acted *bona fide*. *Rez v. Babb*, 3 T. R. 579.

If, a plaintiff having sued out a *fi. fa.*, the defendant pays the plaintiff's attorney the debt and costs, without the writ being delivered to the sheriff, it is no contempt of the court of C. P. to attach the same money in the hands of the plaintiff's attorney, for a debt due from the plaintiff to the defendant:—But quære, whether the debt is such whereon an attachment can be supported. *Gwinness v. Brown*, 4 Taunt. 472.

An attachment will not lie for disobedience to a judge's order until it is made a rule of court, though the order has been acquiesced in and acted upon. *Baker v. Rye*, 1 Dowl. P. C. 689.

An attachment granted in term for non-pay-

ment of costs, under a baron's order on the master's allocatur, set aside, the order not having been first made a rule of court. *Ex parte Arden*, 1 Price's, P. C. 149.

A wife named with her husband in a rule of court, directing costs to be paid to them, is entitled to the advantage of it, if she survives her husband; and an attachment upon the rule issues of right. *Tyt v. Bartlett*, 1 Ld. Ken. 104.

A party in contempt for filing a bill in Chancery to set aside an award, after entering into a rule of K. B. to abide by it, was discharged without any fine, rather than set a small one for so high an offence. *Res v. Wheeler*, 3 Burr. 1256.

On an attachment for rescue, a defendant may be fined without answering to interrogatories. *Res v. Elkins*, 2 Burr. 2129; 1 W. Black. 460.

An attachment granted against rescuers, upon a return by the sheriff of rescue from his bailiff. *Gobby v. Dewes*, 10 Bing. 112.

Costs were granted upon an attachment for contempt, to the person who had purged himself of the contempt upon examination. *Res v. Plummer*, 3 Burr. 1329.

### 3. For Non-payment of Money.

An attachment for non-payment of costs is in the nature of an execution, so much so that the parties are not bailable. *Anon. Lofft*, 305: *S. P. Res v. Stokes*, Cowp. 137.

An attachment for non-payment of money is in the nature of *meane process*. *Lewis v. Morland*, 2 B. & A. 56: *S. P. Res v. Curwen*, 1 Moore, 494.

In the court of Exchequer, an order nisi for costs for not proceeding to trial is served on the clerk in court, which brings the parties into contempt; and upon service of the allocatur, and demand and refusal of costs, an attachment is granted. *Merritt v. Meek*, 3 Anst. 656.

An order of the court of Exchequer, that a defendant pay a certain sum of money, being shewn to the defendant at the time of making a personal demand of it, a copy of such order not having been personally served on the defendant himself, although a copy had been previously served on his attorney, is not sufficient to entitle the plaintiff to an attachment. *Brodenik v. Teed*, 1 Price, 401.

If a defendant in a penal action obtain a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, it is an undertaking by him to pay that sum, and for the non-payment of it the court will grant an attachment. *King v. Clifton*, 5 T. R. 257.

Where a defendant in a penal action obtains a rule to stay proceedings on payment of part of the penalties, the court of C. P. will grant an attachment against him for non-payment. *Hart v. Draper*, 2 Marsh. 358; 7 Taunt. 43.

Though the plaintiff discontinue on the common rule on payment of costs, he is not liable to an attachment for non-payment. *Stokes v. Woodson*, 7 T. R. 6.

If a party obtain a rule for setting aside judg-

ment and execution, on condition of his paying costs, the court will not issue an attachment in the first instance for not paying those costs. — *v. Mynde*, 1 Chit. 158.

The order made on motion to pay money into court, that the defendant shall pay the costs, is imperative in that respect in the court of Exchequer; and if not paid when taxed, the plaintiff may have an attachment against the defendant for non-payment; which process is final, and in the nature of an execution, and therefore not bailable: the plaintiff may, however, proceed to try the cause if the costs are not paid, as is his only course in the court of King's Bench. *Plummer v. Savage*, 6 Price, 126.

An attachment granted on the master's allocatur for costs due from the plaintiff to his attorney, although the attorney be disqualified, the plaintiff having received the whole of the debt and costs from the defendant. *Dimond v. Clarke*, 1 Chit. 222.

By the master's allocatur, an attorney was ordered on the 12th May to pay over to his client a sum of 15*l.*; on the 20th June the attorney became bankrupt and afterwards obtained his certificate:—Held, that it was then too late to move for an attachment for not paying the money pursuant to the master's allocatur. *Baron v. Martell*, 9 D. & R. 390.

An alias attachment lies for non-payment of money pursuant to a rule of court, founded on an award, where defendant has been suffered to go at large upon the original attachment, upon terms which he has failed to comply with. *Good v. Wilks*, 6 M. & S. 413; 2 Tidd's Prac. 1070.

### 4. For Non-performance of Awards.

*Nature of the Proceeding.*—All attachments for non-performance of awards are only in the nature of civil executions, though formerly considered of a criminal nature. *Res v. Myers*, 1 T. R. 266. *And see Res v. Curwen*, 1 Moore, 494.

An attachment may issue if the motion to set aside the award be not made before the last day of the next term after the award is published. *Freame v. Pinneger*, Cowp. 23.

An attachment goes of course for non-performance of an award; and in order to get rid of it, the award must be set aside. *Anon. Lofft*, 451: *S. P. Anon. Lofft*, 321.

The court of C. P. will not infer personal service of an award to bring a party into contempt. *Brander v. Penlease*, 5 Taunt. 613.

The court of C. P. will not grant an attachment for non-performance of an award pending an action brought on the award; nor allow the plaintiff to waive the action in order to apply for the attachment. *Badley v. Loveday*, 1 B. & P. 31.

*By and against whom granted.*—The court will not grant an attachment against a peer for not paying a sum of money awarded, though the defendant consent on condition that the attachment shall lie in the office for a certain time. *Walker v. Grosvenor (Earl)*, 7 T. R. 171.

Nor against a member of parliament. *Cutmur v. Knatchbull (Bart.)*, 7 T. R. 448.

An attachment was issued against a party for non-performance of an award, which had been made a rule of the court of C. P.; although such party resided out of the jurisdiction of that court, as it was in the nature of a civil process; and the court were not bound to inquire whether it could be served with effect or not. *Hopcraft v. Fernor*, 8 Moore, 424; 1 Bing. 378.

An executor may have, without scire facias, or other process of revivor, an attachment for non-performance of an award made in favour of his testator in a cause referred and decided in his lifetime, though the suit abated by his decease. *Rogers v. Stanton*, 7 Taunt. 575.

So, if a stranger to the cause become, by rule of court, party to a reference made in the cause before any jury is sworn, and if, after the award made, but before judgment, one of the parties to the cause die, though the cause abate, the rule of court is not vacated as to the stranger, but an attachment shall go thereon for non-performance of the award. *Id.*

The court will not grant an attachment for the non-payment of costs payable under an award, at the instance of the personal representative of a deceased party, to which party they were to have been paid. *Rex v. Maffey*, 1 Dowl. P. C. 538.

Where a submission to arbitration between A. and B., the parties on the record, had been made a rule of court, and the award not having been made in time, the dispute had been referred to a second arbitrator, by B. and C., who were the real parties in the suit:—Held, that no attachment could issue against B. for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*, 2 T. R. 643.

And as the court had no jurisdiction in this case they could not go into the merits, though B. consented to waive the objection. *Id.*

*For what granted.*—The court refused to grant an attachment where there appeared to be objections to the award which were pleadable to any actions brought upon it, though they were not such as to make them set it aside on motion. *In re Cargay*, 2 D. & R. 222; *S. C. (in error)*, 2 Bing. 199; 9 Moore, 38, and *McCl. 367*; 13 Price, 639. *And see Cargay v. Aitcheson*, 3 D. & R. 433; 2 B. & C. 176.

The refusal by the court to enforce an award by attachment, does not decide on the validity of the award, considered as the subject of an action. *Jackson v. Clarke*, *McCl. & Y.* 900; 13 Price, 28.

The court granted an attachment for non-performance of an award, and would not drive the plaintiff to his action on the submission bond, on an affidavit that the arbitrators, after having appointed one umpire who refused to act, appointed another, who accepted the authority; but he

being objected to by the defendant, the arbitrators each proposed another, but could not agree on the person to be substituted, and another was not substituted, though the respective attorneys agreed on a third person; in consequence of which the umpire objected to was called on to proceed, and made his award within time. *Oliver v. Collings*, 11 East, 367.

An attachment ordered to issue for non-performance, where it appeared that the excuses made were frivolous and vexatious. *Lodge v. Porthouse*, *Lofft*, 388.

Where one only of two defendants who attended an arbitrator under a reference by order of Nisi Prius, made the order a rule of court, and demanded costs from the plaintiff under a taxation to him only:—Held, that an attachment would not lie for the non-payment of the costs to the one defendant only. Semble, that the master had not power to tax the costs separately to the several defendants. *Dickins v. Smith*, 8 D. & R. 285; *S. C. nom. Dickins v. Jarvis*, 5 B. & C. 528.

If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment against the other party, if he refuse to pay his moiety. *Hicks v. Richardson*, 1 B. & P. 93.

So, where the arbitrator awarded a sum together with the costs of the award, the party to whom the money was awarded was allowed, upon taking out the award, and paying the whole costs, to have an attachment against the defendant for the sum awarded and his share of the costs. *Stokes v. Lewis*, 2 Smith, 12.

The court will grant an attachment for the non-payment on demand of money awarded, after an action on the award commenced and discontinued, where the action was not pending at the time of demand. *Higgins v. Willes*, 3 M. & R. 383.

*Previous Demand.*—An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made; even though the time and place for payment of the money be specified in the award. *Brandon v. Brandon*, 1 B. & P. 394.

But personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he has not been personally served with such award and rule. *In re Bower*, 1 B. & C. 264.

If the party in whose favour an award is made, demand more than is due to him, he cannot have an attachment for the non-payment on that occasion of the sum which is due. *Strutt v. Rogers*, 7 Taunt. 213; 2 Marsh. 524.

Where an arbitrator awarded that A. should fulfil an agreement for the purchase of land of B., and should pay the purchase money, on B. conveying the land with a good title, the court of C. P. refused to grant an attachment against A. for non-performance, on an affidavit that B. had



required A. to pay the money, assuring him of his readiness to convey with a good title, without further stating that B. had tendered a conveyance executed. *Standly v. Hemington*, 2 Marsh. 276; 6 Taunt. 561.

On demanding the execution of a deed, directed by an arbitrator, where such demand is made by a third person, it is not necessary that such person should be empowered by deed or power of attorney, in order to enable the party to have an attachment, though it may be so where the demand is of money directed to be paid to the party. *Kenyon v. Grayson*, 2 Smith, 61.

Though a party is at one time in contempt for not paying costs which have been duly demanded; yet, if, before an attachment be moved for, the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment. *Spivy v. Webster*, 1 Dowl. P. C. 696.

The court will not grant an attachment for the non-performance of an award, the performance of which is demanded by a third person acting under a power of attorney, unless the subscribing witness makes an affidavit of its execution, and a copy of the power of attorney is left with the party upon whom the demand is made. *Laugher v. Laugher*, 1 Dowl. P. C. 284; 1 C. & J. 398; 1 Tyr. 353.

An attachment for contempt in not paying money pursuant to the prothonotary's allocatur on demand made by a third person, who acted under a power of attorney, may be supported on an affidavit stating that he shewed the original rule and allocatur to the party charged, at the time of the demand; and it seems that it was not necessary to shew him the power of attorney. *Sed quære. Bass v. Maitland*, 8 Moore, 44.

Held, in K. B. that the application could not be supported on an affidavit of demand of the money by a clerk, without shewing a power of attorney. *Hartley v. Barlow*, 1 Chit. 229.

In the court of Exchequer, affidavits whereon to ground a rule nisi for an attachment against a defendant for non-payment of money and costs pursuant to an award, and the master's allocatur, where the demand has been made by a third person, under a power of attorney, should state, that the original power was shewn to the defendant at the time the demand was made. *Jackson v. Clarke*, 13 Price, 208; M'Clell. 72.

#### 5. For other Things.

An attachment lies in C. P. to compel a plaintiff to produce deeds. *Bateman v. Phillips*, 4 Taunt. 157.

Where an order was made on the defendant to produce indentures of apprenticeship; and it appeared by affidavit that he never had them in his possession, and that, although he had made diligent search for them, he had been unable to find any trace of them:—Held, that he was not liable to an attachment for their non-production. *Cooke v. Thesswell*, 2 Moore, 513; 8 Taunt. 131.

The court of Exchequer will not on motion discharge a defendant from custody under an

attachment for contempt in not producing deeds, papers, &c. before the master, on an affidavit that the defendant has not, nor ever had, any such in his possession or within his power. *Hurd v. Partridge*, 12 Price, 689.

Such an application refused with costs. *Id.*

The course is to have an affidavit of the fact in the master's office, when, on obtaining his certificate, the defendant will be discharged, as a matter of course. *Id.*

It was made part of the terms of a subsequent successful application for the defendant's discharge, that he should pay the costs of that application, and of the previous irregular motion. *Id.*

Where a defendant is served with an order of court, forthwith to re-instate premises belonging to the plaintiff, an attachment cannot issue against him for disobedience of such order, unless a personal demand of performance is made on the party at the time of the service. *Dodding v. Hudson*, 8 Moore, 510; 1 Bing. 410.

But an attachment was afterwards issued against such defendant for not commencing such re-instatement, in compliance with the order, within four days after it was served, although it would have taken him a much longer time to re-instate the premises. *Id.*

An attachment was granted against one for threatening a prosecution with danger of being hanged, but refused against the defendant who indicted the prosecutor for perjury in his affidavit, on which an information was granted. *Res v. Carroll*, 1 Wils. 75.

## II. PRACTICE ON.

### 1. Rule and Writ.

*When Rule absolute.*—An attachment is absolute in the first instance, on a return by the sheriff; but on affidavits, the party must have an opportunity of answering. *Adamson v. Gibson*, 1 Tidd's Prac. 169.

No rule for an attachment to be absolute in the first instance, except for non-payment of costs upon the prothonotary's allocatur. *Chesnut v. Smart*, 1 B. & P. 477; *S. P. Anon.* 1 Tidd's Prac. 486.

But even in that case the rule is only a rule nisi, when the allocatur is founded on an award. *Thompson v. Billingsby*, 2 Chit. 57; *S. P. Gifford v. Gifford*, Forrest, 80.

On motion for an attachment for not paying money under a previous order of the court of Exchequer, on a party who has been called on by the former rule, to shew cause why that money, and the costs of such application, should not be paid, and against which order no cause has been shewn: the rule for the attachment will be granted absolutely in the first instance. *King v. Price*, 1 Price, 341.

An attachment is absolute in the first instance for non-delivery of possession pursuant to a rule of court. *Devies d. Povey v. Doe*, 2 W. Black, 892.

Nor against a member of parliament. *Cutmur v. Knatchbull (Bart.)*, 7 T. R. 448.

An attachment was issued against a party for non-performance of an award, which had been made a rule of the court of C. P.; although such party resided out of the jurisdiction of that court, as it was in the nature of a civil process; and the court were not bound to inquire whether it could be served with effect or not. *Hopcraft v. Fermor*, 8 Moore, 424; 1 Bing. 378.

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So, if a stranger to the cause become, by rule of court, party to a reference made in the cause before any jury is sworn, and if, after the award made, but before judgment, one of the parties to the cause die, though the cause abate, the rule of court is not vacated as to the stranger, but an attachment shall go thereon for non-performance of the award. *Id.*

The court will not grant an attachment for the non-payment of costs payable under an award, at the instance of the personal representative of a deceased party, to which party they were to have been paid. *Rex v. Maffey*, 1 Dowl. P. C. 538.

Where a submission to arbitration between A. and B., the parties on the record, had been made a rule of court, and the award not having been made in time, the dispute had been referred to a second arbitrator, by B. and C., who were the real parties in the suit:—Held, that no attachment could issue against B. for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*, 2 T. R. 643.

And as the court had no jurisdiction in this case they could not go into the merits, though B. consented to waive the objection. *Id.*

*For what granted.*—The court refused to grant an attachment where there appeared to be objections to the award which were pleadable to any actions brought upon it, though they were not such as to make them set it aside on motion. *In re Cargey*, 2 D. & R. 222; *S. C. (in error)*, 2 Bing. 199; 9 Moore, 38, and *McCl.* 367; 13 Price, 639. And see *Cargey v. Aitchison*, 3 D. & R. 433; 2 B. & C. 176.

The refusal by the court to enforce an award by attachment, does not decide on the validity of the award, considered as the subject of an action. *Jackson v. Clarke*, *McCl.* & Y. 200; 13 Price, 28.

The court granted an attachment for non-performance of an award, and would not drive the plaintiff to his action on the submission bond, on an affidavit that the arbitrators, after having appointed one umpire who refused to act, appointed another, who accepted the authority; but he

being objected to by the defendant, the arbitrators each proposed another, but could not agree on the person to be substituted, and another was not substituted, though the respective attorneys agreed on a third person; in consequence of which the umpire objected to was called on to proceed, and made his award within time. *Oliver v. Collinge*, 11 East, 367.

An attachment ordered to issue for non-performance, where it appeared that the excuses made were frivolous and vexatious. *Lodge v. Porthouse*, *Lofft*, 388.

Where one only of two defendants who attended an arbitrator under a reference by order of Nisi Prius, made the order a rule of court, and demanded costs from the plaintiff under a taxation to him only:—Held, that an attachment would not lie for the non-payment of the costs to the one defendant only. Semble, that the master had not power to tax the costs separately to the several defendants. *Dickins v. Smith*, 8 D. & R. 285; *S. C. nom. Dickins v. Jervis*, 5 B. & C. 528.

If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment against the other party, if he refuse to pay his moiety. *Hicks v. Richardson*, 1 B. & P. 93.

So, where the arbitrator awarded a sum together with the costs of the award, the party to whom the money was awarded was allowed, upon taking out the award, and paying the whole costs, to have an attachment against the defendant for the sum awarded and his share of the costs. *Stokes v. Lewis*, 2 Smith, 12.

The court will grant an attachment for the non-payment on demand of money awarded, after an action on the award commenced and discontinued, where the action was not pending at the time of demand. *Higgins v. Willes*, 3 M. & R. 382.

*Previous Demand.*—An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made; even though the time and place for payment of the money be specified in the award. *Brandon v. Brandon*, 1 B. & P. 394.

But personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he has not been personally served with such award and rule. *In re Bower*, 1 B. & C. 264.

If the party in whose favour an award is made, demand more than is due to him, he cannot have an attachment for the non-payment on that occasion of the sum which is due. *Strutt v. Rogers*, 7 Taunt. 213; 2 Marsh. 524.

Where an arbitrator awarded that A. should fulfil an agreement for the purchase of land of B., and should pay the purchase money, on B. conveying the land with a good title, the court of C. P. refused to grant an attachment against A. for non-performance, on an affidavit that B. had

required A. to pay the money, assuring him of his readiness to convey with a good title, without further stating that B. had tendered a conveyance executed. *Steadly v. Hemington*, 2 Marsh. 276; 6 Taunt. 561.

On demanding the execution of a deed, directed by an arbitrator, where such demand is made by a third person, it is not necessary that such person should be empowered by deed or power of attorney, in order to enable the party to have an attachment, though it may be so where the demand is of money directed to be paid to the party. *Kensyon v. Grayson*, 2 Smith, 61.

Though a party is at one time in contempt for not paying costs which have been duly demanded; yet, if, before an attachment be moved for, the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment. *Spivy v. Webster*, 1 Dowl. P. C. 696.

The court will not grant an attachment for the non-performance of an award, the performance of which is demanded by a third person acting under a power of attorney, unless the subscribing witness makes an affidavit of its execution, and a copy of the power of attorney is left with the party upon whom the demand is made. *Laugher v. Laugher*, 1 Dowl. P. C. 284; 1 C. & J. 388; 1 Tyr. 352.

An attachment for contempt in not paying money pursuant to the prothonotary's allocatur on demand made by a third person, who acted under a power of attorney, may be supported on an affidavit stating that he shewed the original rule and allocatur to the party charged, at the time of the demand; and it seems that it was not necessary to shew him the power of attorney. *Sed quere. Bass v. Mailand*, 8 Moore, 44.

Held, in K. B. that the application could not be supported on an affidavit of demand of the money by a clerk, without shewing a power of attorney. *Hartley v. Barlow*, 1 Chit. 229.

In the court of Exchequer, affidavits whereon to ground a rule nisi for an attachment against a defendant for non-payment of money and costs pursuant to an award, and the master's allocatur, where the demand has been made by a third person, under a power of attorney, should state, that the original power was shewn to the defendant at the time the demand was made. *Jackson v. Clarke*, 13 Price, 208; 1 McClell. 72.

#### 5. For other Things.

An attachment lies in C. P. to compel a plaintiff to produce deeds. *Bateman v. Phillips*, 4 Taunt. 157.

Where an order was made on the defendant to produce indentures of apprenticeship; and it appeared by affidavit that he never had them in his possession, and that, although he had made diligent search for them, he had been unable to find any trace of them:—Held, that he was not liable to an attachment for their non-production. *Cooke v. Tanswell*, 2 Moore, 513; 8 Taunt. 131.

The court of Exchequer will not on motion discharge a defendant from custody under an

attachment for contempt in not producing deeds, papers, &c. before the master, on an affidavit that the defendant has not, nor ever had, any such in his possession or within his power. *Hurd v. Partridge*, 12 Price, 689.

Such an application refused with costs. *Id.*

The course is to have an affidavit of the fact in the master's office, when, on obtaining his certificate, the defendant will be discharged, as a matter of course. *Id.*

It was made part of the terms of a subsequent successful application for the defendant's discharge, that he should pay the costs of that application, and of the previous irregular motion. *Id.*

Where a defendant is served with an order of court, forthwith to re-instate premises belonging to the plaintiff, an attachment cannot issue against him for disobedience of such order, unless a personal demand of performance is made on the party at the time of the service. *Dodding v. Hudson*, 8 Moore, 510; 1 Bing. 410.

But an attachment was afterwards issued against such defendant for not commencing such re-instatement, in compliance with the order, within four days after it was served, although it would have taken him a much longer time to re-instate the premises. *Id.*

An attachment was granted against one for threatening a prosecution with danger of being hanged, but refused against the defendant who indicted the prosecutor for perjury in his affidavit, on which an information was granted. *Res v. Carroll*, 1 Wils. 75.

## II. PRACTICE ON.

### 1. Rule and Writ.

[When Rule absolute.]—An attachment is absolute in the first instance, on a return by the sheriff; but on affidavits, the party must have an opportunity of answering. *Adamson v. Gibson*, 1 Tidd's Prac. 169.

No rule for an attachment to be absolute in the first instance, except for non-payment of costs upon the prothonotary's allocatur. *Cheant v. Smart*, 1 B. & P. 477; *S. P. Anon.* 1 Tidd's Prac. 486.

But even in that case the rule is only a rule nisi, when the allocatur is founded on an award. *Thompson v. Billingsby*, 2 Chit. 57; *S. P. Gifford v. Gifford*, Forrest, 80.

On motion for an attachment for not paying money under a previous order of the court of Exchequer, on a party who has been called on by the former rule, to shew cause why that money, and the costs of such application, should not be paid, and against which order no cause has been shewn: the rule for the attachment will be granted absolutely in the first instance. *King v. Price*, 1 Price, 341.

An attachment is absolute in the first instance for non-delivery of possession pursuant to a rule of court. *Davies d. Povey v. Doe*, 2 W. Black, 892.

The rule for an attachment for non-payment of costs pursuant to the master's allocatur is absolute in the first instance, although four years have elapsed since the taxation. *Rex v. C. D. 1* Chit. 723.

The rule for an attachment for non-payment of costs, between attorney and client, pursuant to the master's allocatur, is nisi in the first instance. *Bray v. Yates*, 1 Dowl. P. C. 459.

The rule for an attachment, for not accounting to the Legacy Office, is a rule nisi, which makes itself absolute by a certain day, unless in the mean time cause be shewn. *In re Vivian*, 1 C. & J. 409.

In some cases, the rule to shew cause why an attachment should not be granted, will be discharged with costs. *Jackson v. Clarke*, MClel. & Y. 200; 13 Price, 28.

**Writ.**—An attachment must be directed to elisors, when against the coroners for not attaching the sheriff. *Andrews v. Sharp*, 2 W. Black. 911; *S. P. Rex v. Peckham*, 2 W. Black. 1218.

An attachment is not in the nature of an original, and therefore does not require fifteen days between the teste and return. *Anon. Lofft*, 273.

An attachment will be irregular if it be for more than the precise sum allowed, however small the difference. *Daniel v. Bishop*, MClel. 61; 13 Price, 129.

**When to be moved for.**—Whenever an attachment is absolute in the first instance, it may be moved for on last day of term. *Anon. Lofft*, 301.

But not where there is only a rule nisi. *Anon. 3 Smith*, 118.

An attachment cannot be moved for on the last day of term, except for non-payment of costs, or against a sheriff for not returning a writ. *Anon. 1 Burr*. 651.

An attachment for non-payment of costs may be moved for on the last day of term. *Rex v. York*, 5 Burr. 2686.

The ten days after demand of costs under a recognizance, taken by virtue of stat. 5 & 6 W. & M. c. 11, s. 2 & 3, must elapse, before an attachment can be granted against the party refusing to pay them. *Rex v. Ireland*, 3 T. R. 512.

## 2. Affidavits.

**How intitled.**—Affidavits for attachments in civil suits are proceedings on the civil side of the court until the attachments issue, and are to be intitled with the names of the parties; as soon as the attachments issue, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. *Wood v. Webb*, 3 T. R. 253.

And affidavits to set aside attachments which have been granted (though not issued), must be intitled in the name of the king, &c. *Rex v. Middlesex (Sheriff)*, 7 T. R. 439, 527.

Which title is sufficient, without naming the cause, although it is convenient to do so. *Rex*

*v. Middlesex (Sheriff)*, 5 B. & C. 399; 8 D. & R. 149.

So, the affidavits made in answer to a rule nisi for an attachment, must be intitled on the civil side of the court, in the cause out of which the motion arises; but after the rule is granted, the affidavits must be intitled on the crown side. *Whitehead v. Firth*, 12 East, 165.

Affidavits in support of a rule for an attachment against the sheriff for not bringing in the body, must be intitled with the names of all the parties to the suit; and though the affidavits correspond with the rule for the attachment; yet, if all the parties be not inserted in the affidavits, the court will set aside the attachment. *Etherington v. Kemp*, 1 Chit. 727, n.

Where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award need not be intitled in any cause, but the affidavits in answer must. *Bevan v. Bevan*, 3 T. R. 601.

A rule nisi for an attachment for non-payment of money pursuant to an award was intitled "in the matter of A. and B," but the affidavit of service was intitled, "between A. B. plaintiff and C. D. defendant:"—Held irregular, as the affidavit should have been intitled the same as the rule. *In re Houghton*, 2 M. & P. 452.

**Contents of Affidavits generally.**—An affidavit to support a rule for an attachment for a contempt, must state that the defendant was served personally with a copy of the rule, and that the original was shewn to him at the same time. *Rex v. Smithies*, 3 T. R. 351; *S. P. 7 D. & R. 612*; *Reg. Gen. K. B., C. P., Ex., H. T., 2 W. 4*.

On a motion for an attachment for filing a bill in equity contrary to an order of reference, an affidavit that notice of the motion to make the order a rule of court had been served on the party's servant, &c., is not sufficient. *Hilton v. Hopwood*, 1 Marsh. 66.

**In cases of Awards.**—An affidavit, upon which a rule for an attachment for non-payment of costs pursuant to an award made under a rule of court and the master's allocatur is obtained, must state the due execution of the award, the service of a copy of the award, and of the rule and allocatur on the defendant, the due execution of the letter of attorney, a demand of the costs, and refusal to pay. *Gifford v. Gifford*, Forrest, 80.

The court refused an attachment for non-performance of an award, where the award was made out of the time originally allowed, but authority had been reserved to the arbitrator to enlarge the time, and though the award stated upon the face of it that the arbitrator had enlarged the time; because there was no affidavit of that fact, and it did not appear to them judicially, that the arbitrator had any authority to make the award, without which the court had no jurisdiction. *Moule v. Sewell*, 15 East, 99, n.

Where an award appears to have been made out of the time originally given to the arbitrator by the rule of court, but which rule reserved to him the power of enlarging the time, it is not enough, for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement of the time within which the award was made, when served with the rule for the attachment. *Davis v. Vass*, 15 East, 97.

The arbitrator had power to enlarge the time for making his award by indorsement on the order of reference; that order, together with two indorsements for enlarging the time, was made a rule of court:—Held, on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made. *Dickins v. Jarvis*, 5 B. & C. 528: S. C. nom. *Dickins v. Smith*, 8 D. & R. 285.

Where a cause is referred by a judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a judge's order; on moving for an attachment for not performing the award, it must be shown that the order enlarging the time was made by consent. *Helden v. Glasscock*, 5 B. & C. 390; 8 D. & R. 151.

Where arbitrators have power to enlarge the time for making their award, and have enlarged it, and made their award in the additional time, in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, and that the defendant has been personally served with notice of those facts. *Wohlenberg v. Lagermen*, 6 Taunt. 254; 1 Marsh. 579.

Seemingly, that the affidavit for an attachment for non-performance of an award, must, contrary to the usual practice, always state the time of execution of the award. *Id.*

It is necessary that the affidavit of the due execution of an award should state that the deponent on a certain day saw the arbitrators execute it, in order to shew that it was executed before the arbitrators were functi officio. It is not sufficient to state merely that he saw them execute an award bearing date on such a day. *Harvey v. Harvey*, Tidd's Prac. Forms, 13.

### 3. Service of Rule.

The rule nisi for an attachment must be personally served. *Denman v. Golding*, 2 Tidd's Prac. 981.

Even when against an attorney. *In re* ——— (*Gen.*), 1 D. & R. 529.

And the affidavit must shew it. *Anon.* 2 Chit. 66.

The court refused to order that service at the dwelling-house should be deemed good service of a rule for an attachment, upon an affidavit that the defendants were "shy and difficult to be

met with," and that the deponent had tried all the means in his power, for two months, before he could serve the defendant personally with the award, for the non-performance of which the attachment was sought to be enforced. *Garland v. Goulden*, 2 Y. & J. 69.

Serving an order of the court of Exchequer for an attachment on the servant of the party, was held insufficient. *Anon.* 2 Price, 4.

The court will not grant a rule, that service of an attachment on the defendant's attorney shall be sufficient, though it be sworn that repeated attempts have been made to serve him personally with a copy of the award, but he was not to be found, and although it is suggested that the defendant keeps out of the way to avoid being served. *Read v. Fore*, 1 Chit. 170.

The court will not grant a rule to dispense with the personal service of the master's allocatur for costs, with a view to an attachment, on an affidavit that the tenant keeps out of the way to avoid being served. *Anon.* 1 Chit. 503.

Before an attachment will be granted for non-payment of costs, a copy of the rule, with the officer's allocatur thereon, must be personally served on the party liable; and at the same time the original rule should be shewn to him, and a demand of payment made. *Pope v. Smith*, and *Hubbard v. Horton*, 2 Tidd's Prac. 1029.

And before he is in contempt for the non-payment, he must have refused payment to the principal, and not to a mere clerk. *Hartley v. Barlow*, 1 Chit. 229.

An affidavit of the service of the master's allocatur, on the taxation of costs of a prosecution against a pariah, in order to ground a motion for an attachment against those on whom it was served, must state that they are the same persons as were defendants in the prosecution. *Rex v. Kendal*, 1 Chit. 650, n.

An affidavit of the service of a rule with an allocatur of costs, and a demand thereof on or about such a day, is insufficient to obtain an attachment for non-payment of costs. *Wadham v. Brett*, 2 Wils. 227.

An affidavit to support a rule for an attachment for not paying money pursuant to the master's allocatur must shew that, at the time of serving the copy, the original was shewn to the defendant. *Reid v. Deer*, 7 D. & R. 612.

A rule nisi for an attachment for non-payment of money pursuant to the master's allocatur cannot be served on a Sunday. *M'Ilham v. Smith*, 8 T. R. 86.

The Court of C. P. will not open the rule for an attachment on the mere affidavit of the party that he has not been served; at least unless he shew some mistake in the service. *Hopley v. Granger*, 1 N. R. 256.

### 4. Bail.

An action on the case on the stat. 23 Hen. 6, c. 9, will not lie against a sheriff for refusing to take bail on an attachment out of Chancery; that

statute referring only to process in courts of common law. *Studd v. Acton*, 1 H. Black. 468.

For although a sheriff may, if he chooses, take a bail bond on an attachment out of Chancery, he is not compellable to take bail thereupon. *Morris v. Hayward*, 6 Taunt. 569; 2 Marsh. 280.

The sheriff may recover on a bail bond so taken. *Id.*

But such bail bond is not assignable under the statute 4 Anne, c. 16, s. 20. *Miller v. Palfreyman*, 4 B. & Adol. 146.

The statute 23 Hen. 8, c. 9, does not authorize a sheriff to take a bail bond from a defendant who is in custody under an attachment for non-payment of costs, because such a process is in the nature of an execution. *Phelps v. Barrett*, 4 Price, 23.

No arrest to be made on attachments for not appearing to a subpoena ad respondendum, unless for a bailable cause of action, and the writ be duly marked and indorsed for bail. *Reg. Gen. T. T.* 1 Will. 4, Ex., 1 Price's P. C. 31; 1 Tyr. 519.

A defendant arrested, and in the county jail, in custody of the sheriff, on a writ of attachment for not appearing to a subpoena ad respondendum, discharged by order of court, on a rule to shew cause made absolute, (the cause of action being a debt under 20*l.*), on terms of entering a common appearance to the writ of subpoena, and undertaking not to bring any action. The attachment set aside for irregularity, with costs. *Worboys v. Adkins*, 1 Price's P. C. 44.

It is the duty of the sheriff to execute a writ of attachment, issued for not appearing to a subpoena ad respondendum; and he must return the writ as having been executed (in whatever manner), or that the party is not found in his bailwick. *Masters v. Cooper*, 1 Price's P. C. 8.

Where a defendant has been held to bail upon an attachment for contempt, in not appearing to a subpoena ad respondendum, the Court of Exchequer will not grant a messenger to bring up the body, if bail have been given to the sheriff; because the plaintiff has a remedy on the bail bond, (although the penalty (40*l.*) be, in almost all instances, very inadequate to the occasion,) if the condition should be broken. *Birdwood v. Hart*, 6 Price, 32.

Two days' notice of bail on an attachment is not required, nor any justification of such bail. *Reg. v. Hall*, 2 W. Black. 1110.

A defendant may be admitted to bail, and sworn to answer interrogatories upon an attachment for contempt, although a defective notice of bail have been served on the prosecutor. *In re ———*, 4 D. & R. 393.

### 5. Interrogatories.

Where attachments have issued in order to compel any person to answer upon interrogatories, the name of the cause shall be inserted in the list of motions to come on peremptorily in the ensuing terms. *Reg. Gen. K. B. H. T.* 34 Geo. 3, 5 T. R. 547; *Id.* 723.

Interrogatories filed and exhibited to persons, against whom attachments have been ordered, must be signed by counsel. *Reg. Gen. K. B.*, M. T. 34 Geo. 3, 5 T. R. 474.

A defendant under attachment must answer interrogatories; he cannot come in and confess the contempt before he does so. *Reg. v. Edwards*, 4 Burr. 2105; 1 W. Black. 637.

On an attachment for rescue, the defendant may submit to a fine without answering interrogatories. *Reg. v. Elkins*, 1 W. Black. 640; 2 Burr. 2129.

But where a defendant is brought up, it is the practice of the court to put interrogatories to him, although he do not deny the charge in the affidavits, unless the prosecutor waives putting them. *Reg. v. Horsley*, 5 T. R. 362.

The report of the prothonotary is not conclusive against parties who have given bail to answer interrogatories before him, but they may except to such report on any material point; where, therefore, after the prothonotary had made his report that the parties were in contempt, the interrogatories not having been sufficiently answered, and he was directed to inspect an account-book belonging to one of them, which had been accidentally omitted to be delivered to him in the first instance, and which tended to support the answers given by the parties: the Court of C. P. refused to allow the clerk, who made the entries in such book, to be examined by the prothonotary, on an application made by the prosecutor for that purpose. *In re Isaacson*, 8 Moore, 214; 1 Bing. 272.

Nor would they allow affidavits to be received, that two of the parties were too poor to take office copies of the interrogatories filed against them. *Id.*

The report of the master of the crown office, that a defendant and his attorney were in contempt for not obeying an award and filing a bill, is to be taken as a conviction; and on the defendant's being brought up for judgment, the court will not receive affidavits in denial of the contempt, but only in mitigation of punishment. *Coulson v. Graham*, 2 Chit. 57.

The master's report upon interrogatories of contempt cannot be moved for on the last day of term, without the previous leave of the court, unless upon extraordinary cases, and personal service of notice. *Reg. v. Wheeler*, 1 W. Black. 311.

### III. PROCEEDINGS UNDER.

Taking an unreasonable quantity of goods under process of attachment does not make the officer a trespasser ab initio. *Moore v. Taylor*, 5 Taunt. 70.

On attachment of goods, the officer cannot legally continue in possession of the defendant's house or keep the goods therein for a long and unreasonable time; but must remove them to a place of safe custody; else he is a trespasser ab initio. *Read v. Harrison*, 2 W. Black. 1218.

## ATTAINDER.

A person attainted can be heard as a suitor in a court of justice only for the direct purpose of reversing the attainder, not in prosecution of a civil right. *Ex parte Bullock*, 14 Ves. jun. 452; *S. C. nom. Rex v. Bullock*, 1 Taunt. 82; 2 Leach, C. C. 966.

A civil action will lie against one attainted of treason. *Ramsay v. McDonald*, 1 W. Black. 30; *S. C. nom. Ramsden v. Macdonald*, 1 Wils. 217.

And quere, whether a commission of bankruptcy cannot issue against a person attainted, as he may be sued in a civil action. *Id.*

By attainder all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and, therefore, attainder may be well pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder. *Bullock v. Dodds*, 2 B. & A. 258. *And see Lambert v. Taylor*, 6 D. & R. 188; 4 B. & C. 138.

By the statutes 4 Geo. 1, c. 11, and 8 Geo. 3, c. 15, the mere transportation of an offender to a place appointed, does not amount to an actual pardon, but he still remains in the situation of an attainted felon, until he has served the period of transportation; and when he returns by the permission of the governor of New South Wales, under the provisions of the 30 Geo. 3, c. 47, he is only to have the same advantage as if his Majesty had signified his intention of pardoning under the sign manual, and is to have his name inserted in the next general pardon under the great seal; and a return under such circumstances is not sufficient to restore him to all his rights and privileges until such pardon be passed under the great seal. *Id.*

Personal property not belonging to a felon, convicted of simple larceny, and sentenced to transportation, at the time of conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown. *Roberts v. Walker*, 1 Russ. & Myles, 752.

A grant of a liberty in a manor of goods and chattels of tenants in such manor attainted of felony, is confined to the goods, &c. of felons, being locally situate within the manor, and does not pass goods, &c. lying out of it. *Rex v. Capner*, 5 Price, 217.

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### I. ARTICLED CLERKS.

#### 1. *Persons contracting.*

*Statutes.*—By 2 Geo. 2, c. 23, no person is to act as an attorney or solicitor unless he has served a clerkship of five years to an admitted attorney or solicitor, under a contract in writing; who is not to have more than two clerks at the same time; except that prothonotaries and secondaries may have three.

By 22 Geo. 2, c. 46, s. 7, no person shall take a clerk after discontinuance or leaving off business, or during such time as he shall not actually practise.

By s. 16, sworn clerks in the six clerks' office, and persons bound to them, may be admitted solicitors.

By 1 & 2 Geo. 4, c. 48, s. 1, (amended by 3 Geo. 4, c. 16), persons who shall have taken at Oxford, Cambridge, or Dublin, a degree of bachelor of arts or of law within six or eight years after matriculation, need only serve a clerkship of three years, if commenced within four years after graduation; the qualification as to the time within which the degree must be taken not to apply to persons who had taken degrees at the time of passing the act 7 Geo. 4, c. 44, s. 5.

By s. 2, persons bound for five years may serve part of that time, not exceeding one year, as pupil with a practising barrister, or certificated special pleader.

*Who may be Articled Clerks.*—A person who holds a situation, and receives a salary from government, as surveyor of assessed taxes, is not sui juris to enter into a contract for service as an articled clerk to an attorney; and where a person so situated was articled to an attorney, and nominally served him for five years, retaining his situation under government all the time, and then commenced practising as an attorney, the court ordered him to be struck off the roll. *In re Tay-*

*lor*, 6 D. & R. 428; 4 B. & C. 341; 5 B. & A. 538.

An attorney of K. B. having by mere collusion, and with intent to secure the business arising from the prisoners, taken one of the turnkeys of the King's Bench prison for his articled clerk, the articles were cancelled in court. *Fraser's case*, 1 Burr. 291.

*Who may take Clerks.*—No attorney, retained or employed as a writer or clerk by any other attorney, shall, during the time of such employ, take or have any clerk under articles; and no service to any such attorney shall be deemed good service. *Reg. Gen. K. B.*, T. T. 31 Geo. 3, 4 T. R. 379.

#### 2. *Service under Articles.*

The statutes 2 Geo. 2, c. 23, s. 5, and 22 Geo. 2, c. 46, s. 8, require the clerk to continue during the whole period specified in the contract in the service of his master, and to be actually employed by him or his agent in the proper business of an attorney or solicitor; and the latter statute requires an affidavit of that fact to be made before admission.

By 6 Geo. 4, c. 46, no person who has regularly served his clerkship is disqualified from being admitted by reason of the master having omitted to take out his annual certificate.

Under the stat. 2 Geo. 2, c. 23, the clerk must actually serve the five years under articles; and the statute is not complied with by the clerk serving part of the time with another attorney with his master's consent, and the rest of the time with his master. *Ex parte Hill*, 7 T. R. 456.

It appearing upon affidavit, that, during more than three of the five years for which he was bound, the service of a clerk had been given to the attorney to whom he was articled, and that he afterwards bound himself to another attorney and served him for two years; it was held, that his service under the first articles could not be coupled with his service under the second. *In re Taylor*, 4 B. & C. 341; 6 D. & R. 428; 5 B. & A. 538.

An articled clerk performing all his master's business, may, at leisure hours, work for wages with another attorney. *Ex parte Blunt*, 2 W. Black. 764.

An articled clerk who had served under the articles two years and a half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted, was allowed by the court to be admitted an attorney. *Ex parte Matthews*, 1 B. & Adol. 160.

If, during the five years, an articled clerk has been absent two months, by consent of his master, at his father's house, and at the end of the five years has served two additional months, he will be entitled to admission. *Ex parte Hubbard*, 1 Dowl. P. C. 438.

No person who shall enter into articles with an attorney shall be at liberty to serve the agent of such attorney under such articles for a longer



time than one year of his clerkship; and any such service beyond that time shall not be deemed good service. *Reg. Gen. K. B.*, T. T. 31 Geo. 3, 4 T. R. 379.

### 3. Assignment and Discharge of Clerk.

By 2 Geo. 2, c. 23, s. 12, and 22 Geo. 2, c. 46, s. 9, on the death of the master, or his leaving off practice, or when the contract is vacated by mutual consent, or when the clerk is legally discharged by rule or order of court, before the expiration of the five years, the clerk may be assigned to any other attorney or solicitor by contract in writing, and service under it shall be as effectual as if the clerk had continued under the original contract.

By statute 34 Geo. 3, c. 14, s. 8, the words are more extensive—"or on any other event."

The court refused to compel an attorney to assign his clerk, who had been guilty of crim. con. with his master's wife, even after a promise to assign. *Ex parte Briggs*, 1 Tidd's Prac. 63.

A rule nisi can only be granted to discharge an articulated clerk, where the attorney had become bankrupt and absconded; and the rule must be served at the last place of abode of the attorney to the commission, and stuck up in the King's Bench Office. *Anon.* 2 Chit. 62: *S. P. Anon.* 1 Chit. 558, n.

Since the 22 Geo. 2, c. 46, the five years' service need not be continuous. *Ex parte Hill*, 2 W. Black. 957.

An articulated clerk, who has served part of his clerkship with an attorney who died before the clerkship was completed, is at liberty, after an interval of six years from that time, to serve the remainder of his clerkship with another attorney, with a view to his admission. *In re Smith*, 1 D. & R. 14.

But where a clerk had served part of his time with a master who afterwards left this country, and before his articles were assigned to another master, an interval of ten months had elapsed, during which time he did not serve under any articles, but served the remainder of the time specified under the assignment; the court would not allow him to be admitted until he had served the remaining ten months under new articles. *Ex parte Rowe*, 2 Chit. 61.

A gentleman who had taken the degree of bachelor of arts at Cambridge, articulated himself to an attorney for three years, but served only two months, and abandoned the contract. After the expiration of the three years mentioned in the original articles, he was assigned to another attorney, with whom he served two years and ten months:—Held, that as the original articles had expired previously to the assignment, the service under the assignment was not a service within the terms of the stat. 1 & 2 Geo. 4, c. 48, s. 1. *Ex parte Unthank*, 2 M. & P. 453.

### 4. Inrolment of Articles.

The 22 Geo. 2, c. 46, requires an affidavit of the execution of articles to be made, and filed within

three months; and a book to be kept for entering the names and places of abode of the attorney and clerk.

The stat. 34 Geo. 3, c. 14, s. 2, requires that the indentures of an attorney's clerkship shall be inrolled or registered with the proper officer of the court, together with an affidavit of the time of executing the same, before the clerk shall be admitted to practise as an attorney; and enacts, that unless the indentures are inrolled or registered within six months next after execution, together with the affidavit of the time of execution of such contract, the service shall be deemed to commence from the time of inrolment or registry only.

Where a clerk had been articulated to an attorney in the country, and the indentures had been sent to London to be inrolled in the master's office, pursuant to the statute; and after the clerkship had been served, no trace of the indentures could be discovered in that office; the court refused to admit him, although it appeared from the books of the town agent, that a clerk of the latter had tendered the fees payable in the master's office upon inrolment, contemporaneously with the time when the inrolment was supposed to have taken place. *Ex parte Pilgrim*, 2 D. & R. 429; 1 B. & C. 264.

So, in C. P. every person (not before an attorney or solicitor), must, before his admission, file his articles with the secondary, together with an affidavit of the execution thereof, and of due service under the same. *Reg. Gen. C. P.*, T. T. 37 Geo. 3, 1 B. & P. 90.

The court will allow a copy of articles of clerkship to an attorney to be inrolled, where the original articles are lost; and the party may be afterwards admitted, on production of the copy of the articles, and the usual affidavits and notices. *Ex parte Clarke*, 3 B. & A. 610. And see 2 B. & A. 314; 1 Chit. 102.

## II. ADMISSION.

*Statutes.*—By 2 Geo. 2, c. 23, no person is to practise as an attorney or solicitor unless he has taken the oath (or made affirmation, if a quaker, 12 Geo. 2, c. 13, s. 8,) and been admitted and inrolled in the court in which he practises; the judges of which are to examine candidates for admission as to their fitness and capacity.

By sect. 21, Sworn attorneys may be admitted solicitors, and solicitors in one court of equity may be admitted into any other court; and, by 6 Geo. 2, c. 27, s. 2, attorneys of superior courts may be admitted in inferior courts. And see 12 Geo. 2, c. 13, s. 7.

So, by 23 Geo. 2, c. 26, s. 15, solicitors may be admitted attorneys.

By 11 Geo. 4 & 1 Will. 4, c. 70, s. 10, attorneys of K. B. and C. P. may practise in the Exchequer; and attorneys of the courts of Great Sessions in Wales (abolished by the act) may be admitted as attorneys of the courts at Westminster.

By 1 & 2 Will. 4, c. 56, s. 10, all attorneys and solicitors of the courts of law and equity at Westminster may be admitted to practise in the court of bankruptcy.

of standing trees, made after the trees had been felled and taken away by the defendant, will support a count upon an account stated, though not for goods sold and delivered. *Knowles v. Michel*, 13 East, 249.

Semble, that money paid cannot be given in evidence under a count on an account stated. *Pinley v. Bagnall*, 3 Dougl. 155.

Where the particulars of the plaintiff's demand were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for want of a promissory note stamp:—Held, that the account stated might be proved by other evidence than the memorandum:—Held, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it. *Singleton v. Barrett*, 2 C. & J. 368.

In assumpsit for use and occupation, 4l. were paid into court on the account stated. The plaintiffs proved that the defendant, being indebted to them as surviving executors of T., and having no other account with them, was called upon by them for payment, and refused, saying that he had a cross demand on the funds of the testator. The plaintiffs gave evidence of a debt exceeding 4l., and contended that these, with the admission implied by the payment into court, entitled them to recover the larger sum on the account stated, the other counts proving inapplicable:—Held, that they could not so recover, for that the averment of an account stated could only refer to a single occasion; and the above-mentioned answer of the defendant, with the subsequent payment into court, merely shewed that upon that accounting, which alone was in question, the defendant was found indebted 4l. *Kennedy v. Withers*, 3 B. & Adol. 467.

Plaintiff was allowed to recover on a subsequent promise, under the count on an account stated, where the original agreement was void by the statute of frauds. *Seago v. Deane*, 4 Bing. 459; 1 M. & P. 227; 3 C. & P. 170.

A promise to pay plaintiff the expenses he had been put to by defendant not performing an agreement, is evidence under the account stated count, where the plaintiff failed on his special count, the agreement being void by the statute of frauds. *Id.*

In assumpsit for goods sold, and on an account stated, to recover the value of growing poles purchased from the plaintiff by the defendants, and afterwards carried away by them; it appeared in evidence, that, at the time of the bargain, some memorandums in writing had been made, but which were neither stamped nor signed by the parties; and it was also proved, that the defendants, after the poles were carried away, admitted that a balance was due to the plaintiff, who, under these circumstances, was nonsuited:—Held, that such nonsuit was proper, as it was not proved that the defendants had admitted a precise and definite sum to be due to the plaintiff; and, therefore, that he could not recover on

the account stated, without reference to the memorandums, which were not admissible in evidence: but as the contract had been executed by the defendants, they having carried away the poles, the court of C. P. granted the plaintiff a new trial, on payment of costs. *Teall v. Auty*, 4 Moore, 542; 2 B. & B. 99.

To support a count on an account stated, there must be an acknowledgment of a subsisting debt. *Tucker v. Barrow*, 1 M. & R. 518; 7 B. & C. 623; M. & M. 139; 3 C. & P. 85, 89.

Semble, that a compulsory admission made before commissioners of bankrupt, is not evidence of an account stated. *Id.*

An admission by the defendant, that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt, is not evidence to support a count on an account stated with the assignees. *Id.*

Whether a conversation between the defendant and a witness is sufficient to entitle a plaintiff to recover on an account stated, is a question of law and not of fact. *Bishop v. Chambré*, 3 C. & P. 55; M. & M. 116—Tenterden.

## VII. PLEADING IN ASSUMPSIT.

*Indebitatus Assumpsit.*—A declaration in assumpsit, alleging that the defendant was indebted to the plaintiff in a certain quantity of wheat for tolls, without stating the value, is bad on special demurrer. *Reading (Mayor, &c.) v. Clarke*, 4 B. & A. 268.

A count stating a promise to pay a sum of money to the plaintiff, without alleging to whom the promise was made, is insufficient. *Price v. Easton*, 1 Nev. & M. 303.

But it was held in C. P. in the case of a bill of exchange, that a promise similarly alleged was sufficient. *Bancks v. Camp*, 9 Bing. 604.

It is no objection, on general demurrer, that the promise is stated under a "whereas." Semble, that it would be no objection on special demurrer. *King v. Roxbrough*, 2 C. & J. 418.

Every material and traversable fact must be laid with time and place. A count in *indebitatus assumpsit* stated the time of the defendant being indebted to the plaintiff's testator in his lifetime, and of his making the promise on the 2nd day of January, 1833, and stated the time of the grant of letters of administration to the plaintiff, on the 11th of January, 1831:—Held, on special demurrer, that the allegations were inconsistent, and the count bad; and that one of the allegations of time could not be rejected as surplusage, as then a material and traversable fact would be laid without a time. *Id.*

A count in *indebitatus assumpsit* stated the promise to pay several sums of money, in consideration of being indebted in those sums for the several matters respectively stated in the count:—Held, that it was no objection to the whole count, on special demurrer, that one of the matters stated was insufficient and bad, as a consi-

deration for that part of the promise which related to it. *Id.*

**Special Assumpsit.**—It is not necessary in assumpsit, in declaring on a parol agreement, to set out the whole of the instrument: it is sufficient to set out that part of it only to which the particular breach applies. *Ward v. Smith*, 11 Price, 19.

If the part omitted do not qualify that which is stated. *Tempest v. Rawlings*, 13 East, 18.

So, it is sufficient if the declaration shew so much of the terms beneficial to the plaintiff in a contract, as comprehends the point for the failure of which the plaintiff sues. *Cotterill v. Cuff*, 4 Taunt. 285.

In declaring upon a contract, not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire consideration for the act, and the entire act or duty which is to be done, (including the time, manner, and other circumstances of its performance,) in virtue of such consideration, the breach of which act or duty is complained of; but such part of the contract, which respects only the liquidation of damages, after a right to them has accrued by a breach of the contract, is not necessary to be set forth in the declaration, but is only matter of evidence, to be given to the jury in reduction of damages. *Clarke v. Grey*, 6 East, 564; 2 Smith, 622; 4 Esp. 177.

In an action of assumpsit for not delivering bonds and other securities, pursuant to an agreement, where the consideration money was to be paid on the receipt of the securities; it is not necessary to aver an actual tender of the money, an allegation of the plaintiff's being ready and willing to pay is sufficient. *Levy v. Herbert (Lord)*, 1 Moore, 56; 7 Taunt. 314.

In a special action on a promise to deliver up a bond, pledged upon payment of money borrowed of the defendant, a breach assigned that defendant refused to deliver up the bond, was held well enough, although it is not laid that the money was paid and tendered, it having been proved at the trial that the money was tendered and refused. *Alcorn v. Westbrook*, 1 Wils. 115.

If a promise to pay money purports on the face of it to have been given for consideration, the plaintiff is not bound to set out the consideration in his declaration: therefore, a declaration on a note, in general terms, stating the promise by the defendant to pay the money sought to be recovered, is sufficient to sustain the action, although the note, when produced, shews on the face of it, that it was given to pay the debt and costs of an action against a third person. *Coombs v. Ingram*, 4 D. & R. 211.

In an action upon an agreement to deliver possession for certain considerations, subject to a forfeiture on failure by either party; the person who was to deliver possession cannot sue for the forfeiture, without shewing in his declaration a possessory title in himself. *Luxton v. Robinson*, 2 Dougl. 630.

Mutual promises are a good consideration in an

action of assumpsit without an averment of the performance of the promise of the plaintiff. *Martindall v. Fisher*, 1 Wils. 88.

Where the first count of a declaration in assumpsit, stating an agreement between two persons, omitted the mutual promises: on motion in arrest of judgment, held, that the agreement imported a promise. *Mountfort v. Horton*, 2 N. R. 62.

Where goods consigned to an agent to be sold on commission by a proprietor, who still retains the absolute control over them, have been shipped and despatched, but are not yet arrived, the consignor, pending the voyage, may, in pleading, still describe the sending them as a thing future and executory. *Smith v. Brown*, 6 Taunt. 340; 2 Marsh. 41.

Where an agreement in writing is to be performed on a certain day, and the parties agree to enlarge the time, a declaration on the day stated in the agreement, though the evidence is of a different day, will support the action. *Thresh v. Rake*, 1 Esp. 53—Kenyon.

In assumpsit on a special agreement, the plaintiff must aver performance of what is to be done on his part, or shew that he was ready to perform it. *Collins v. Gibbs*, 2 Burr. 899.

But where the defendant has incapacitated himself from performing his contract, it renders any thing further to be done by the plaintiff unnecessary. *Knight v. Crockford*, 1 Esp. 190—Eyre. And see *Sadler v. Robins*, 1 Camp. 253; and *Williamson v. Watts*, 1 Camp. 552.

Where it is not material to aver a request at all, a request laid in the declaration to pay the debt before it is due, is not bad. *Frampton v. Coulson*, 1 Wils. 33.

In assumpsit on an agreement, whereby plaintiff agreed to procure a lease to be granted to defendant, and defendant agreed to pay the plaintiff, his solicitor, or agent, on request, the sum of 25*l.* in full for his share or proportion of the costs and expenses of the agreement, and of the lease:—Held, that the declaration was good without an averment that any costs or expenses had been incurred. *Thomson v. Burns*, 1 C. & M. 177; S. C. not S. P. 2 C. & J. 468; 1 Dowl. P. C. 562.

In assumpsit for the breach of an agreement in not paying a certain sum in exchange of an old for a new portable threshing machine, the plaintiff averred, that he made the new machine for the defendant, and put it up at T., and took down the old one, and took the same at 20*l.*, according to the provisions of the said agreement:—Held, that these latter words applied to the whole of the sentence; and that the averment was sufficient on general demurrer, although, by the agreement, certain conditions precedent were to be performed by the plaintiff, namely, that the new machine should be capable of threshing a certain quantity of wheat in a day, to be worked by four horses, and to be erected on the spot at T., where the old one stood. *Varley v. Manton*, 2 M. & Scott, 484.

## ASYLUM—See LUNATIC.

## ATTACHMENT.

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## I. WHEN GRANTED.

1. *Against Officers of the Court.*

Where the process of the court has been abused, and undue means have been used in its execution, an attachment, and not an information, is the proper remedy. *Anon.* 2 Ld. Ken. 372.

But, where the officer who executes process has behaved improperly, as well as those who resisted him, the court will not in general grant extraordinary process for contempt. *Gregory v. Onslow*, Loft, 35.

An attachment was granted for arresting the plaintiff while attending arbitrators under a rule of court, on purpose to prejudice his cause. *Rez v. Hall*, 2 W. Black. 1110.

But altering a sheriff's warrant is no ground for an attachment, unless an ill use be made of it. *Hale v. Castleman*, 1 W. Black. 2.

The sealer of writs is not guilty of a contempt in refusing to seal a writ on St. Luke's day, being one of the holidays appointed by statute 5 & 6 Edw. 6, c. 3, to be observed; and the Court of C. P. will not grant an attachment for such refusal. *Martin v. Bold*, 7 Taunt. 182; 2 Marsh. 487.

2. *For contempt of Process.*

The court will not grant an attachment where there is a remedy by action, and the matter is doubtful. *Hanington v. Jennings*, Loft, 188.

In one case, the court refused an attachment in the first instance for not obeying a rule of court, but granted a rule to go before the master, otherwise an attachment nisi. *Anon.* Loft, 159.

A defendant being served with a copy of a *capias* tore it in pieces, and threw it at the officer:—Held, not to amount to a contempt of court for which an attachment might be granted. *Myers v. Wille*, 4 Moore, 147.

So where a person, on being served with process, collared and shook the officer serving it, and ordered him to quit his presence:—Held, that this did not amount to a contempt of court and obstruction of its process, for which an attachment might be granted. *Adams v. Hughes*, 1 B. & B. 24.

Although an attachment may issue against a peer for refusing to obey the process of the court of K. B.; quere, whether in ecclesiastical affairs, the writ should not be moved against the chancellor, commissary, or official, instead of the bishop. *Rez. v. St. Asaph (Bishop)*, 1 Wils. 332.

Service of all processes intended to bring a party into contempt should be personal, if possible; but if it can be made appear to the court of Exchequer that service cannot be effected personally, and that there was probable cause to suspect that the party kept out of the way for the purpose of avoiding such personal service, that court will grant a rule nisi for an attachment; and order that service, by leaving the rule at the dwelling-house, shall be efficient. *Weston v. Faulkener*, 2 Price, 2.

Where a mandamus had been granted for the election of a mayor, under the 11 Geo. 1, c. 4, s. 2, and a rule made that public notice should be affixed in the market-place, which had been done accordingly, the court granted an attachment for disobedience of the mandamus, against a member of the corporation who was served with a copy of the rule, notwithstanding neither the original mandamus nor the rule was shewn him at the time; for the public notice directed by the act is *prima facie* sufficient. *Rez v. Edgemoor*, 3 T. R. 352.

But the application for the attachment would be well answered, if the party could shew that he had no notice of the mandamus. *Id.*

Where a rule had been granted for an information in the nature of a *quo warranto* against A., to shew by what authority he claimed to be mayor of G., on the relation of some of the corporators, and another rule in that cause for inspecting all the corporation books, papers, &c. directed to the town-clerk; an inspection of such only as related to the election and office of mayor, was held to be a sufficient compliance with the rule, so as to protect the town-clerk from an attachment as for a contempt of the court, it appearing that he had acted *bona fide*. *Rez v. Babb*, 3 T. R. 579.

If, a plaintiff having sued out a *fi. fa.*, the defendant pays the plaintiff's attorney the debt and costs, without the writ being delivered to the sheriff, it is no contempt of the court of C. P. to attach the same money in the hands of the plaintiff's attorney, for a debt due from the plaintiff to the defendant:—But quere, whether the debt is such whereon an attachment can be supported. *Gwinness v. Brown*, 4 Taunt. 472.

An attachment will not lie for disobedience to a judge's order until it is made a rule of court, though the order has been acquiesced in and acted upon. *Baker v. Rye*, 1 Dowl. P. C. 689.

An attachment granted in term for non-pay-

ment of costs, under a baron's order on the master's allocatur, set aside, the order not having been first made a rule of court. *Ex parte Arden*, 1 Price's, P. C. 149.

A wife named with her husband in a rule of court, directing costs to be paid to them, is entitled to the advantage of it, if she survives her husband; and an attachment upon the rule issues of right. *Tilt v. Bertlett*, 1 Ld. Ken. 104.

A party in contempt for filing a bill in Chancery to set aside an award, after entering into a rule of K. B. to abide by it, was discharged without any fine, rather than set a small one for so high an offence. *Rez v. Wheeler*, 3 Burr. 1256.

On an attachment for rescue, a defendant may be fined without answering to interrogatories. *Rez v. Elkins*, 2 Burr. 2129; 1 W. Black. 460.

An attachment granted against rescuers, upon a return by the sheriff of rescue from his bailiff. *Gobby v. Deves*, 10 Bing. 112.

Costs were granted upon an attachment for contempt, to the person who had purged himself of the contempt upon examination. *Rez v. Plumket*, 3 Burr. 1329.

### 3. For Non-payment of Money.

An attachment for non-payment of costs is in the nature of an execution, so much so that the parties are not bailable. *Anon. Loft*, 305; S. P. *Rez v. Stokes*, Cowp. 137.

An attachment for non-payment of money is in the nature of mesne process. *Lewis v. Morland*, 2 B. & A. 56; S. P. *Rez v. Curwen*, 1 Moore, 494.

In the court of Exchequer, an order nisi for costs for not proceeding to trial is served on the clerk in court, which brings the parties into contempt; and upon service of the allocatur, and demand and refusal of costs, an attachment is granted. *Merritt v. Meek*, 3 Anst. 656.

An order of the court of Exchequer, that a defendant pay a certain sum of money, being shewn to the defendant at the time of making a personal demand of it, a copy of such order not having been personally served on the defendant himself, although a copy had been previously served on his attorney, is not sufficient to entitle the plaintiff to an attachment. *Brodenik v. Teed*, 1 Price, 401.

If a defendant in a penal action obtain a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, it is an undertaking by him to pay that sum, and for the non-payment of it the court will grant an attachment. *King v. Clifton*, 5 T. R. 257.

Where a defendant in a penal action obtains a rule to stay proceedings on payment of part of the penalties, the court of C. P. will grant an attachment against him for non-payment. *Hart v. Draper*, 2 Marsh. 358; 7 Taunt. 43.

Though the plaintiff discontinue on the common rule on payment of costs, he is not liable to an attachment for non-payment. *Stokes v. Woodson*, 7 T. R. 6.

If a party obtain a rule for setting aside judg-

ment and execution, on condition of his paying costs, the court will not issue an attachment in the first instance for not paying those costs. — *v. Mynde*, 1 Chit. 158.

The order made on motion to pay money into court, that the defendant shall pay the costs, is imperative in that respect in the court of Exchequer; and if not paid when taxed, the plaintiff may have an attachment against the defendant for non-payment; which process is final, and in the nature of an execution, and therefore not bailable: the plaintiff may, however, proceed to try the cause if the costs are not paid, as is his only course in the court of King's Bench. *Plummer v. Savage*, 6 Price, 126.

An attachment granted on the master's allocatur for costs due from the plaintiff to his attorney, although the attorney be disqualified, the plaintiff having received the whole of the debt and costs from the defendant. *Dimond v. Clarke*, 1 Chit. 222.

By the master's allocatur, an attorney was ordered on the 12th May to pay over to his client a sum of 15*l.*; on the 20th June the attorney became bankrupt and afterwards obtained his certificate:—Held, that it was then too late to move for an attachment for not paying the money pursuant to the master's allocatur. *Baron v. Martell*, 9 D. & R. 390.

An alias attachment lies for non-payment of money pursuant to a rule of court, founded on an award, where defendant has been suffered to go at large upon the original attachment, upon terms which he has failed to comply with. *Good v. Wilke*, 6 M. & S. 413; 2 Tidd's Prac. 1070.

### 4. For Non-performance of Awards.

*Nature of the Proceeding.*—All attachments for non-performance of awards are only in the nature of civil executions, though formerly considered of a criminal nature. *Rez v. Myers*, 1 T. R. 266. And see *Rez v. Curwen*, 1 Moore, 494.

An attachment may issue if the motion to set aside the award be not made before the last day of the next term after the award is published. *Freame v. Pinneger*, Cowp. 23.

An attachment goes of course for non-performance of an award; and in order to get rid of it, the award must be set aside. *Anon. Loft*, 451; S. P. *Anon. Loft*, 321.

The court of C. P. will not infer personal service of an award to bring a party into contempt. *Brander v. Penlease*, 5 Taunt. 813.

The court of C. P. will not grant an attachment for non-performance of an award pending an action brought on the award; nor allow the plaintiff to waive the action in order to apply for the attachment. *Badley v. Loveday*, 1 B. & P. 31.

*By and against whom granted.*—The court will not grant an attachment against a peer for not paying a sum of money awarded, though the defendant consent on condition that the attachment shall lie in the office for a certain time. *Walker v. Grosvenor (Earl)*, 7 T. R. 171.

Nor against a member of parliament. *Cutmur v. Knatchbull (Bart.)*, 7 T. R. 448.

An attachment was issued against a party for non-performance of an award, which had been made a rule of the court of C. P.; although such party resided out of the jurisdiction of that court, as it was in the nature of a civil process; and the court were not bound to inquire whether it could be served with effect or not. *Hopcraft v. Fermor*, 8 Moore, 424; 1 Bing. 378.

An executor may have, without scire facias, or other process of revivor, an attachment for non-performance of an award made in favour of his testator in a cause referred and decided in his lifetime, though the suit abated by his decease. *Rogers v. Stanton*, 7 Taunt. 575.

So, if a stranger to the cause become, by rule of court, party to a reference made in the cause before any jury is sworn, and if, after the award made, but before judgment, one of the parties to the cause die, though the cause abate, the rule of court is not vacated as to the stranger, but an attachment shall go thereon for non-performance of the award. *Id.*

The court will not grant an attachment for the non-payment of costs payable under an award, at the instance of the personal representative of a deceased party, to which party they were to have been paid. *Rex v. Maffey*, 1 Dowl. P. C. 538.

Where a submission to arbitration between A. and B., the parties on the record, had been made a rule of court, and the award not having been made in time, the dispute had been referred to a second arbitrator, by B. and C., who were the real parties in the suit:—Held, that no attachment could issue against B. for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*, 2 T. R. 643.

And as the court had no jurisdiction in this case they could not go into the merits, though B. consented to waive the objection. *Id.*

*For what granted.*—The court refused to grant an attachment where there appeared to be objections to the award which were pleadable to any actions brought upon it, though they were not such as to make them set it aside on motion. *In re Cargay*, 2 D. & R. 222; S. C. (in error), 2 Bing. 199; 9 Moore, 38, and M'Clel. 367; 13 Price, 639. And see *Cargay v. Aitchison*, 3 D. & R. 433; 2 B. & C. 176.

The refusal by the court to enforce an award by attachment, does not decide on the validity of the award, considered as the subject of an action. *Jackson v. Clarke*, M'Clel. & Y. 200; 13 Price, 28.

The court granted an attachment for non-performance of an award, and would not drive the plaintiff to his action on the submission bond, on an affidavit that the arbitrators, after having appointed one umpire who refused to act, appointed another, who accepted the authority; but he

being objected to by the defendant, the arbitrators each proposed another, but could not agree on the person to be substituted, and another was not substituted, though the respective attorneys agreed on a third person; in consequence of which the umpire objected to was called on to proceed, and made his award within time. *Oliver v. Collings*, 11 East, 367.

An attachment ordered to issue for non-performance, where it appeared that the excuses made were frivolous and vexatious. *Lodge v. Porthouse*, Loft, 388.

Where one only of two defendants who attended an arbitrator under a reference by order of Nisi Prius, made the order a rule of court, and demanded costs from the plaintiff under a taxation to him only:—Held, that an attachment would not lie for the non-payment of the costs to the one defendant only. Semble, that the master had not power to tax the costs separately to the several defendants. *Dickins v. Smith*, 8 D. & R. 285; S. C. nom. *Dickins v. Jervie*, 5 B. & C. 528.

If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment against the other party, if he refuse to pay his moiety. *Hicks v. Richardson*, 1 B. & P. 93.

So, where the arbitrator awarded a sum together with the costs of the award, the party to whom the money was awarded was allowed, upon taking out the award, and paying the whole costs, to have an attachment against the defendant for the sum awarded and his share of the costs. *Stokes v. Lewis*, 2 Smith, 12.

The court will grant an attachment for the non-payment on demand of money awarded, after an action on the award commenced and discontinued, where the action was not pending at the time of demand. *Higgins v. Willes*, 3 M. & R. 382.

*Previous Demand.*—An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made; even though the time and place for payment of the money be specified in the award. *Brandon v. Brandon*, 1 B. & P. 394.

But personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he has not been personally served with such award and rule. *In re Bower*, 1 B. & C. 264.

If the party in whose favour an award is made, demand more than is due to him, he cannot have an attachment for the non-payment on that occasion of the sum which is due. *Strutt v. Rogers*, 7 Taunt. 213; 2 Marsh. 524.

Where an arbitrator awarded that A. should fulfil an agreement for the purchase of land of B., and should pay the purchase money, on B. conveying the land with a good title, the court of C. P. refused to grant an attachment against A. for non-performance, on an affidavit that B. had

required A. to pay the money, assuring him of his readiness to convey with a good title, without further stating that B. had tendered a conveyance executed. *Standly v. Hemington*, 2 Marsh. 276; 6 Taunt. 561.

On demanding the execution of a deed, directed by an arbitrator, where such demand is made by a third person, it is not necessary that such person should be empowered by deed or power of attorney, in order to enable the party to have an attachment, though it may be so where the demand is of money directed to be paid to the party. *Kenson v. Grayson*, 2 Smith, 61.

Though a party is at one time in contempt for not paying costs which have been duly demanded; yet, if, before an attachment be moved for, the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment. *Spivy v. Webster*, 1 Dowl. P. C. 696.

The court will not grant an attachment for the non-performance of an award, the performance of which is demanded by a third person acting under a power of attorney, unless the subscribing witness makes an affidavit of its execution, and a copy of the power of attorney is left with the party upon whom the demand is made. *Laugher v. Laugher*, 1 Dowl. P. C. 284; 1 C. & J. 398; 1 Tyr. 352.

An attachment for contempt in not paying money pursuant to the prothonotary's allocatur on demand made by a third person, who acted under a power of attorney, may be supported on an affidavit stating that he shewed the original rule and allocatur to the party charged, at the time of the demand; and it seems that it was not necessary to shew him the power of attorney. *Sed quare. Bass v. Mailand*, 8 Moore, 44.

Held, in K. B. that the application could not be supported on an affidavit of demand of the money by a clerk, without shewing a power of attorney. *Hartley v. Barlow*, 1 Chit. 229.

In the court of Exchequer, affidavits whereon to ground a rule nisi for an attachment against a defendant for non-payment of money and costs pursuant to an award, and the master's allocatur, where the demand has been made by a third person, under a power of attorney, should state, that the original power was shewn to the defendant at the time the demand was made. *Jackson v. Clarke*, 13 Price, 208; M'Clel. 72.

#### 5. For other Things.

An attachment lies in C. P. to compel a plaintiff to produce deeds. *Bateman v. Phillips*, 4 Taunt. 157.

Where an order was made on the defendant to produce indentures of apprenticeship; and it appeared by affidavit that he never had them in his possession, and that, although he had made diligent search for them, he had been unable to find any trace of them:—Held, that he was not liable to an attachment for their non-production. *Cooke v. Transwell*, 2 Moore, 513; 8 Taunt. 131.

The court of Exchequer will not on motion discharge a defendant from custody under an

attachment for contempt in not producing deeds, papers, &c. before the master, on an affidavit that the defendant has not, nor ever had, any such in his possession or within his power. *Hurd v. Partridge*, 12 Price, 689.

Such an application refused with costs. *Id.*

The course is to have an affidavit of the fact in the master's office, when, on obtaining his certificate, the defendant will be discharged, as a matter of course. *Id.*

It was made part of the terms of a subsequent successful application for the defendant's discharge, that he should pay the costs of that application, and of the previous irregular motion. *Id.*

Where a defendant is served with an order of court, forthwith to re-instate premises belonging to the plaintiff, an attachment cannot issue against him for disobedience of such order, unless a personal demand of performance is made on the party at the time of the service. *Dodding v. Hudson*, 8 Moore, 510; 1 Bing. 410.

But an attachment was afterwards issued against such defendant for not commencing such re-instatement, in compliance with the order, within four days after it was served, although it would have taken him a much longer time to re-instate the premises. *Id.*

An attachment was granted against one for threatening a prosecution with danger of being hanged, but refused against the defendant who indicted the prosecutor for perjury in his affidavit, on which an information was granted. *Res v. Carroll*, 1 Wils. 75.

## II. PRACTICE ON.

### 1. Rule and Writ.

[When Rule absolute.]—An attachment is absolute in the first instance, on a return by the sheriff; but on affidavits, the party must have an opportunity of answering. *Adamson v. Gibson*, 1 Tidd's Prac. 169.

No rule for an attachment to be absolute in the first instance, except for non-payment of costs upon the prothonotary's allocatur. *Chaunt v. Smart*, 1 B. & P. 477; *S. P. Anon.* 1 Tidd's Prac. 486.

But even in that case the rule is only a rule nisi, when the allocatur is founded on an award. *Thompson v. Billingsby*, 2 Chit. 57; *S. P. Gifford v. Gifford*, Forrest, 60.

On motion for an attachment for not paying money under a previous order of the court of Exchequer, on a party who has been called on by the former rule, to shew cause why that money, and the costs of such application, should not be paid, and against which order no cause has been shewn: the rule for the attachment will be granted absolutely in the first instance. *King v. Price*, 1 Price, 341.

An attachment is absolute in the first instance for non-delivery of possession pursuant to a rule of court. *Devies d. Povey v. Doe*, 2 W. Black, 692.

The rule for an attachment for non-payment of costs pursuant to the master's allocatur is absolute in the first instance, although four years have elapsed since the taxation. *Rez v. C. D. 1* Chit. 723.

The rule for an attachment for non-payment of costs, between attorney and client, pursuant to the master's allocatur, is nisi in the first instance. *Bray v. Yates*, 1 Dowl. P. C. 459.

The rule for an attachment, for not accounting to the Legacy Office, is a rule nisi, which makes itself absolute by a certain day, unless in the mean time cause be shewn. *In re Vivian*, 1 C. & J. 409.

In some cases, the rule to shew cause why an attachment should not be granted, will be discharged with costs. *Jackson v. Clarke*, MClel. & Y. 200; 13 Price, 28.

**Writ.**—An attachment must be directed to elisors, when against the coroners for not attaching the sheriff. *Andrews v. Sharp*, 2 W. Black. 911; *S. P. Rez v. Peckham*, 2 W. Black. 1218.

An attachment is not in the nature of an original, and therefore does not require fifteen days between the teste and return. *Anon. Lofft*, 273.

An attachment will be irregular if it be for more than the precise sum allowed, however small the difference. *Daniel v. Bishop*, MClel. 61; 13 Price, 129.

**When to be moved for.**—Whenever an attachment is absolute in the first instance, it may be moved for on last day of term. *Anon. Lofft*, 301.

But not where there is only a rule nisi. *Anon. 3 Smith*, 118.

An attachment cannot be moved for on the last day of term, except for non-payment of costs, or against a sheriff for not returning a writ. *Anon. 1 Burr*, 651.

An attachment for non-payment of costs may be moved for on the last day of term. *Rez v. York*, 5 Burr. 2686.

The ten days after demand of costs under a recognizance, taken by virtue of stat. 5 & 6 W. & M. c. 11, s. 2 & 3, must elapse, before an attachment can be granted against the party refusing to pay them. *Rez v. Ireland*, 3 T. R. 512.

## 2. Affidavits.

**How intitled.**—Affidavits for attachments in civil suits are proceedings on the civil side of the court until the attachments issue, and are to be intitled with the names of the parties; as soon as the attachments issue, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. *Wood v. Webb*, 3 T. R. 253.

And affidavits to set aside attachments which have been granted (though not issued), must be intitled in the name of the king, &c. *Rez v. Middlesex (Sheriff)*, 7 T. R. 439, 527.

Which title is sufficient, without naming the cause, although it is convenient to do so. *Rez*

*v. Middlesex (Sheriff)*, 5 B. & C. 389; 8 D. & R. 149.

So, the affidavits made in answer to a rule nisi for an attachment, must be intitled on the civil side of the court, in the cause out of which the motion arises; but after the rule is granted, the affidavits must be intitled on the crown side. *Whitehead v. Firth*, 12 East, 165.

Affidavits in support of a rule for an attachment against the sheriff for not bringing in the body, must be intitled with the names of all the parties to the suit; and though the affidavits correspond with the rule for the attachment; yet, if all the parties be not inserted in the affidavits, the court will set aside the attachment. *Etherington v. Kemp*, 1 Chit. 727, n.

Where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award need not be intitled in any cause, but the affidavits in answer must. *Bevan v. Bevan*, 3 T. R. 601.

A rule nisi for an attachment for non-payment of money pursuant to an award was intitled "in the matter of A. and B," but the affidavit of service was intitled, "between A. B. plaintiff and C. D. defendant:"—Held irregular, as the affidavit should have been intitled the same as the rule. *In re Houghton*, 2 M. & P. 452.

**Contents of Affidavits generally.**—An affidavit to support a rule for an attachment for a contempt, must state that the defendant was served personally with a copy of the rule, and that the original was shewn to him at the same time. *Rez v. Smithies*, 3 T. R. 351; *S. P. 7 D. & R. 612*; *Reg. Gen. K. B., C. P., Ex., H. T., 2 W. 4*.

On a motion for an attachment for filing a bill in equity contrary to an order of reference, an affidavit that notice of the motion to make the order a rule of court had been served on the party's servant, &c., is not sufficient. *Hilton v. Hopwood*, 1 Marsh. 66.

**In cases of Awards.**—An affidavit, upon which a rule for an attachment for non-payment of costs pursuant to an award made under a rule of court and the master's allocatur is obtained, must state the due execution of the award, the service of a copy of the award, and of the rule and allocatur on the defendant, the due execution of the letter of attorney, a demand of the costs, and refusal to pay. *Gifford v. Gifford*, Forrest, 80.

The court refused an attachment for non-performance of an award, where the award was made out of the time originally allowed, but authority had been reserved to the arbitrator to enlarge the time, and though the award stated upon the face of it that the arbitrator had enlarged the time; because there was no affidavit of that fact, and it did not appear to them judicially, that the arbitrator had any authority to make the award, without which the court had no jurisdiction. *Moule v. Stowell*, 15 East, 99, n.



Where an award appears to have been made out of the time originally given to the arbitrator by the rule of court, but which rule reserved to him the power of enlarging the time, it is not enough, for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement of the time within which the award was made, when served with the rule for the attachment. *Davis v. Vass*, 15 East, 97.

The arbitrator had power to enlarge the time for making his award by indorsement on the order of reference; that order, together with two indorsements for enlarging the time, was made a rule of court:—Held, on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made. *Dickins v. Jarvis*, 5 B. & C. 528; *S. C. nom. Dickins v. Smith*, 8 D. & R. 285.

Where a cause is referred by a judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a judge's order; on moving for an attachment for not performing the award, it must be shewn that the order enlarging the time was made by consent. *Haldea v. Glasscock*, 5 B. & C. 390; 8 D. & R. 151.

Where arbitrators have power to enlarge the time for making their award, and have enlarged it, and made their award in the additional time, in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, and that the defendant has been personally served with notice of those facts. *Wohlenberg v. Lagemaen*, 6 Taunt. 254; 1 Marsh. 579.

Seemle, that the affidavit for an attachment for non-performance of an award, must, contrary to the usual practice, always state the time of execution of the award. *Id.*

It is necessary that the affidavit of the due execution of an award should state that the deponent on a certain day saw the arbitrators execute it, in order to shew that it was executed before the arbitrators were functi officio. It is not sufficient to state merely that he saw them execute an award bearing date on such a day. *Harvey v. Harvey*, Tidd's Prac. Forms, 13.

### 3. Service of Rule.

The rule nisi for an attachment must be personally served. *Denman v. Golding*, 2 Tidd's Prac. 981.

Even when against an attorney. *In re ———* (Genl.), 1 D. & R. 529.

And the affidavit must shew it. *Anon.* 2 Chit. 66.

The court refused to order that service at the dwelling-house should be deemed good service of a rule for an attachment, upon an affidavit that the defendants were "shy and difficult to be

met with," and that the deponent had tried all the means in his power; for two months, before he could serve the defendant personally with the award, for the non-performance of which the attachment was sought to be enforced. *Garland v. Goulden*, 2 Y. & J. 89.

Serving an order of the court of Exchequer for an attachment on the servant of the party, was held insufficient. *Anon.* 2 Price, 4.

The court will not grant a rule, that service of an attachment on the defendant's attorney shall be sufficient, though it be sworn that repeated attempts have been made to serve him personally with a copy of the award, but he was not to be found, and although it is suggested that the defendant keeps out of the way to avoid being served. *Read v. Fore*, 1 Chit. 170.

The court will not grant a rule to dispense with the personal service of the master's allocatur for costs, with a view to an attachment, on an affidavit that the tenant keeps out of the way to avoid being served. *Anon.* 1 Chit. 503.

Before an attachment will be granted for non-payment of costs, a copy of the rule, with the officer's allocatur thereon, must be personally served on the party liable; and at the same time the original rule should be shewn to him, and a demand of payment made. *Pope v. Smith, and Hubbard v. Horton*, 2 Tidd's Prac. 1029.

And before he is in contempt for the non-payment, he must have refused payment to the principal, and not to a mere clerk. *Hartley v. Barlow*, 1 Chit. 229.

An affidavit of the service of the master's allocatur, on the taxation of costs of a prosecution against a parish, in order to ground a motion for an attachment against those on whom it was served, must state that they are the same persons as were defendants in the prosecution. *Rez v. Kendal*, 1 Chit. 650, n.

An affidavit of the service of a rule with an allocatur of costs, and a demand thereof on or about such a day, is insufficient to obtain an attachment for non-payment of costs. *Wadham v. Brett*, 2 Wils. 227.

An affidavit to support a rule for an attachment for not paying money pursuant to the master's allocatur must shew that, at the time of serving the copy, the original was shewn to the defendant. *Reid v. Deer*, 7 D. & R. 612.

A rule nisi for an attachment for non-payment of money pursuant to the master's allocatur cannot be served on a Sunday. *McIlham v. Smith*, 8 T. R. 86.

The Court of C. P. will not open the rule for an attachment on the mere affidavit of the party that he has not been served; at least unless he shew some mistake in the service. *Hopley v. Granger*, 1 N. R. 256.

### 4. Bail.

An action on the case on the stat. 23 Hen. 6, c. 9, will not lie against a sheriff for refusing to take bail on an attachment out of Chancery; that

statute referring only to process in courts of common law. *Studd v. Acton*, 1 H. Black. 468.

For although a sheriff may, if he chooses, take a bail bond on an attachment out of Chancery, he is not compellable to take bail thereupon. *Morris v. Hayward*, 6 Taunt. 569; 2 Marsh. 280.

The sheriff may recover on a bail bond so taken. *Id.*

But such bail bond is not assignable under the statute 4 Anne, c. 16, s. 20. *Miller v. Palfreyman*, 4 B. & Adol. 146.

The statute 23 Hen. 8, c. 9, does not authorize a sheriff to take a bail bond from a defendant who is in custody under an attachment for non-payment of costs, because such a process is in the nature of an execution. *Phelips v. Barrett*, 4 Price, 23.

No arrest to be made on attachments for not appearing to a subpoena ad respondendum, unless for a bailable cause of action, and the writ be duly marked and indorsed for bail. *Reg. Gen. T. T.* 1 Will. 4, Ex., 1 Price's P. C. 31; 1 Tyr. 519.

A defendant arrested, and in the county jail, in custody of the sheriff, on a writ of attachment for not appearing to a subpoena ad respondendum, discharged by order of court, on a rule to shew cause made absolute, (the cause of action being a debt under 20*l.*), on terms of entering a common appearance to the writ of subpoena, and undertaking not to bring any action. The attachment set aside for irregularity, with costs. *Worboys v. Adkins*, 1 Price's P. C. 44.

It is the duty of the sheriff to execute a writ of attachment, issued for not appearing to a subpoena ad respondendum; and he must return the writ as having been executed (in whatever manner), or that the party is not found in his bailwick. *Masters v. Cooper*, 1 Price's P. C. 8.

Where a defendant has been held to bail upon an attachment for contempt, in not appearing to a subpoena ad respondendum, the Court of Exchequer will not grant a messenger to bring up the body, if bail have been given to the sheriff; because the plaintiff has a remedy on the bail bond, (although the penalty (40*l.*) be, in almost all instances, very inadequate to the occasion,) if the condition should be broken. *Birdwood v. Hart*, 6 Price, 32.

Two days' notice of bail on an attachment is not required, nor any justification of such bail. *Rez v. Hall*, 2 W. Black. 1110.

A defendant may be admitted to bail, and sworn to answer interrogatories upon an attachment for contempt, although a defective notice of bail have been served on the prosecutor. *In re —*, 4 D. & R. 393.

### 5. Interrogatories.

Where attachments have issued in order to compel any person to answer upon interrogatories, the name of the cause shall be inserted in the list of motions to come on peremptorily in the ensuing terms. *Reg. Gen. K. B. H. T.* 34 Geo. 3, 5 T. R. 547; *Id.* 723.

Interrogatories filed and exhibited to persons, against whom attachments have been ordered, must be signed by counsel. *Reg. Gen. K. B.*, M. T. 34 Geo. 3, 5 T. R. 474.

A defendant under attachment must answer interrogatories; he cannot come in and confess the contempt before he does so. *Rez v. Edwards*, 4 Burr. 2105; 1 W. Black. 637.

On an attachment for rescue, the defendant may submit to a fine without answering interrogatories. *Rez v. Elkins*, 1 W. Black. 640; 2 Burr. 2129.

But where a defendant is brought up, it is the practice of the court to put interrogatories to him, although he do not deny the charge in the affidavits, unless the prosecutor waives putting them. *Rez v. Horsley*, 5 T. R. 362.

The report of the prothonotary is not conclusive against parties who have given bail to answer interrogatories before him, but they may except to such report on any material point; where, therefore, after the prothonotary had made his report that the parties were in contempt, the interrogatories not having been sufficiently answered, and he was directed to inspect an account-book belonging to one of them, which had been accidentally omitted to be delivered to him in the first instance, and which tended to support the answers given by the parties: the Court of C. P. refused to allow the clerk, who made the entries in such book, to be examined by the prothonotary, on an application made by the prosecutor for that purpose. *In re Isaacson*, 8 Moore, 214; 1 Bing. 272.

Nor would they allow affidavits to be received, that two of the parties were too poor to take office copies of the interrogatories filed against them. *Id.*

The report of the master of the crown office, that a defendant and his attorney were in contempt for not obeying an award and filing a bill, is to be taken as a conviction; and on the defendant's being brought up for judgment, the court will not receive affidavits in denial of the contempt, but only in mitigation of punishment. *Coulson v. Graham*, 2 Chit. 57.

The master's report upon interrogatories of contempt cannot be moved for on the last day of term, without the previous leave of the court, unless upon extraordinary cases, and personal service of notice. *Rez v. Wheeler*, 1 W. Black. 311.

### III. PROCEEDINGS UNDER.

Taking an unreasonable quantity of goods under process of attachment does not make the officer a trespasser ab initio. *Moore v. Taylor*, 5 Taunt. 70.

On attachment of goods, the officer cannot legally continue in possession of the defendant's house or keep the goods therein for a long and unreasonable time; but must remove them to a place of safe custody; else he is a trespasser ab initio. *Read v. Harrison*, 2 W. Black. 1218.

**ATTAINDER.**

A person attainted can be heard as a suitor in a court of justice only for the direct purpose of reversing the attainder, not in prosecution of a civil right. *Ex parte Bullock*, 14 Ves. jun. 452; *S. C. nom. Rex v. Bullock*, 1 Taunt. 82; 2 Leach, C. C. 966.

A civil action will lie against one attainted of treason. *Ramsay v. McDonald*, 1 W. Black. 30; *S. C. nom. Ramsden v. Macdonald*, 1 Wils. 217.

And quere, whether a commission of bankruptcy cannot issue against a person attainted, as he may be sued in a civil action. *Id.*

By attainder all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and, therefore, attainder may be well pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder. *Bullock v. Dodds*, 2 B. & A. 258. *And see Lambert v. Taylor*, 6 D. & R. 186; 4 B. & C. 138.

By the statutes 4 Geo. 1, c. 11, and 8 Geo. 3, c. 15, the mere transportation of an offender to a place appointed, does not amount to an actual pardon, but he still remains in the situation of an attainted felon, until he has served the period of transportation; and when he returns by the permission of the governor of New South Wales, under the provisions of the 30 Geo. 3, c. 47, he is only to have the same advantage as if his Majesty had signified his intention of pardoning under the sign manual, and is to have his name inserted in the next general pardon under the great seal; and a return under such circumstances is not sufficient to restore him to all his rights and privileges until such pardon be passed under the great seal. *Id.*

Personal property not belonging to a felon, convicted of simple larceny, and sentenced to transportation, at the time of conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown. *Roberts v. Walker*, 1 Russ. & Mylne, 752.

A grant of a liberty in a manor of goods and chattels of tenants in such manor attainted of felony, is confined to the goods, &c. of felons, being locally situate within the manor, and does not pass goods, &c. lying out of it. *Rex v. Capner*, 5 Price, 217.

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third person. *Champion v. Rigby*, 1 Russ. & Mylne, 539; 1 Tam. 421.

A solicitor, who has been employed to advise on a title, cannot, on purchasing it himself of his client, set up an objection to it, which he did not think of any importance when advising his principal. *Bevor v. Simpson*, 1 Tam. 69.

Where a client executes a deed in favour of a solicitor, reserving a life interest and a power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the hands of the client. *Balch v. Symes*, 1 Turn. & Russ. 92.

An attorney having received money for his client, and being owed on mortgage from another person the sum of 3000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the client, he undertook, when thereunto required, to execute a transfer of the same:—Held, that this was not a mere proposal, and although there was no express acceptance, yet, there being no refusal of the security, the client was entitled to all such interest as the attorney had therein. *Palmer v. Scott*, 1 Tam. 488.

#### VII. AUTHORITY OF ATTORNEIES.

Where the respective attorneys of the plaintiff and defendant signed an agreement to withdraw a record on certain terms, and that the defendant's costs should be taxed by certain persons as between attorney and client:—Held, that the defendant was not bound by such an arrangement on the part of his attorney. *Iveson v. Corington*, 2 D. & R. 307; 1 B. & C. 160. And see *Burrell v. Jones*, 3 B. & A. 47.

An attorney being employed for a person by his father to defend an action, if such person knew of his retainer, and did not disapprove of it, he is bound by the acts of such attorney, in the same way as if he had himself employed him. *Cameron v. Baker*, 1 C. & P. 268.—Best.

Payment of a debt to the attorney of a plaintiff amounts to payment to the plaintiff himself, and the latter is bound by the receipt of his attorney. *Yates v. Freckleton*, 2 Dougl. 623.

The authority of an attorney is determined on final judgment being signed. *Macbeath v. Cooke*, 1 M. & P. 513; S. C. nom. *Macbeath v. Ellis*, 4 Bing. 578.

#### VIII. LIABILITY OF ATTORNEIES.

##### 1. On their Undertakings.

*To appear and put in Bail.*—An attorney giving an undertaking to appear, was compelled to perform it, though obtained by fraud. *Anon.* 1 Chit. 139, (a).

The court granted a rule to shew cause why the defendant's attorney should not enter a common appearance, in consequence of a verbal undertaking to appear. *Anon.* 2 Chit. 36.

The court of Exchequer will compel an at-

torney to cause an appearance to be entered for the defendant pursuant to his undertaking. *Hudson v. Handley*, 1 C. & J. 373, n.

A general undertaking by an attorney to appear to process, does not oblige him to put in bail to bailable process. *Anon.* 2 Chit. 415.

An undertaking for a bail-bond given to the sheriff by the defendant's attorney, being a mere nullity, as illegal and contrary to stat. 23 Hen. 6, c. 9, an application by defendant to set it aside, and enter a common appearance, was discharged with costs, though defendant was a feme covert. *Lewis v. Knight*, 8 Bing. 271; 1 M. & Scott, 353; 1 Dowl. P. C. 261.

Where an attorney had given an undertaking to the sheriff to give a bail-bond in due time, and neglected so to do, in consequence of which the plaintiff recovered from the sheriff in an action for an escape; the court refused to proceed summarily against the attorney, and make him pay the debt and costs. *Sedgworth v. Spicer*, 4 East, 568; 2 Smith, 305. And see *Rez v. Southerton*, 6 East, 143; *Fuller v. Prest*, 7 T. R. 109.

A solicitor was ordered to pay all the costs occasioned by his refusing to appear for the defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook v. Broomhead*, 16 Ves. jun. 133.

An attachment does not lie for neglecting to enter an appearance for a defendant in pursuance of an undertaking. *Mould v. Roberts*, 4 D. & R. 719; S. P. *Anon.* Loft, 192.

*For Payment of Debt and Costs.*—Semble, that the court will enforce a verbal undertaking by an attorney on behalf of a client to pay damages and costs, where the other party has been thereby induced to consent to take a verdict for a certain sum, instead of going to a jury. *Kite v. Milman*, 2 M. & Scott, 616.

The court cannot permit an attorney to have the benefit of executions issued against a client for damages and costs, which the former has been compelled by a rule to pay in consequence of a personal undertaking. *Id.*

The respective attorneys for the plaintiff and defendant in a horse cause, which was ready for trial, but had been withdrawn at the assizes, signed the following undertaking or agreement:—"We, the undersigned, attorneys for the above-named plaintiff and the above-named defendant, do hereby personally consent, undertake, and agree, that the record in this cause shall be withdrawn; that the above-named defendant shall take back again the horse in the pleadings in this cause named, and shall pay the sum of 64*l.* 17*s.* to the above-named plaintiff; that the costs of the suit on the part of the defendant shall be taxed between the parties, on the principle between plaintiff and defendant; and that such taxation shall be made and perfected by, &c.:"—Held, that the plaintiff's attorney in the original action was personally liable upon this undertaking to pay to the defendant's attorney the costs when taxed, pursuant to the agreement. *Iveson v. Corington*, 2 D. & R. 307; 1 B. & C. 160.

So, where the solicitors of the assignees of a bankrupt tenant, on whose lands a distress had been levied by the landlord, gave a written undertaking in the following terms:—"We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained:"—Held, that they were personally liable. *Burrell v. Jones*, 3 B. & A. 47.

An attorney who stays proceedings upon an undertaking to pay costs, is bound to fulfil his engagement, although his client die before bail be put in. *Hellings v. Jones*, 3 Bing. 70; 10 Moore, 360.

Where an attorney of one court gives his undertaking as an attorney for a debt and costs in an action in another, the court of which he is an attorney will compel him to fulfil his undertaking, though void by the Statute of Frauds. *In re Paterson*, 1 Dowl. P. C. 468.

So, it seems that the court of Exchequer will compel an attorney to perform an undertaking entered into by him, notwithstanding it is void by the Statute of Frauds, and no action can be brought upon it. *Evans v. Duncombe*, 1 C. & J. 372; & C. nom. *Evans v. Duncan*, 1 Tyr. 283.

Where an action was commenced in C. P. and judgment obtained, and an attorney of K. B., but not of C. P., but who was attorney for the defendant, agreed verbally to give his two notes for the debt and costs, in consideration of the plaintiff staying proceedings, but which he failed to do:—Held, that although the undertaking was void by the Statute of Frauds, the court of K. B. might nevertheless exercise a summary jurisdiction over one of its own officers, an attorney of the court, and compel him to perform it. *In re Greaves*, 1 C. & J. 374, n.

**Other Things.**—An attorney who signs an instrument agreeing to give up certain bills, on certain things being done, is personally liable, unless it is specially stated that he enters into the agreement as attorney or agent only. *Kendray v. Hodgson*, 5 Esp. 228—Ellenborough.

So, if the respective attorneys for the prosecutor and defendants, on an indictment against a parish for not repairing a road, enter into an agreement by which the attorney for the prosecutor agreed that the recognizances should be respited, and the attorney on the part of the parish agreed to pay the costs; this agreement is personally binding on the latter. *Watson v. Murrel*, 1 C. & P. 307—Garrow.

The Court of Chancery will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, given by him at the sale, to do certain acts for clearing the title to the estates. *Pearl v. Bushell*, 2 Simon, 38.

Where an attorney, in order to get possession of papers belonging to A., in the hands of A.'s former attorney, who had a lien upon them for the amount of a bill then in dispute, undertook that A. should enter into an unqualified reference not revocable:—Held, that the attorney was liable, pursuant to his undertaking, to procure A.'s signature to an agreement of reference, and

to find security for the performance of an award to the satisfaction of the master. *Ex parte Hugkes*, 5 B. & A. 482.

Where the defendant's attorney, on their being sued by the plaintiff, undertook by letter to procure their signature to a cognovit for the payment of the debt and costs, which he failed to do; but the plaintiff afterwards said that he would proceed with the action:—Held, that this was virtually a waiver of the attorney's undertaking, and that he could not be called on by the court to perform it. *Miller v. James*, 8 Moore, 208.

**Mode of enforcing.**—The undertaking of an attorney can only be enforced by attachment where he has given it for his client. *Ex parte Watts*, 1 Dowl. P. C. 512.

An attorney giving an undertaking for another, in a case in which he is not concerned as attorney, will not be forced summarily to fulfil it; but the party to whom it is given will be left to his action. *Walker v. Arietti*, 1 Dowl. P. C. 61.

An attorney who is a party in a cause, giving an undertaking to the sheriff in that cause, is not liable to have that undertaking summarily enforced by the court. *Northfield v. Orton*, 1 Dowl. P. C. 415.

The court of Exchequer will grant an attachment against an attorney, not of that court, for the non-payment of a sum of money pursuant to his undertaking. *Payne v. Johnson*, 1 C. & J. 373, n.

## 2. To Attachment.

An attachment was ordered absolutely in the first instance against an attorney, for non-payment of money to another attorney of the party, for whom the former had been changed pursuant to an order of the court of Exchequer; although in that order, as well as in the order for changing the attorney, he had been called John, whereas his real name was James; but he had attended several summonses taken out as against John, and had consented to some of them without objecting to the misnomer, which that court thought, under the circumstances, cured the mistake. *Stevenson v. Power*, 9 Price, 384.

Personal service of an attachment against an attorney for not paying money pursuant to the master's allocatur, cannot be dispensed with. *In re ———*, (*Gent.*) 1 D. & R. 529.

An attachment will not be granted against an attorney for an error of judgment. *Harrington v. Jennings*, Lofft, 188.

Nor for compromising an action without the consent of his principal. *Anon.* Lofft, 433.

Nor in C. P. for having brought a writ of error, notwithstanding the defendants had agreed, under a consolidation rule, not to do so, if it appears that it was not done for delay, and that he was led into a mistake. *Camden v. Edie*, 1 H. Black. 21.

So, where a person, not having been admitted an attorney of C. P., had acted as such by issuing out process; the court refused to grant an

attachment against him, but left the party to sue for the penalty given him by the statute 2 Geo. 2, c. 23, s. 24. *Matthews v. Royle*, 6 Moore, 70. And see *Ex parte Flint*, 2 D. & R. 406; 1 B. & C. 254.

But the court, on the motion of the chirographer, granted an attachment against an attorney for omitting to perfect fines, and gave the costs of the application. *Gruggen v. White*, 4 Taunt. 881. And see *Stone v. Stone*, 4 Taunt. 601; and *In re Lawrence*, 2 Moore, 665.

On a motion for not paying over surplus money when a rule has been obtained for taxing an attorney's bill, the court will not grant an attachment against the attorney for not paying the balance due to his client, until the costs have been taxed, though the balance is admitted, and though it is agreed to dispense with taxation. *v. Barton*, 2 Chit. 66.

A rule to shew cause why an attachment should not issue against the former attorneys of a defendant in a cause, for not delivering their bill of costs to the defendant's new attorneys, pursuant to a baron's order, discharged, the bill having been delivered since the rule was served on the parties; and illness having been assigned in the affidavit as the cause of the parties not obeying the order. The rule was discharged without costs. *Gripper v. Cole*, 11 Price, 593.

Such an order is not of a peremptory nature, nor absolute in the first instance. *Id.*

### 3. To summary Jurisdiction.

#### (a) Why, and in what Cases.

If an attorney of the superior courts do any wrong as an attorney of an inferior court, the former will oblige him to answer the complaint. *Evans v. P—*, 2 Wils. 282.

An attorney gains credit by means of his office, and is compellable to rectify misconduct done by him not directly within his office as an attorney, as where he was a mere deputy. *Parker v. Marshall*, Loft, 271.

The court of C. P. granted a rule nisi, calling upon an attorney to answer for an alleged misconduct, in a matter where no suit was depending, but which appeared to have been intrusted to him in the capacity of an attorney. *In re Knight*, 1 Bing. 91.

Where more than seven years had elapsed after the settlement of transactions between an attorney and his client, the court refused to interfere to have them re-opened, in the absence of any suggestion of fraud or misconduct. *Ex parte Shipden*, 6 D. & R. 338.

Semble, that, before the uniformity of process act, the summary jurisdiction of the court of Exchequer reached an attorney, who practised there in the name of a side clerk. *Evans v. Duncan*, 1 Tyr. 283; S. C. nom. *Evans v. Duncombe*, 1 C. & J. 372.

If there be reasonable and probable cause for applying to the court against an attorney, although it eventually turn out that there is no actual foundation for imputing misconduct to

him, the court will not give him the costs of the application. *Doe d. Thwaites v. Roe*, 3 D. & R. 226.

Unless there is a cause in court, an application cannot be made at chambers against an attorney. *Ex parte Higgs*, 1 Dowl. P. C. 495.

#### (b) Striking off the Roll.

If an attorney be struck off the roll of the court of K. B. for misconduct, the court of C. P. will make a like order on motion, founded on a copy of the original report of the master of K. B. *In re Smith*, 4 Moore, 319; 1 B. & B. 522.

But in another case, that court refused the application, unless the contents of the affidavits on which the court of K. B. acted were stated to them, and proof was produced that the attorney had been struck off for a misdemeanour. *Ex parte Hague*, 3 B. & B. 257.

In a recent case, it was held that an attorney might be struck off the roll of C. P. upon reading the rule for striking him off the roll of K. B. merely. *Ex parte Yates*, 9 Bing. 455; 2 M. & Scott, 618; 1 Dowl. P. C. 724.

In one case an attorney was struck off the roll after conviction for a conspiracy. *Anon.* 1 Chit. 557.

It has, however, been recently held that a conviction of conspiracy is not of itself a sufficient ground for striking an attorney off the roll. *Re —*, 1 Dowl. P. C. 174.

An attorney convicted of felony was struck off the roll, though he had been burnt in the hand, and suffered imprisonment pursuant to his sentence five years before, and no misconduct imputed to him since, he being an unfit person to practise as an attorney. *Ex parte Brownsonall*, Cowp. 829.

By 12 Geo. 1, c. 29, s. 4, (made perpetual by 21 Geo. 2, c. 3, and 6 Geo. 3, c. 14), judges have power to transport attorneys in practice after having been convicted of perjury or forgery.

An attorney was struck off the roll for signing a fictitious name to a demurrer, as and for the signature of a barrister. *Smith v. Matham*, 4 D. & R. 738.

A solicitor, falsely representing that an injunction was granted, was struck off the roll. *Kimpton v. Eve*, 2 Ves. & B. 352.

The court of C. P. refused to strike an attorney off the roll on the ground that he had not served a regular clerkship, and had misconducted himself previously to his admission, where there was no charge of misconduct subsequently to such admission. *In re Page*, 7 Moore, 372; 1 Bing. 160.

A motion to strike an attorney off the roll on the ground of misconduct, and the want of regular service in his clerkship, comes too late when the party has been three years and a half admitted. *In re —*, 2 B. & Adol. 766.

Quære, whether an attorney, who keeps out of the way to avoid service of the master's allocatur, is eligible to remain any longer on the roll? *In re — (Gent.)*, 1 D. & R. 589.

An attorney cannot be struck off the roll on his own motion, though he has never practised, without an affidavit that no proceedings are pending against him for misconduct. *Anon.* 1 Chit. 557.

So, the court of Chancery will not strike a solicitor off the roll at his own request, without an affidavit that there is no other reason for the application. *Ex parte Owen*, 6 Ves. jun. 11: *S. P.* *Ex parte Foley*, 8 Ves. jun. 33.

(c) *As to Clerks.*

The court of K. B. has a summary jurisdiction over matters in difference between attornies and their clerks; and, therefore, where a clerk misconducted himself, and left the service of the attorney, to whom he was articulated, at the end of a year and a half, and the latter refused to take him back, in consequence of his previous misconduct, the court referred it to the master, who decided that a portion of the premium should be returned; and the decision was affirmed by the court, though the point in question had been decided otherwise in a suit in the Exchequer. *Ex parte Fisher*, 1 Chit. 694.

So the court ordered an attorney, who had refused to take back an apprentice who had run away from his service, on the ground of misconduct, and with whom a premium had been given, to return to the parents of such apprentice a part of such premium. *Ex parte Prankerd*, 3 B. & A. 257.

A party was articulated as a clerk to one of two attornies in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been articulated died: the court ordered the surviving partner to refund a portion of the premium, although at the time of the payment of such premium his partner was indebted to him, and the premium had been set off in account between them. *Ex parte Bayley*, 9 B. & C. 691; 4 M. & R. 603.

(d) *Allowing others to use their Names.*

By 2 Geo. 2, c. 23, attornies and solicitors permitting others to practise in their names are to be disabled from practice.

By 22 Geo. 2, c. 46, s. 11, it is enacted, "that if any sworn attorney or solicitor shall suffer his name to be used by an unqualified person, to enable him to practise as an attorney or solicitor, and complaint shall be made thereof in a summary way, and proof made thereof upon oath to the satisfaction of the court, such attorney or solicitor shall be struck off the roll;" and by the same section it is enacted, "that in that case, and upon such complaint, and proof made as aforesaid, it shall be lawful for the court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court for any time not exceeding one year."

The court struck two attornies off the roll for knowingly permitting an unqualified person to practise as an attorney in their names, for his own profit, contrary to the 22 Geo. 2, c. 46, and

sentenced such unqualified person to be imprisoned for three months in the prison of the court: and the latter being previously a prisoner for debt, was ordered to be brought up without a day rule, on a suggestion that he was unable to pay the expenses of such rule. *In re Clark*, 3 D. & R. 260.

Where an attorney of C. P. was found by the prothonotary to be in contempt, for allowing another person to practise in his name, who had not been admitted an attorney, the court ordered the former to be struck off the roll, and the latter to be committed to the Fleet prison for three months. *In re Isaacson*, 8 Moore, 322.

An attorney who forms a partnership with an unqualified person is within the provisions of the 22 Geo. 2, c. 46, s. 11. *Tench v. Roberts*, 6 Madd. 145.

An attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profit instead of a salary. The names of both were painted on the office door, and bills for business were made out and delivered in their joint names:—Held, that this was a case within the 22 Geo. 2, c. 46, s. 11, inasmuch as the attorney had allowed his name to be used, for and on account of an unqualified person: the court ordered the attorney to be struck off the roll, and the conveyancer to be committed to prison for a month. *In re Jackson*, 1 B. & C. 270; and see *Grojan v. Wade*, 2 Stark. 443.

The court refused to strike an attorney off the roll on an affidavit which stated, that a person, who had lately been his clerk, and who lived in a town eight miles distant from the residence of the attorney, and carried on business at an office, over the door of which was written the attorney's name, but that he only attended on market days, and then transacted all his business at an inn, on the ground that it should have been shewn that such person either participated in the profits, or carried on business on his own account. *In re Garbutt*, 9 Moore, 157; 2 Bing. 74.

An attorney having died, and bequeathed all his property to his widow; his eldest son, for the mixed consideration of the good-will of the business, the advancement of money for carrying it on, and family affection, enters into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the minority of his younger brothers and sisters: this arrangement is not contrary to the policy of the stat. 22 Geo. 2, c. 46, s. 11. *Candler v. Candler*, 6 Madd. 141.

Where a bailiff had written to an attorney for writs, which the latter sent him without knowing any thing of the parties or circumstances; but the bailiff never represented himself, nor had been considered as an attorney, nor looked for any profit upon the law proceedings:—Held, that this was not a case within the 22 Geo. 2, c. 46, s. 11; but that it was a most improper practice, which the court, by virtue of its general jurisdiction over attornies, would punish severely. *Ex parte Watton*, 5 B. & A. 824.

A person brought within the latter branch of

the section, upon an affidavit of his offence, is not entitled to have the witnesses in support of the charge examined viva voce. After the matter had been referred in such a case by consent of counsel to the master of the Crown Office, who reported the party to be in contempt, the court allowed the latter to bring the whole of the case under their own consideration, when brought up to be committed. *In re Jacques*, 2 D. & R. 64.

(c) *Delivery up of Documents.*

[For the Production of Documents for purposes of Evidence, see EVIDENCE.]

**Generally.**—Where a solicitor has in his possession deeds and papers belonging to his client which he refuses to part with, the court of Chancery has jurisdiction to order the solicitor to deliver up the deeds and papers, and also his bill of costs, the party offering to pay what the master shall find to be due to him; though there is no cause pending, and though no part of the costs has been incurred in respect to any action or suit in law or equity. *In re Murray*, 1 Russ. 519.

A court of common law will not order an attorney to deliver up deeds which he swears were delivered to him for a special purpose, which he has fulfilled. *Smith v. Cotterell*, 4 Dougl. 205.

If it appear that a third person be interested in the deeds, the court will take a security from the person to whom they are delivered, to produce them on demand, for the inspection of such third person. *Hughes v. Mayre*, 3 T. R. 275.

The court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment or security for payment of the solicitor's bill. *Redfearn v. Sowerby*, 1 Swans. 84.

It seems that the summary jurisdiction of the court extends to the representatives of solicitors. *Id.*

**Attorney holds as Party or Trustee.**—The court will not compel an attorney to deliver up a deed where he holds it as a party or trustee. *Pearson v. Sutton*, 5 Taunt. 364.

Where an attorney has drawn his own marriage settlement, under which he takes no interest, but is mentioned in it, and it is deposited with him for safety, the court will not compel him to give it up at the instance of a trustee under it. *Ex parte Moxon*, 1 Dowl. P. C. 7.

**In Attorney's Hands for Professional Purposes.**—An attorney is not entitled to retain drafts and copies of original deeds which his client has paid for; and if he will not deliver them up, the court will compel him to do so. *Ex parte Horsfall*, 7 B. & C. 528; 1 M. & R. 306.

So they will not compel an attorney to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it. *In re Lowe*, 8 East, 237.

Where the deeds are delivered to an attorney,

by two jointly, for the purpose of carrying on a suit in the Exchequer, the court of C. P., upon motion by one alone, will not order such deeds to be delivered up, on payment of the debt and costs by him, as they could not bring the other before them, nor bind his rights in his absence. *Duncan v. Richmond*, 1 Moore, 99; 7 Taunt. 391.

The court will not, on a summary application, compel an attorney to deliver up, on payment of what is due to him, deeds which have been intrusted to him for the purpose of raising money upon them. *In re Millard*, 1 Dowl. P. C. 140.

The court, after refusing the first application, granted a rule nisi against an attorney, why he should not deliver up two bills, delivered to him to get discounted, or pay over the amount, although he was not retained at the time in any legal proceeding. *Ex parte Hall*, 7 Moore, 437.

Semble, that an attorney, who has drawn an agreement between two parties, will be ordered, upon motion to the court, to give up to either of them a copy thereof, to the best of his power, where the same shall be requisite, upon payment of the costs thereof. *Clarke v. Terret*, 1 Smith, 399.

**Where Attorney a Steward.**—The court, under special circumstances, will entertain a summary jurisdiction over an attorney, by obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court, and receiver of rents. *Hughes v. Mayre*, 3 T. R. 275; *S. P. Marshall's case*, 2 W. Black. 912; and — *v. Russell*, 1 Ld. Ken. 129.

So also in C. P., which court will, it seems, make him pay over rents received. *Ex parte C. C. Coll*, 6 Taunt. 105.

Particularly at the instance of the lord of the manor. *Ex parte Grubb*, 5 Taunt. 206.

But the court of K. B. refused to proceed summarily against a steward, who was an attorney, to compel him to account before the Master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and to deliver up, upon oath, all deeds, writings, &c. relative to the estate; this being the proper subject of a bill in equity, and not a case for a mandamus to compel a steward of a manor to deliver up court-rolls, &c., in lieu of which, this summary mode of proceeding has been adopted, where the steward of the manor is an attorney. *Cocks v. Harman*, 6 East, 404; 2 Smith, 409.

A steward may be examined as a witness, to give evidence of the existence and contents of a particular document, if due notice have been given to produce it specifically. *Falmouth (Earl) v. Moss*, 11 Price, 455.

**In case of Bankruptcy.**—If one of two attorneys, partners, is bankrupt, the court will not, on motion, order the assignees to deliver the papers of the clients to the solvent partner, without the client's consent. *Davidson v. Napier*, 1 Sim. 297.

The court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with



his attorney, in actions commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where assignees wanted such papers for the purpose of instituting criminal proceedings against the bankrupt, the court refused to make the order, and dismissed the petition with costs. *Ex parte Innes*, Buck, 327.

An attorney who receives a deed from his client, and is compelled to produce it by commissioners of bankrupt, and afterwards receives it back from them, undertaking to produce it again if required, may nevertheless refuse to produce it in an action brought by the assignees of the bankrupt, under whose commission he was compelled to produce it. *Nixon v. Mayoh*, 1 M. & Rob. 76—Tindal.

#### (f) Payment of Money.

A summary application may be supported against an attorney, to compel him to pay monies received by him, though he was not employed in any suit: and an agent may make the application, though he has no authority to receive; and the court will compel the payment into court for the benefit of the parties interested. *De Wolfe v. —*, 2 Chit. 68.

The plaintiff, having sued out a writ of capias ad satisfaciendum against the defendant, sent it to the sheriff to be executed: the under-sheriff sent the writ to the defendant's attorney, who neglected to levy or act upon it:—Held, that the attorney could not be called on by a summary application to pay the plaintiff the amount of the debt, as his remedy in the first instance was against the under-sheriff, for having delivered the writ to the defendant's attorney, instead of his own officer. *Harding v. Francis*, 5 M. & P. 637.

Where an attorney was employed by J. S. to collect and get in effects due to him as administrator of another person, the court compelled such attorney to render an account to the executors of J. S. of monies received by him, although he had never been employed by J. S. or his executors to conduct any proceedings at law, or in equity, on his or their behalf. *In re Aitkin*, 4 B. & A. 47.

Where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the court will not compel him summarily to pay over the alleged balance. *Ex parte Schwalbanker*, 1 Dowl. P. C. 182.

The court will not grant an application requiring an attorney to pay over the interest of a sum of money which has come improperly into his hands. *Fenn v. Wild*, 1 Dowl. P. C. 498.

The court will not compel an attorney to pay a sum of money he has received in his character of attorney, he having, after the receipt of the money, become bankrupt, and obtained his certificate. *Ex parte Culliford*, 8 B. & C. 220: *S. P. Baron v. Martell*, 9 D. & R. 390; *Rex v. Edwards*, 9 B. & C. 652.

Where an attorney employed by both vendor and purchaser receives the purchase-money and

omits to pay it over, and afterwards becomes a bankrupt, and obtains his certificate, the court will not make a rule compelling him to pay the amount, unless fraud be shown: otherwise, if there be fraud. *In re Bonner*, 1 Nev. & M. 555.

#### (g) Payment of Costs.

The court will compel an attorney to pay the costs occasioned by his vexatious conduct in giving repeated notices of justifying bail at chambers in vacation. Therefore, where a defendant had been removed by habeas corpus from Lincoln Castle to the King's Bench prison, and the plaintiff had been put to the expense of inquiring after six sets of bail, as to one of whom a false description had been given; the court ordered the defendant's attorney to pay the costs incurred by the plaintiff, although it was sworn that such attorney had no personal knowledge of the misdescription and insufficiency of the bail. *Blundell v. Blundell*, 1 D. & R. 142; 5 B. & A. 533.

If an attorney deliver a particular of demand, containing only the debtor side of the account, he may be made to pay the costs subsequently incurred in the action. *Adlington v. Appleton*, 2 Camp. 410—Ellenborough.

Where an attorney brought an action for his bill of costs, and arrested the defendant for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing:—Held, that the court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances. *Robinson v. Elsom*, 5 B. & A. 661. And see *Thwaites v. Piper*, 4 D. & R. 194.

The attorney for the plaintiff having put in bail for the defendant, and having acted on both sides, deluding the parties, and preventing an interview, the court on motion set aside the proceedings, and made the attorney pay costs. *Berry v. Jenkins*, 3 Bing. 423; 11 Moore, 307.

Where process appeared to be sued out in the name of A. by B. neither of whom were attorneys of the court out of which it was sued, and B. had no authority from any other attorney to act in his name, the court of C. P. set aside the proceedings, and ordered A. and B. to pay the costs. *Hawkins v. Edwards*, 4 Moore, 603.

The defendant, in putting in bail, misinstructed the filacer as to the Christian name of one of two plaintiffs; the plaintiff's attorney thereupon swore that there were no bail in that action, and moved that the defendant's attorney might pay debt and costs for superseding the defendant; the court of C. P. discharged the rule with costs, to be paid by the attorney so swearing. *Clarke v. Gorman*, 3 Taunt. 492.

Upon an application under the stat. 43 Geo. 3, c. 46, without sufficient grounds, the court of C. P. in discharging the rule will direct the costs of the motion to be paid by the defendant's attorney. *Rolfe v. Rogers*, and *Rogers v. Burgess*, 4 Taunt. 191.

The plaintiff's attorney, in a cause tried at Nisi Prius, contradicted the testimony given by one of

the defendant's witnesses, who had sworn that he never had any conversation with the former on the subject in question, by stating positively that he had, and what the conversation was; and the defendant's witness was in consequence committed for perjury, but was afterwards discharged, on the attorney's stating the next day that he might have been mistaken in the person of the witness for that of his brother, who greatly resembled him; and an application being made for a new trial under these circumstances, and that the plaintiff or his attorney should be ordered to pay the costs of the former trial, the court of Exchequer granted a rule accordingly, which was afterwards made absolute, and the plaintiff's attorney was ordered to pay the costs of the former trial. *Trubody v. Brain*, 9 Price, 76.

#### (h) Answering Matters of Affidavits.

An attorney shall not be called on to answer matters of an affidavit, charging an irregularity, but not a crime, as the matter is of a criminal nature. *Anon. Lofft*, 618.

But the court of C. P. will not proceed to call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence; but will leave the parties complaining to their prosecution for such offence. *Short v. Pratt*, 1 Bing. 102.

So, on an affidavit containing a charge of conspiracy. *Knight v. Hall*, 1 Bing. 142.

A. being committed for forgery, the prosecutor called on him in prison, and said he had no wish to appear against him, but that the attorney concerned would proceed unless his costs were paid, which the prosecutor had no means of paying: he then proposed that A. should advance the money, which he did; and it got into the hands of the prosecutor's attorney; notwithstanding this, A. was put on his trial, and the prosecutor appeared against him. A., however, being acquitted, applied to the court of C. P. to compel the prosecutor's attorney to refund the money, on an affidavit of his innocence of the offence charged against him, and that he had paid the money, because from his knowledge of the parties he believed his life was then in danger; but the court refused to interfere. *Ex parte Brookes*, 1 Bing. 105.

The court will not, on the last day of term, grant a rule nisi for an attorney to answer the matters of an affidavit, or hear cause shewn against such a motion. *Baily v. Jones*, 1 Chit. 744: *S. P. Jacob's case*, 4 Burr. 2502.

Unless it appear to the court that, under the circumstances, it could not have been made earlier. *Leader v. Harris*, 1 Tidd's Prac. 503.

In disposing of a rule nisi obtained on that and other grounds, the court will not give an opinion on the alleged unreasonableness of an attorney's bill, stated as the sole ground for supporting the rule; that being a proper subject of reference to the master; nor will they make such reference a part of the order for discharging the original rule. *Peace v. Roberts*, McClell. & Y. 105.

Quære, whether the affirmation of a Quaker is admissible to call on an attorney to answer the

matters of an affidavit? *In re Gellibrand*, 1 D. & R. 121.

If an attorney, required to answer the matters of an affidavit, swear in his exculpation to an incredible story, the court will grant an attachment against him, though he positively deny the malpractices imputed to him. *In re Crossley*, 6 T. R. 701.

An attorney's clerk attending the court in person, upon a complaint against him for malpractice, which he has fully answered by affidavits, cannot be examined ore tenus upon oath. *Tyson v. Ironmonger*, 1 Wils. 30.

#### (i) Other professional Misconduct.

Where an attorney, although without any corrupt or unworthy motive, prepared a special case in order to take the opinion of the court upon the will of a testator, and suggested facts which had no foundation:—Held, that he was guilty of a contempt, and he was fined in 30*l.* for his offence. *In re Elsom*, 5 D. & R. 389; 3 B. & C. 597.

It is a high misdemeanour in an attorney to compromise a criminal charge; therefore, an attorney was fined 500*l.*, and suspended six months, for taking 200*l.* from one who was charged with forgery, to let him out of the custody of a tipstaff. *Rex v. Vaughan*, 1 Wils. 221.

A plaintiff's attorney was compelled to refund the costs of a bill of Middlesex, where it appeared that no precept or warrant to prosecute had been filed in the office. *Wadworth v. Allen*, 1 Chit. 186. And see 1 Chit. 651.

Where an attorney had wholly prepared and signed a bond to pay money to his client upon a wrong stamp, he was compelled upon motion to put a proper stamp upon it; but, though the only subscribing witness was his own servant, at the time of the execution, the court refused to compel him to admit the execution of the bond, he swearing that he did not then know where such witness resided. *Gwilliam v. Barnett*, 2 Smith, 155.

#### 4. For Negligence.

##### (a) Conduct of Causes.

*Error of Judgment*.]—An attorney is not liable for the consequence of a mistake in a point of law, upon which a reasonable doubt may be entertained. *Kemp v. Burt*, 1 Nev. & M. 262.

Nor is he to lose the amount of his bill, on account of any error in the execution of his duty which a cautious man might fall into; but if the charges contained in his bill are brought upon his client by his inadvertence, he cannot recover them in an action. *Montrion v. Jefferys*, 2 C. & P. 113; R. & M. 317—Abbott.

An attorney, with the advice of counsel, produced, in an action against J. B. for negligence in the conduct of the plaintiff's defence to another action, the prothonotary's book to prove an allegation "that in consequence of the negligence of J. B., judgment by default had been signed, and such further proceedings had, that final judg-

ment was afterwards signed, and execution issued;" whereupon plaintiff was nonsuited for not producing the record of that judgment, or a proper copy:—Held, that this was not such negligence as rendered the attorney liable to an action. *Godefroy v. Dalton*, 6 Bing. 460; 4 M. & P. 149.

**General Want of Attention.**—Where the plaintiff employed the defendants to conduct an action of ejectment for the recovery of premises forfeited to him by the tenant's breach of covenant to repair, and it was referred to an arbitrator, who was to decide what repairs were necessary, but the defendants neglected to attend him, whereby the plaintiff was obliged to pay the defendants' costs incurred in the ejectment, instead of the tenant:—Held, that an action was maintainable, and that it was not necessary to produce the lease on which the ejectment was brought. *Swannell v. Ellis*, 8 Moore, 340; 1 Bing. 347.

Where plaintiff's attorney suffered a cause to be called on for trial, without having ascertained whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which he was nonsuited:—Held, that in an action against such attorney for negligence, it was rightly left to the jury to determine whether he had used reasonable care in conducting the cause, and they having found that he had not, the court refused to disturb the verdict. *Reece v. Rigby*, 4 B. & A. 202. *And see In re Jones*, 1 Chit. 651; and *Dax v. Ward*, 1 Stark. 109.

An attorney in a cause is not answerable for the absence, neglect, or want of attention in the counsel engaged in it. *Lowry v. Guilford*, 5 C. & P. 234—Taunton.

Rule for new trial afterwards made absolute. *Id.*

If a cause, which is meant to be defended, be called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court of C. P. will grant a new trial, compelling the defendant's attorney to pay the costs as between attorney and client out of his own pocket. *De Rouffigny v. Peale*, 3 Taunt. 484.

A dispute between A. B., a married woman, and C. D., was referred to arbitration. After the reference had proceeded some time, an additional matter was submitted by the attorneys for the said parties. C. D.'s attorney signed the submission in his presence. A. B.'s attorneys signed in the presence of C. D.'s attorney, but without any authority from their client; the award was afterwards set aside, and C. D.'s attorney sued him for the expenses of the arbitration:—Held, that in not requiring to see the authority of A. B.'s attorneys, he had not been guilty of such negligence as would prevent his recovering the amount of his bill. *Edwards v. Cooper*, 3 C. & P. 277—Park.

In case against an attorney, for filing a bill in Chancery without any authority from, and without the knowledge of, the plaintiff, which was afterwards dismissed with costs, which the plaintiff was obliged to pay; the venue may be laid either

in the county where the court of Chancery is held, or the county where he actually paid the money. *Lyde v. Rodd (in error)*, 1 Bro. P. C. 60.

**Letting Judgment go by Default.**—The defendant, an attorney, was sued for negligence in allowing judgment to go by default, in an action which the plaintiff had retained him to defend; the negligence being proved:—Held, it was for the attorney to defend himself by shewing, if he could, that the plaintiff had no defence in that action, and not for the plaintiff to begin by shewing he had a good defence, and so had been damaged by the judgment by default. *Godefroy v. Jay*, 7 Bing. 413; 5 M. & P. 284.

It was the duty of the defendant to have pleaded the general issue, and not to have suffered judgment to go by default. *Id.*

It seems that an action against an attorney for negligence is maintainable without proof of special damage. *Id.*

The plaintiff declared against an attorney, for negligence in not causing an application to be made to the court to set aside proceedings in an action brought against him, on the ground that he had never been served with process; in consequence whereof, judgment was signed against him by default, and afterwards final judgment was sued out, and execution issued thereon:—Held, that it was incumbent on the plaintiff to produce an examined copy of the record, to prove both the judgments; and that proof of the entry of the judgment by default, in the prothonotaries' book, and the inquisition with the prothonotaries' allocatur, were not sufficient evidence of such judgment. *Godefroy v. Jay*, 1 M. & P. 236; 3 C. & P. 192. *And see Godefroy v. Dalton*, 6 Bing. 460; 4 M. & P. 149.

Seemle, that the judgments are the gist of the action, and not merely special damage. *Id.*

**As to Prisoners.**—Neglecting to charge a defendant in execution within time, will subject the attorney to an action. *Pitt v. Valden*, 4 Burr. 2060.

Though it appear to be rather want of judgment than negligence. *Russell v. Palmer*, 2 Wils. 325.

The two terms allowed by the rule of court, T. T. 26 Geo. 3, for charging a prisoner in execution, must be computed from the date of the notice of surrender. Therefore, in case against an attorney for negligence, where plaintiff had recovered a judgment against A., who surrendered in discharge of his bail on the day before the escon day of E. T., and gave notice thereof two days afterwards, and, not being charged in execution during E. T., was discharged in T. T.:—Held, that the action was not maintainable; first, because A. was improperly discharged; and second, because the meaning of the rule of court is doubtful. *Leidler v. Elliott*, 5 D. & R. 635; 3 B. & C. 738.

In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment, the return of the

writ on which the debtor was arrested being laid to be in the 25th year, &c., and the writ itself appearing to have been returnable in the 24th year, &c.; this was held to be a fatal variance, even though the day of the return was alleged in the declaration under a videlicet. *Green v. Rennett*, 1 T. R. 656.

In an action against an attorney for suffering a debtor, in custody at the suit of the plaintiff, to be superseded, proof that such debtor was a married woman destroys the action, when the declaration states that she was indebted. *Lee v. Ayrton*, Peake, 119—Kenyon.

### (b) Investigation of Titles.

Where an attorney acts for a client, who advances money on the security of a legacy given to the borrower under a will, he is not warranted in relying upon a partial extract from the will, it is his duty to examine the will itself. *Wilson v. Tucker*, 3 Stark. 154; D. & R. N. P. C., 30—Abbott.

But it seems that his duty is not so strict, but that if he be lulled by the assurance of his client into a persuasion that the security on which such client proposes to advance the money is good, so as to abate his vigilance in the inquiry into its validity, his liability for negligence is discharged. *Id.*

The executrix of an attorney is liable in an action on the case for negligence of her testator, in not making due inquiry into the validity of a security upon which his client proposed to advance money. *Id.*

Where the plaintiff, as administrator, declared in assumpsit that the intestate had retained the defendant as his attorney, to investigate and procure a good title of an estate about to be conveyed to the intestate as purchaser; and assigned for breach that he did not do so, but accepted a bad and defective title in the lifetime of the latter, whereby his personal estate was much injured:—Held, on demurrer to the declaration, that the action was well brought, although it was objected, first, that though it was framed in contract, it was in substance a tort, arising from a neglect of duty by the defendant; secondly, that the heir should have sued, and not the administrator, as it was a contract which ran with the land; and lastly, that it was not alleged in the declaration that the defendant undertook to ascertain and procure a good title in his professional character as an attorney; for, by the demurrer, the defendant admitted the promise to the intestate, as well as the allegation that the injury accrued to his personal estate during his lifetime; and it must be implied that he was bound to fulfil his duty as an attorney, it being alleged that the intestate employed him as such. *Knights v. Quarles*, 4 Moore, 532; 2 B. & R. 102.

Semble, an attorney ought himself to peruse a title on the part of his client, before he sends it for counsel's opinion. *Draz v. Scroope*, 1 Dowl. P. C. 69; 2 B. & Adol. 581.

Where the attorney of the vendee of an estate was employed to investigate the title thereto, and,

in taking the opinion of counsel thereon, omitted to state in the case certain deeds materially affecting the title; and upon the faith of the opinion given (which would have been different, had all the deeds been stated), the vendee concluded the purchase, but was afterwards damnified by finding that the title was imperfect:—Held, that the attorney was liable to him in an action of negligence. *Ireson v. Pearman*, 5 D. & R. 687; 3 B. & C. 799.

In an action against an attorney for non-feasance, in not looking properly into a title, it is sufficient to state that he was retained as an attorney, without stating the consideration. If diligence would have been ineffectual, the defendant must prove it; and if the declaration state that the defendant was an attorney of a particular court, the plaintiff must prove it, though the defendant put in his plea as such. *Bourne v. Diggle*, 2 Chit. 311.

If the declaration state that the plaintiff retained the defendant, an attorney, to see if a certain security was good, and that he accepted the retainer, and neglected his duty, and represented the security to be good; and that the plaintiff advanced his money, and that the security was bad, by means of which the plaintiff lost the interest, it is sufficient. *Howell v. Young*, 5 B. & C. 259; 2 C. & P. 238.

### (c) Annuities and Fines.

*Preparing Annuity Securities.*—An attorney employed to purchase and prepare the assignment of an annuity, before the decisions holding that the trusts in the annuity deeds must be particularly set forth in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchased was void, because the memorial omitted particularly to specify the trusts of the annuity deeds. *Bakie v. Chandless*, 3 Camp. 17—Ellenborough: *S. P. Compton v. Chandless*, cited 3 Camp. 19.

Where an annuity has been made void by reason of a defect in the memorial, and the attorney who prepared the conveyances is sued by the grantee for negligence, and a verdict recovered against him to the amount of the consideration money paid for the same, which he pays, he cannot recover it over against the grantor in an action of assumpsit. *Burdon v. Webb*, 2 Esp. 527—Ken.

A count in assumpsit stated that plaintiff having retained defendant, at his request, to lay out 700*l.* in the purchase of an annuity, the defendant promised to lay it out securely; that plaintiff delivered the money to him for that purpose; and that defendant laid it out insecurely:—Held, after verdict, that the consideration for the defendant's promise was sufficiently stated. *Whitehead v. Greatham*, 2 Bing. 464; *McCl. & Y.* 205; 10 Moore, 183.

A count in assumpsit against an attorney for negligence, stating "that, in consideration that plaintiff would retain defendant in investing money in the purchase of an annuity, defendant undertook to perform his duty in the premises; that plaintiff did retain defendant for the purpose

aforsaid; yet defendant did not perform his duty in the premises, but invested the money in security of no value, by reason of which premises plaintiff lost the money:"—Held, on motion in arrest of judgment, that the count was bad, because it did not state that any reward was to be paid to the defendant, or that he was employed in any particular character, so as to make him responsible for taking bad security, although not guilty of negligence or dishonesty. *Dartnall v. Howard*, 6 D. & R. 438; 4 B. & C. 345.

In an action against an attorney for negligence in the purchase of an annuity, the party who appears to be the grantor on the face of the deed, is a competent witness to prove it to be a forgery, as he could in no case avail himself of the verdict. *Hunter v. King*, 4 B. & A. 209.

*Levying Fines.*—If a sum of money be paid to an attorney for the purpose of levying a fine, and he neglect to do so, whereby the party is put to the expense of levying another, the Court of C. P. will not order such sum to be repaid by the attorney, as his bill might have been taxed when it was discovered that the fine had not been passed; and they left the party to his remedy by action. *In re Lawrence*, 2 Moore, 665.

But if an attorney mislays the papers of a fine, and does not complete it, the court will, if all the parties be alive, direct a new one at the expense of the attorney. *Stone v. Stone*, 4 Taunt. 601. And see *Gruggen v. White*, 4 Taunt. 881: *S. P. Linds v. —*, 5 Taunt. 305.

#### (d) Client's Money.

If an attorney pay into his bankers' hands money of his client's, mixing it with his own, and the bankers fail, the attorney is liable to make good the loss. *Robinson v. Ward*, 2 C. & P. 59; *R. & M. 274*—Abbott.

A solicitor in a cause, who improperly assumes the character of receiver, is responsible for rents lost by his neglect. *Wood v. Wood*, 4 Russ. 558.

#### (e) How made answerable.

The Court of K. B. will not interfere on motion against an attorney, for negligence in the discharge of his professional duty, if there be no fraud; and, therefore, where an attorney, who was retained to defend an action, allowed judgment to go by default, and afterwards desired his client not to attend to endeavour to mitigate the damages, because the proceedings might be set aside for irregularity, when in fact they could not; and, in the end, execution was sued out, and the client paid the sum claimed and costs:—Held, that the only remedy against the attorney was by action. *In re Jones*, 1 Chit. 651. And see 1 Chit. 186.

The court will not make an order for an attorney to pay the debt and costs, upon a suggestion of negligence, unless something corrupt be shewn. *Anon. Loft*, 545.

Nor will they, upon motion, compel an attorney, who has made a fatal mistake, to indemnify his client. *Barker v. Butler*, 2 W. Black. 780.

Where bail call together upon an attorney, and employ him to surrender their principal, one of them cannot afterwards maintain a separate action against the attorney for neglecting to effect the render pursuant to his undertaking. *Hill v. Tucker*, 1 Taunt. 7.

#### (f) When a Defence to Action.

Negligence in the conduct of a cause cannot be set up as a defence to an action on the attorney's bill. *Templer v. McLachlan*, 2 N. R. 136.

Nor that he had neglected to follow the instructions of his client. *Johnston v. Alston*, 1 Camp. 176—Ellenborough.

So, it is no defence in such an action, that the defendant has derived no benefit from the suit, where the failure does not result wholly from the plaintiff's negligence, but partly from accident. *Dax v. Ward*, 1 Stark. 409—Ellenborough.

Nor that the items in the bill were for suing out a commission of bankruptcy, under a misrepresentation of the plaintiff, that it would operate in the sale of Man, and that it had been wholly fruitless. *Pasmore v. Birnie*, 2 Stark. 59—Ellenborough.

An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, and not with the design of imposing on the client. *Hill v. Featherstonhaugh*, 7 Bing. 569; 5 M. & P. 541.

In considering an attorney's bill, the jury may discard an item for work entirely useless; though, upon an item partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross action. *Shaw v. Arden*, 9 Bing. 287; 2 M. & Scott, 341; 1 Dowl. P. C. 705.

#### 5. To Action of Trespass.

An attorney is not liable with his client in a joint action of trespass, unless it can be proved that he has gone beyond the strict line of his duty. *Sedley v. Sutherland*, 3 Esp. 202—Kenyon: *S. P. Carrett v. Smallpage*, 9 East. 330.

But trespass for false imprisonment lies as well against an attorney as against his client, who sues out at the suit of his client an illegal writ of *capias ad satisfaciendum* against a defendant, and causes such defendant to be imprisoned thereon. *Barker v. Braham*, 3 Wils. 368; 2 W. Black. 866.

And where a defendant, on being taken in execution under a writ of *ca. sa.*, tendered the debt and costs to the plaintiff's attorney, and required him to sign his discharge, which he refused to do until he had paid an independent collateral demand for costs:—Held, that the plaintiff and his attorney were liable to an action on the case for such refusal. *Crozer v. Pilling*, 6 D. & R. 129; 4 B. & C. 26.

Where an attorney, at the instance of a creditor, sued out process against a debtor in the county court, and the attorney's agent, after the debt and costs had been paid, but in ignorance

of that fact, signed judgment and sued out execution, and levied upon the debtor's goods though he had never appeared:—Held, that both the creditor and his attorney were liable to the debtor in an action of trespass. *Bates v. Pilling*, 9 D. & R. 44; 6 B. & C. 38.

A. placed money in the hands of his attorney to invest for him, giving the attorney an unlimited authority to do what was best; the attorney advanced the money to B. on mortgage, but discovering that the security was bad, the attorney sued out a bailable writ in A.'s name against the borrower for the amount, without the knowledge of A.:—Held, that B. could not maintain an action against the attorney for arresting him without the authority of A., if the attorney acted bona fide, and A. afterwards approved of what he had done. *Anderson v. Watson*, 3 C. & P. 214.—Vaughan.

A defendant, on whose application a judgment has been set aside for irregularity in practice, without costs, cannot recover such costs as damages in an action for trespass against the plaintiff's attorney, for taking his goods under colour of the judgment. *Loton v. Devereux*, 3 B. & Adol. 343.

## IX. BILL OF COSTS.

### 1. Signing and Delivery.

#### (a) Statutes.

By 3 Jac. 1, c. 7, s. 1, *attornies and solicitors are to give a true bill to their clients of all charges concerning suits, subscribed with their hands and names.*

By 2 Geo. 2, c. 23, s. 23, *no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after he shall have delivered unto the party charged therewith, or left for him at his dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, subscribed with the proper hand of such attorney or solicitor.*

If an attorney does business of a taxable nature, and other business clearly not so, he is bound to include the whole in one bill, which is taxable; and he cannot bring an action for the non-taxable business alone, but must deliver his whole bill under the statute. *Thwaites v. Mackerson*, 3 C. & P. 341; *M. & M.* 199.—Tenterden: *S. P. Benton v. Garcia*, 3 Esp. 149.

Even for costs out of pocket. *Miller v. Twiss*, Peake, 102.—Kenyon.

But when there are matters in the bill which have no relation to business as an attorney,—as money advanced to the defendant,—the master upon reference to him should strike those items out, and proceed to tax the rest. *Wardle v. Nicholson*, 1 Nev. & M. 355.

And the attorney is entitled to recover the money lent, without reference to his business of attorney. *Mowbray v. Fleming*, 11 East, 285.

In an action on an attorney's bill, it is sufficient to bring the bill within the statute, that

some of the items upon the face of it are of such a nature as to shew that a cause must have been depending in some court; and it is not necessary to prove, aliunde, that there was a cause depending. *Watt v. Collins*, 2 C. & P. 71; *R. & M.* 284.—Best.

The month required by the statute is a lunar month. *Hurd v. Leach*, 5 Esp. 168.—Ellenb.

The clause of 3 Jac. 1, c. 7, s. 1, requiring attornies to deliver a bill to their clients before charging them with any of the "fees or charges" in the act mentioned, is to be confined to business done in the king's courts of record at Westminster. *Reynal v. Smith*, 2 B. & Adol. 469; *1 M. & Rob.* 85; *1 Dowl. P. C.* 334.

#### (b) Items of Charge.

[If there be any items which are taxable, a bill delivered is required; and therefore the expressions may be considered as synonymous.]

If any part of an attorney's bill be for business done in K. B., the bill must be signed and delivered a month before an action can be brought upon it, even though some of the items be for business not taxable. *Winter v. Payne*, 6 T. R. 645.

So in C. P. *Hill v. Humphreys*, 2 B. & P. 343; 3 Esp. 254.

In that court, even though such items were not at all connected with the plaintiff's professional capacity. *Id.*

And if the attorney fail as to those items which are taxable, for want of regularity in the delivery of the bill, he must fail altogether. *Id.*

So of a solicitor's bill. *Margerum v. Sendiford*, 3 Bro. C. C. 233.

Obtaining a bankrupt's certificate is business done in a court, and a bill for such business must be signed and delivered. *Collins v. Nicholson*, 2 Taunt. 321; *1 Rose*, 119.

For obtaining a chancellor's signature was considered as business done in court. *Id.*

But a bill for business done under a commission of bankruptcy need not. *Hamilton v. Jones*, 4 M. & P. 868; *S. C. nom. Hamilton v. Pitt*, 7 Bing. 232; *1 Dowl. P. C.* 209; *S. P. Crowder v. Davies*, 3 Y. & J. 433; *Finchett v. How*, 2 Camp. 278.

Nor where the charges are for drawing an affidavit of a petitioning creditor's debt and bond to the chancellor, in order to obtain a commission of bankruptcy, where the affidavit was never sworn, nor the commission issued. *Burton v. Chatterton*, 3 B. & A. 486; 2 Stark. 522.

Quære, whether a bill for business done in suing out and prosecuting a commission of lunacy is taxable, as for charges in law or equity. *Jones v. Bywater*, 2 Tyr. 402; 2 C. & J. 37; *1 Dowl. P. C.* 557.

A solicitor's bill for obtaining an act of parliament is not taxable. *Ex parte Wheeler*, 3 Ves. & B. 21; *S. P. Williams v. Odell*, 4 Price, 279.

A solicitor's bill in the house of lords is only taxable through the recognizance. *Id.*

But there is a distinction between costs of an

appeal before the House of Lords, and of soliciting a bill; the former being a proceeding in a court of law, the bill is taxable. *Id.*

Charges for proceedings before the Lord Chancellor as exercising visitatorial power upon a royal foundation are not taxable. *Ex parte Dunn*, 9 Ves. jun. 547.

A bill for business done in the county court is taxable. *Wardle v. Nicholson*, 1 Nev. & M. 355.

The preparing of a replevin bond is business done in the county court. *Id.*

But a bill for business done in the Middlesex court of requests is not. *Becke v. Wells*, 1 C. & M. 75.

A charge for business done at the quarter sessions is. *Sylvester v. Webster*, 9 Bing. 388; 2 M. & Scott, 506; 1 Dowl. P. C. 708: *S. P. Clark v. Donovon*, 5 T. R. 694; 1 Esp. 137. *And see Ex parte Williams*, 4 T. R. 496.

So, prosecuting an extent. *Res v. Collingridge*, 3 Price, 280: *S. P. Rex v. Partridge*, 1 Tidd's Prac. 330.

So, fees for holding a court-leet as steward of a manor. *Lethbridge v. Luzmore*, 1 D. & R. 511: *S. C. nom. Luzmore v. Lethbridge*, 5 B. & A. 398.

So, for procuring the discharge of an insolvent debtor. *Smith v. Wattleworth*, 6 D. & R. 510; 4 B. & C. 364; 1 C. & P. 615.

But attending upon and concerting measures with the attorney of the opposing creditor to resist the discharge of an insolvent, is not taxable business. *Crowder v. Davies*, 3 Y. & J. 433.

Preparing a warrant of attorney is a taxable item. *Sandom v. Bourne*, 4 Camp. 68—Ellenborough. *S. P. James v. Child*, 2 Tyr. 732; *Wilson v. Gutteridge*, 4 D. & R. 736; 3 B. & C. 157.

Even although the instrument have not been executed. *Weld v. Crawford*, 2 Stark. 538—Ab.

So, drawing an affidavit of debt, and getting it sworn. *Winter v. Payne*, 6 T. R. 645.

A *dedimus potestatem*, charged in an attorney's bill, is a sufficient item to enable the court of C. P. to refer the bill for taxation, though, with this exception, it be entirely for conveyancing. *Ex parte Prickett*, 1 N. R. 266.

A charge for searching whether satisfaction of a judgment was entered, or whether an issue was entered, will not constitute an attorney's bill a taxable bill, so as to make it necessary to deliver it regularly signed before the action brought. *Fenton v. Correa*, 2 C. & P. 45; *R. & M. 262*—Abbott.

A charge in an attorney's bill for attending at a lock-up house and obtaining defendant's release, and filling up the bail-bond, is a taxable charge. *Fearne v. Wilson*, 6 B. & C. 86; 9 D. & R. 157.

So, charges by an attorney for attending the defendant and advising him, he having been served with a writ after paying the amount of the debt; and attending him, and advising on an action that had been brought against him, are taxable items. *Smith v. Taylor*, 5 M. & P. 66; 7 Bing. 259; 1 Dowl. P. C. 212.

So, a sum advanced by the attorney to the defendant to discharge the debt and costs of an action, is a disbursement within the statute. *Id.*

A., an attorney, at the request of B., who was in custody for debt in an action in which A. had not been concerned, gave an undertaking for the debt and costs, which he accordingly paid to the plaintiff's attorney, without having the costs taxed:—Held, that this was not a disbursement by A., as an attorney, within the meaning of the statute. *Prothero v. Thomas*, 1 Marsh. 539; 6 Taunt. 196.

"Attending A. and B., the proposed bail of the defendant, and examining them as to their competency to justify; attending the plaintiff in several actions commenced against the defendant, and arranging with him to take cognovits therein," are taxable items. *Watt v. Collins*, R. & M. 284; 2 C. & P. 71—Best.

#### (c) In what Cases.

By 12 Geo. 2, c. 13, s. 5, it is provided, that the stat. 2 Geo. 2, c. 23, is not to extend to bills due from one attorney or solicitor to another attorney or solicitor, or clerk in court.

One attorney, as agent for another in the country, has no occasion to deliver his bill signed before he brings his action. *Bridges v. Francis*, Peake, 1—Kenyon: *S. P. Nelson v. Garforth*, 1 Esp. 221; *Jones v. Price*, Peake, 2, n. *And see Wildbore v. Brian*, 8 Price, 677.

If the charges be for agency in causes in which the defendant was the attorney, and in which the plaintiff acted as his agent. *Sandys v. Hornby*, 4 C. & P. 520; 1 M. & Rob. 33—Tenterden.

But an action on an attorney's bill cannot be maintained for professional business against an attorney without delivering a signed bill previously to the action. *Heming v. Wilton*, M. & M. 529; 4 C. & P. 318—Tenterden.

But an item for money lent, which is not a disbursement in a cause, may be separated from the professional items, and recovered. *Id.*

In order to enable one attorney to maintain an action against another for business done by the plaintiff for the defendant, before the defendant became an attorney, it is not necessary for the plaintiff to leave his bill signed. *Ford v. Maxwell*, 2 H. Black. 589; 1 Esp. 442.

An executor of a deceased attorney, who sues for a bill due to him need not leave a signed bill. *Barrett v. Moss*, 1 C. & P. 3—Burr. *And see Penon v. Johnson*, 4 Taunt. 724.

If a bill have been delivered to a deceased client, it is not necessary, in order to maintain an action against his personal representatives, to deliver another to them. *Reynolds v. Caswell*, 4 Taunt. 193.

Before an attorney can set off his bill for business done, he must deliver such bill signed, but it need not be delivered a month under the statute. *Murphy v. Cunningham*, 1 Anst. 198; *S. P. Bulman v. Birkett*, 1 Esp. 449.

A solicitor may sue out a commission upon a

debt for costs, without having delivered a bill signed. *Ex parte Howell*, 1 Rose, 312.

So, an attorney may prove his bill under a commission of bankrupt without delivering a signed bill. *Eicke v. Nokes*, M. & M. 303—Tenterden.

Rule for new trial afterwards obtained. *Id.*

(d) *Sufficient Signing and Delivery.*

*Signature.*—A bill for business by two attorneys in partnership, signed by one in the name of the firm, is a sufficient subscription within the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, although the signature do not contain the christian names of the partners. *Smith v. Brown*, 1 C. & J. 542; 1 Tyr. 486; 1 Price's P. C. 89; 5 C. & P. 94.

*Where and to whom delivered.*—The bill must be left with the client. *Brookes v. Mason*, 1 H. Black. 290.

Delivery at the counting-house of the client is not a good delivery. *Hill v. Humphreys*, 2 B. & P. 343; 3 Esp. 254.

But leaving it at the defendant's last known apparent place of abode is sufficient. *Wadson v. Smith*, 1 Stark. 324—Ellenborough.

Delivery of an attorney's bill to the attorney of the party to be charged, is sufficient, if the party himself attend the taxation, or the bill be shewn to have come into his hands. *Warren v. Cunningham*, Gow, 71—Dallas.

A party in a cause, having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the statute, which delivery was accordingly made to the second attorney in the cause:—Held, that this was a sufficient delivery to the party to be charged therewith. *Vincent v. Slaymaker*, 12 East, 372.

It is not sufficient evidence of delivery of a signed bill at the defendant's abode, that a signed bill was delivered at a particular place not shewn to be his abode, and that he afterwards gave the bill to his present attorney, who attended the taxation of costs. *Eicke v. Nokes*, M. & M. 303—Tenterden.

The defendant having signed an admission of the debt, to enable the attorney to prove it under a commission of bankrupt then subsisting against him, is no admission of the delivery of a signed bill, and does not dispense with the necessity of such proof in an action subsequently brought against him for the same claim. *Id.*

A bill with an indorsement upon it, "March 4th, 1815, delivered a copy to C. D.," which indorsement is proved to be the handwriting of a deceased clerk of the plaintiff's, (whose duty it was to have delivered a copy of the bill), and proved to have existed at the time of the date, is evidence to prove the delivery of the bill. *Champeys v. Peck*, 1 Stark. 404—Ellenborough.

*Joint Retainer.*—Where an attorney is retained jointly by several parties to defend a suit

against each, the delivery of a bill to one is sufficient to entitle him to maintain a joint action against all for his costs, within the statute. *Oxenham v. Lemon*, 2 D. & R. 461.

Where the one to whom the bill was delivered was the party from whom he received all his instructions, and to whom the management of the business was left by the other; or otherwise if he deliver it to one who did not intermeddle. *Finchett v. How*, 2 Camp. 275—Ellenborough.

It would appear that separate bills need not be given to underwriters who jointly retained the attorney. *Crowder v. Shee*, 1 Camp. 437—Ellenborough.

(e) *Omission.*

If a defendant be arrested by an attorney for fees, and a bill of costs be delivered to him without being signed, he cannot be discharged out of custody on entering a common appearance, as a want of such signature will be a defence to the action on producing the bill at the trial. *Twinslinson v. Clark*, 4 Moore, 4.

An attorney cannot maintain an action even for the money paid out of pocket in a cause, until he has delivered a bill signed. *Miller v. Towers*, Peake, 102—Kenyon.

Nor if part of his demand be for money advanced to his client's use, and the remainder for business done, unless a bill be delivered; neither will he be allowed to divide his demands at the trial, and recover for the money advanced. *Benton v. Garcia*, 3 Esp. 149—Heath. *S. P. Thwaites v. Mackerson*, 3 C. & P. 341; M. & M. 199.

Nor for money paid for costs which his client is adjudged to pay. *Crowder v. Shee*, 1 Camp. 437—Ellenborough.

An attorney, not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order, after action brought, is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provisions of the statute. *Mowbray v. Fleming*, 11 East, 285; *S. P. Wardle v. Nicholson*, 1 Nev. & M. 355.

Although a plaintiff could not recover a particular item, on account of the provisions of the statute not having been complied with; held, that nevertheless he might recover the residue of the bill. *Drew v. Clifford*, R. & M. 280; 2 C. & P. 69—Abbott.

2. *Contents of Bill.*

By 2 Geo. 2, c. 23, s. 23, the bill must be written in a common legible hand, and in the English tongue (except law terms and names of writs), and in words at length (except terms and sums).

By 12 Geo. 2, c. 13, s. 5, such abbreviations as are commonly used may be written in bills.

An attorney may deliver a bill of costs containing such abbreviations of English words as are usual and intelligible. *Reynolds v. Caswell*, 4 Taunt. 193.



An attorney may recover the amount of his bill in an action, although the copy delivered contains such abbreviations as "declon." "instrons." "confce." "aft." "attg." &c. *Frowd v. Stillard*, 4 C. & P. 51—Tenterden.

A mistake in the date of items, which does not mislead, will not vitiate, so as to render the delivery nugatory. *Williams v. Barber*, 4 Taunt. 806.

It is not sufficient to charge the costs of an action, brought for the now defendant by the plaintiffs as his attorneys, at one sum in the lump, although the costs in that action had been taxed at that sum as between party and party. *Drew v. Clifford*, 2 C. & P. 69; R. & M. 280—Abbott.

If, in an action for an attorney's bill, it appear that the plaintiff in his bill charges for specific attendance on certain days; and, besides that, charges a further sum for several attendances, the judge at the trial will direct the jury to deduct this latter sum from the amount of the bill. *Rawson v. Earle*, 4 C. & P. 44—Tenterden.

### 3. Taxation of Bill.

#### (a) When allowed.

*Authority to tax.*—By 2 Geo. 2, c. 23, s. 23, a bill delivered may, upon application of the party charged, or of any person in that behalf authorized, to the court in which the business or the greatest part thereof in amount or value shall have been transacted, and upon submission to pay the whole sum that upon taxation shall be allowed, be referred for taxation to the proper officer, although no action or suit shall be then depending; and if upon due notice either party shall not attend, the officer may proceed *ex parte*: payment of the sum allowed to be a discharge, and in default may be enforced by attachment or other proceedings; and if there has been an over payment, the repayment of the overplus may be in like manner enforced.

The courts have an inherent jurisdiction at common law to tax the bills of attorneys practising in them, independently of the powers given by the statutes 2 Geo. 2, c. 23, s. 23, and 30 Geo. 2, c. 19, in cases where no actions have been brought on such bills. *Wilson v. Gutteridge*, 4 D. & R. 736; 3 B. & C. 157; S. P. *Anon.* 2 Chit. 155.

Therefore, where an action was pending on an attorney's bill against two defendants, and a baron at chambers, on application by one of them, made an order for taxation without imposing the terms of an undertaking to pay the sum found to be due, the court refused a rule to rescind the order imposing such terms, for the order was made at common law, and not under the statute. *Watson v. Postan*, 2 Tyr. 406; 2 C. & J. 370; 1 Dowl. P. C. 556.

It is a matter of doubt whether the court has a power, independently of the statute, to refer an attorney's bill for taxation, when it contains no taxable item. *Dagley v. Kentish*, 1 Dowl. P. C. 331; 2 B. & Adol. 411.

An attorney having sued for the amount of his bill, which did not contain any taxable item, the defendant, (who had before tendered part of the amount, but objected to the rest as unreasonable), moved to have it referred to the master, on the

ground of the general authority possessed by the court over its officers:—The court (after conference with the other judges) refused to interfere. *Id.*

The application to tax an attorney's bill for business done in suing out and prosecuting a commission of lunacy should be made to the Lord Chancellor, though after action brought on the bill in a court of law. *Jones v. Bywater*, 2 Tyr. 402; 2 C. & J. 37; 1 Dowl. P. C. 557.

The court of Chancery has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the court of Great Sessions in Wales, where there is no detention of title deeds, nor any other matter besides costs in dispute. *Ex parte Partridge*, 2 Mer. 500; 3 Swans. 398.

The court of Chancery has no jurisdiction to order a solicitor's bill to be taxed on the application of the solicitor. *Sawyers v. Walond*, 1 Sim. & Stu. 97.

The jurisdiction of the court of Exchequer, and its authority to make orders for the payment of a crown solicitor's bill of fees, is independent of the statute 2 Geo. 2, c. 23, and is founded on the necessary and inherent control of the court over the conduct of its officers; and delay to a certain extent in making application to the court for such purpose will not, in a gross case on the part of such solicitor, be considered laches. *Rex v. Bach*, 9 Price, 349.

An agreement between plaintiff and defendant, that the plaintiff's bill should not be taxed:—Held, not to be binding upon the bail. *Woosman v. Wood*, 1 Dowl. P. C. 681.

*Before Payment.*—Attorneys' and solicitors' bills may be taxed as of course at any distance of time before they are settled and paid. *Anon.* 1 Tidd's Prac. 333.

Even after an action brought, at any time before trial, although after plea pleaded, and issue joined. *Id.*

And even after a verdict has been found for the full amount. *Nuttall v. Marr*, 3 D. & R. 33.

This is done on a suggestion, that some of the items therein would not have been allowed by the master had it been originally referred to him; but only upon the terms of the defendant's paying the costs of the application and taxation, and also those of the cause as between attorney and client, the plaintiff being at liberty to take out money forthwith, which had been paid into court. *Lee v. Wilson*, 2 Chit. 63.

So, a solicitor may proceed to tax his costs after a verdict at law, notwithstanding an injunction to stay execution, with a view to commencing an action in his own name for the amount, after a final settlement between the parties by arbitration, without his concurrence. *Brooks v. Bourne*, 1 Price, 72.

So, an attorney's bill may be referred for taxation, though it is his executor who sues on it. *Penson v. Johnson*, 4 Taunt. 724.

The court of Exchequer would not stay the

postea in the hands of the associate, for the purpose of having an attorney's bill, upon which an action had been brought and a verdict recovered, referred for taxation, and to be indorsed according to the allocatur, where the jury expressly found a verdict for the plaintiff for the amount of his bills, subject to taxation; and they discharged the rule for the application with costs. *Hewitt v. Ferneley*, 7 Price, 234.

Where an attorney arrested the defendant, and held him to bail, for his bill of costs, amounting to 15*l.*, and the costs were afterwards reduced by taxation to a sum less than that amount: the court refused to order the bail-bond to be delivered up to be cancelled. *Thwaite v. Piper*, 4 D. & R. 194. And see *Robinson v. Elsom*, 5 B. & A. 661.

Semble, that an attorney may maintain an action for business done under a commission of bankrupt, against the assignees, without having his bill taxed by a master in Chancery, if he have regularly delivered the bill. *Finchett v. How*, 2 Camp. 278—Ellenborough.

The bill of costs of an attorney who is agent to the attorney employed by the party in respect of whose business the agency charges have been incurred, will not be ordered to be referred to the master to be taxed, on the application of the client. *Wildbore v. Bryan*, 8 Price, 677: *S. P. Anon.* 1 Wils. 266.

**Attorney's Bills after Payment.**—The court of C. P. will not direct an attorney's bill to be referred to taxation after payment, unless it can be impeached on the grounds of gross overcharge, fraud, or mistake, or some specific charge, which must be distinctly pointed out; and although the application was made by a *cestui que trust*, who had a direct interest in the subject-matter for which the expenses in the bill were incurred; yet, it having been previously paid by the representative of a surviving trustee, acting under a deed of trust for sale, the court refused to interfere. *Wilkinson v. Foster*, 7 Moore, 496.

So in K. B. where no fraud or misconduct was suggested, and more than seven years had elapsed since the transactions had been done and adjusted, and the money paid, the court refused to open or refer them for taxation. *Ex parte Shipden*, 6 D. & R. 338. And see *Johnes v. Lloyd*, 10 Price, 62.

The court of Exchequer will refer an attorney's bill to be taxed by the master, after it has been paid, on application within a reasonable time, without shewing circumstances of fraud or imposition. *Glascott v. Castle*, 2 C. & J. 355; 2 Tyr. 302; 1 Dowl. P. C. 317.

But where several bills of costs had been delivered in, settled, and paid, in the course of a long cause, and a receipt in full given, the court would not allow the client to have the bills taxed at the end of the cause. *Pistor v. Dunbar*, 1 Anst. 186.

A plaintiff's attorney was in one case ordered to deliver a bill of costs to be taxed on the part of defendant, after payment of debt and costs

charged, and to pay the costs of the application. *Ex parte Ardens*, 1 Price's P. C. 149.

A plaintiff having paid to an attorney the amount of his bill, cannot, after the reduction of the bill by taxation, recover the difference. *Gower v. Popkin*, 2 Stark. 85—Ellenborough.

**Solicitor's Bills after Payment.**—A solicitor's bill cannot be taxed after payment and long acquiescence, unless very gross charges are distinctly pointed out. *Plenderleath v. Fraser*, 3 Ves. & B. 175.

Thus, taxation was refused after a security given, payment and acquiescence: some charges, though improper, not being so gross as to amount to fraud. *Id.*

Though settled by bond and mortgage, a solicitor's bill may be taxed. *Newman v. Payne*, 4 Bro. C. C. 350.

Though the court will open a solicitor's bill, and order taxation, after several years, and a security given, or even payment, or a judgment given, upon gross error, fraud or undue pressure. *Langstaff v. Taylor*, 14 Ves. jun. 263.

Yet where nothing appeared but a trifling inaccuracy, and under other favourable circumstances, the court would not restrain proceeding upon a security obtained, while the business was depending. *Cooke v. Settee*, 1 Ves. & B. 126.

A bill of costs, where the amount of it has been settled between the solicitor and client, and part of it has been paid and security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation. *Gratton v. Seyburne*, 1 Turn. & Russ. 407.

A settlement of a bill of costs during the continuance of the suit, while the client has no professional adviser, except the solicitor himself, is not a bar to its taxation. *Crossley v. Parker*, 1 J. & W. 460: *S. P. Howell v. Edmunds*, 4 Russ. 67.

A party liable under a bond of indemnity for the costs of another, having, on a compromise, paid what the solicitor stated to be the amount of them, is entitled afterwards to have the bill taxed. *Baine v. Paver*, Jacob, C. C. 305.

#### (b) Proceedings to Tax.

An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable. *Reg. Gen.* K. B., C. P., and Excheq., H. T. 2 W. 4, 1 Dowl. P. C. 196; 8 Bing. 302; 1 M. & Scott, 429; 3 B. & Adol. 388; 2 C. & J. 194; 2 Tyr. 349; 4 Bligh, N. S. 604.

A bill of costs delivered by the solicitor in 1809, and shortly afterwards paid by the client; between that time and March, 1817, four other bills of costs were delivered, and various payments were made on account; in November, 1817, a sixth bill was delivered; when the client paid the general balance due on the bills of costs, at the same time stating that he would insist on having the bills taxed; an application for taxation to a judge at law, in 1818, and an application to K.

R. in 1819, failed, from circumstances not involving the merits of the question; some attempts at a compromise were made from time to time; and the client was obliged on three or four occasions to leave England in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper.—The court ordered that the bill last delivered should be taxed generally, and that the five antecedent bills should be referred to the master, with a direction that the client should deliver to the solicitor a schedule of items complained of, and that the master should exercise as large a discretion as he might think fit with respect to the evidence on which he should proceed in forming his judgment concerning these items. *Scougall v. Campbell*, 3 Russ. 545.

An order for taxing a bill of costs, intituled in the cause, if obtained by a party to the cause, is regular under the general jurisdiction; but a person, not a party in the cause, must apply *ex parte* under the statute 2 Geo. 3, c. 23, s. 2. *Bignol v. Bignol*, 11 Ves. jun. 328.

Quere, whether a party having obtained such an order in a cause may pursue it under the statute. *Id.*

A party who by agreement has paid the bill of costs of another party cannot apply for a taxation. *Langford v. Nott*, 1 J. & W. 291.

A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. *Oste v. Christian*, 1 Turn. & Russ. 325.

#### (c) Costs of Taxation.

**Amount of Reduction.**—By 2 Geo. 2, c. 23, s. 23, upon taxation, the courts are authorized to award costs of taxation to be paid by the parties according to the event, i. e. if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs; but if it shall not be less, the court in their discretion shall charge the attorney or client in regard to the reasonableness or otherwise of the bill.

Where an attorney's bill is reduced on taxation by a sixth part, the client is entitled to the costs of taxation, as they are not in the discretion of the courts. *Higgins v. Woolcott*, 5 B. & C. 760; *S. C. nom. Dickens v. Woolcott*, 8 D. & R. 589.

But the attorney cannot be compelled in the Exchequer to pay the costs of the taxation, unless for improper items amounting to one sixth. *Yea v. Yea*, 2 Anst. 594.

Nor in C. P. where the deduction of one sixth is occasioned, not by the particular items being taxed, but by a whole branch of it being disallowed. *White v. Milner*, 2 H. Black. 357.

Where a sum less than one sixth was deducted, including disbursements made by the client in the course of the cause, the court of C. P. ordered the client to pay the costs of taxation. *Hindle v. Shackleton*, 1 Taunt. 536.

Where the attorney delivered in a bill, including an item which, though fairly due, could not

be allowed on taxation; and afterwards delivered a second, without that item; and the latter was referred for taxation, and less than a sixth taken off: the court would not give costs on either side. *Webb v. Stone*, 1 Anst. 260.

Where an attorney's bill had been reduced nearly one sixth on taxation, the court refused to allow him the costs of taxation. *Elwood v. Pearce*, 1 Dowl. P. C. 251; 1 M. & Scott, 159; 8 Bing. 83.

Items in a solicitor's bill were charged to the plaintiff in respect of the defence of a third person, at the plaintiff's request; the solicitor did not shew that he was employed in such defence by the plaintiff, and the items were struck out; and held, that such items were to be computed among the deductions, for the purpose of determining upon whom the costs of taxation were to fall. *Rigby v. Edwards*, 5 Madd. 20.

If, on the taxation of a crown solicitor's bill of fees and disbursements, so large a sum be disallowed as to make it a matter of reprobation by the court, they will not only order the costs of the taxation to be paid by the solicitor to the defendant, but, if he has received the whole bill by sums paid him on account, they will order him to pay interest for the balance which the master shall report to be due from him, in consequence of the disallowance of the sums taxed off; although some of the disallowed charges be for sums paid to others for services in aid of the crown solicitor's duty, and it be not shewn that he made any interest on the balance. *Rex v. Bach*, 9 Price, 349.

**Attorney dead or a Bankrupt.**—If a bill of costs be taxed after the solicitor's death, his representative will not be ordered to pay the costs of taxation, although more than one sixth be deducted. *In re Cole*, 2 Sim. & Stu. 463.

Where, on the taxation of a deceased attorney's bill, in an action brought by the executors (who had acted improperly in other respects), instead of his surviving partner, the master deducted less than one sixth; but by allowing credit for a sum, the two together amounted to more than one sixth of the whole bill; the court left each party to pay their own costs of the taxation. *Gale v. Pakington (Bart.)*, M'Clel. & Y. 354.

If a clerk in court's bill be included in and taxed with an attorney's bill, after the attorney's death, the court will order the amount to be paid by the client to the clerk in court, and the remainder of the attorney's bill to the attorney's executrix. *Rex v. Smollett*, and *Rex v. Hamilton*, 3 Burr. 1313.

In an action on an attorney's bill, by the assignees of the bankrupt attorney, an order for taxing the bill was obtained on an undertaking to pay the amount taxed, with the costs of the action. More than one sixth of the bill having been disallowed:—Held, that costs of taxation could not be allowed to the plaintiff as costs in the action. *Featherstonhaugh v. Ren*, 1 C. & M. 495.

**Delay.**—The costs of taxing an attorney's bill

are not allowed in C. P. to a party who succeeds in striking off a sixth, where the order for taxing is not obtained till after an action on the bill has been commenced. *Benton v. Bullard*, 4 Bing. 561.

So in *K. B. Jay v. Coaks*, 3 M. & R. 35; 8 B. & C. 635; *S. P. Harbin v. Miles*, 3 B. & C. 755.

And where the solicitor was guilty of great delay in bringing in his bills, the court of Exchequer would not give him his costs of the taxation, although less than one sixth part was taken off. *Yea v. Yea*, 2 Anst. 589.

**Proceedings for Costs.**—Where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time, and cannot recover them by motion after making a subsequent settlement. *Whitfield v. James*, 8 Moore, 40; 1 Bing. 207.

An order in bankruptcy was made referring a solicitor's bill to a master for taxation, reserving costs of taxation; and the bill was taxed, and more than one sixth taken off: the solicitor brought an action for taxed costs, without deducting the costs of taxation. On petition, the action was staid, and a reference made to the master to tax the costs of the taxation of costs; and after deducting the amount thereof from the taxed costs, the same were ordered to be paid to the solicitor. *Ex parte Bellott*, 4 Madd. 379. And see *Hewitt v. Bellott*, 2 B. & A. 745.

Where one sixth of a solicitor's bill has been taxed off upon a reference, and he applies to confirm the report, giving notice to the petitioning creditor, he must pay the costs of the appearance on such application, and of the petition and taxation. *Ex parte Nutting*, 1 Mont. & Bligh, 267.

#### (d) Items of Charge.

Where an attorney charged for a declaration as containing more folios than it really did, and the charge was allowed by the master, the court held that there was no ground for reviewing the taxation. *Morris v. Hunt*, 1 Chit. 544.

The court of Exchequer refused to grant a rule to review the taxation of an attorney's bill, where the master had allowed charges for signing interlocutory judgment, which was afterwards set aside with costs, and for opposing the motions made for that purpose, objecting that the party applying had not shewn that the proceedings complained of had been resorted to mala fide, from motives inconsistent with a fair intention, and a due regard to the interest of the client. *Lloyd v. Crutchley*, and *Lloyd v. Powell*, 13 Price, 211.

Charges by a country solicitor for attending the cause in London, are to be allowed in some cases; but the circumstance of their being undertaken by the direction of the client, is not alone a sufficient ground for allowing them, as the solicitor himself is better able to judge of their necessity. *Crossley v. Parker*, 1 J. & W. 460.

An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is not binding; but

the charges made according to such agreement may be allowed on taxation, if the master, on inquiring into them, considers them proper. *Draz v. Scroope*, 2 B. & Adol. 581; 1 Dowl. P. C. 69.

Where such charges had been allowed on taxation, and paid, the court (on application about four months after) refused to order a review of the taxation, it not being shewn that the master had forborne to exercise his judgment on the charges, in consequence of the agreement between attorney and client. *Id.*

Correspondence, if not allowed separately, may be allowed in gross at the end of the bill. *Ex parte Whitehead*, 1 Price's P. C. 136.

Where certain claims are not made on the taxation of costs, they will not afterwards be allowed on reviewing taxation on the part of the party claiming them. *Id.*

#### 4. Recovery of Bill by Action.

**Parties.**—Where two persons were in partnership as attorneys, and one of them was alone appointed replevin clerk to the sheriff:—Held, that an action brought to recover the expenses of preparing a replevin-bond must be brought by the replevin clerk alone, although it was executed in the office where both carried on their joint business. *Brandon v. Hubbard*, 4 Moore, 367; 2 B. & B. 11.

An attorney carried on business under the firm of A. & Son; the son was not, in fact, a partner, but acted as clerk to his father, and received a salary:—Held, that A. might maintain an action in his own name to recover from a client the amount of a bill for business done. *Kell v. Naisby*, 10 B. & C. 20; 5 M. & R. 76.

A proctor may recover for business done by his clerk, although the client apprehended that the clerk was the principal, he acting as the principal, and never disclosing the name of his employer, provided no prejudice arises from the concealment. An agreement between a proctor and his clerk to pay the latter a salary amounting to half the annual average profits of the last three years, is not an evading of the statute. *Grojan v. Wade*, 2 Stark. 443—Abbott. And see *Brown v. Brooks*, 1 Esp. 388.

If an attorney having given credit to a person for the costs of a suit, put forward such person as a witness, and have him examined on the trial of the cause without a release (no objection being taken), he cannot afterwards maintain an action against him for the recovery of such costs. If an attorney's clerk give a receipt for money on account to a different person from that to whom he gives credit, to enable such person to deceive others, such act of the clerk will not affect the master's right to recover the remainder against such person; though, if the attorney had done it himself, it would be good ground of nonsuit. *Williams v. Goodwin*, 11 Moore, 342; 2 C. & P. 257. And see *Loveridge v. Botham*, 1 B. & P. 49.

**Pending Taxation.**—After a reference and taxation of an attorney's bill, he may maintain an action for the residue, even whilst an application

for the costs of such taxation, under statute 2 Geo. 2, c. 23, is pending, for that statute expressly authorizes the court to award payment of the residue, and only prohibits any action to be brought pending the reference and taxation. *Hewitt v. Bellott*, 2 B. & A. 745. And see *Ex parte Bellott*, 4 Madd. 379.

The court of C. P. will not stay proceedings in an action on an attorney's bill, brought subsequent to the order of the judge of another court for its taxation, but previous to that taxation having taken place. *Stevenson v. Watson*, 1 B. & P. 365.

A solicitor, whose bill had been taxed and more than one sixth taken off, brought an action against his client, before the costs of taxation were ascertained, for the amount so taxed; the court granted an injunction to restrain the action. *Berr v. Wiggins*, 4 Sim. 125.

Injunction granted to restrain an action for the amount of a solicitor's bill, which had been taxed after the commencement of the action, and more than one sixth had been taken off, but the costs of taxation had not been ascertained. *Walton v. Johnson*, 2 Sim. 456.

**Amount.**—After an attorney's bill has been delivered a month, and no application has been made to have it taxed by the master, the defendant will not be permitted to question the reasonableness of the items before a jury. *Williams v. Friid*, 1 Dougl. 189; *S. P. Hooper v. Till*, 1 Dougl. 198; *Anderson v. May*, 2 B. & P. 237; 3 Esp. 167.

In an action on an attorney's bill, it is only necessary to give evidence of the retainer and the delivery of the bill, the prothonotary being the proper party to decide on the items of it. *Hellings v. Gregory*, 10 Moore, 337; 1 C. & P. 627.

A solicitor can only recover money actually paid out of pocket for the defence of a Chancery suit against his client, who has been admitted to defend in forma pauperis. *Philipe v. Baker*, 1 C. & P. 533—Abbott.

Delivery of an attorney's bill is conclusive evidence against an increase of charge in a subsequent bill, on any of the items contained in it; and strong presumptive evidence against any additional items. *Loveridge v. Botham*, 1 B. & P. 49.

**Evidence.**—In an action on an attorney's bill, the nisi prius roll is good prima facie evidence, that the action was not commenced till the expiration of a month after the delivery of the bill. *Webb v. Pritchett*, 1 B. & P. 263.

It is sufficient to give in evidence a judge's order to tax the bill, the defendant's undertaking to pay what should appear to be due, and the master's allocatur thereon. *Lee v. Jones*, 2 Camp. 496—Ellenborough.

In an action on a bill for prosecuting an action, where the defence was, that the plaintiff undertook to conduct the cause gratis, a declaration to that effect, made by the plaintiff's clerk, when he attended the master to tax the costs in the

former action, is evidence for the defendant, as it was so nearly connected with the subject of the latter action. *Ashford v. Price*, 3 Stark. 185—Abbott.

Where the charges are for business done for two persons, partners; if one only is sued, and there is no plea in abatement, the other may be called as a witness for the plaintiff. *Fawcett v. Weathall*, 2 C. & P. 305—Abbott.

In an action for business done in procuring the execution of a bail-bond, the bond itself must be produced. *Swinford v. Green*, 3 Stark. 135—Abbott.

An examined copy of a bill, the original of which has been delivered to the defendant, may be admitted in evidence, without proof of notice to produce the original; and is conclusive as to the reasonableness of the items. *Anderson v. May*, 2 B. & P. 237; 3 Esp. 167; *S. P. Collins v. Treweek*, 9 D. & R. 456; 6 B. & C. 394.

The plaintiff cannot give parol evidence of the contents of the bill delivered. *Philipeon v. Chase*, 2 Camp. 110—Ellenborough.

If an action be brought on a note, and for business done as an attorney, the note not tallying in its amount with the business done at the date of it, and no evidence being given as to the consideration for it: it will be left to the jury to say whether the note was given in satisfaction of the bill for business done up to the time of its date, or whether it was an entirely distinct transaction. *King v. Masters*, 3 C. & P. 347—Tenterden.

By a private act of parliament, the expenses attending its passing were directed to be paid out of the tolls raised or levied, or to be raised under it. The attorney who prepared and solicited the act sued the clerk to the commissioners named in it, for the amount of his bill:—Held, that he was bound to shew that there were sufficient funds in the hands of the commissioners, which had been raised or levied by tolls or otherwise, to satisfy his demand. *Andrews v. Dally*, 1 M. & P. 490; 4 Bing. 566.

### 5. Security for Costs.

An attorney or solicitor cannot take a bond of his client for unliquidated costs. *Newman v. Payne*, 4 Bro. P. C. 350.

Nor can he take a security by mortgage for future bills of costs, for business to be done. *Pitcher v. Rigby*, 9 Price, 83; *S. P. Jones v. Tripp*, Jacob, C. C. 322.

A mortgage by a client to an attorney for costs due and to become due, held a valid security for the costs then due only. *Williams v. Piggott*, Jacob, C. C. 598.

So, a warrant of attorney given by a client to his attorney to secure future costs is illegal. *Jones v. Hunter*, 1 Dowl. P. C. 462.

A warrant of attorney given to secure the payment of future costs, and also of costs and money already due and advanced, though void as to the client's future liability, is valid as to his actual liability. *Holdsworth v. Wakeman*, 1 Dowl. P. C. 532.

6. *Payment of Bill.*

Where a sheriff's officer was written to by the plaintiff's attorney to execute the process and receive the debt and costs, and he did so, and paid the debt to him, but there was a dispute between him and the plaintiff's attorney as to the costs:—Held, the plaintiff's attorney could not proceed upon the bail-bond for the costs, the debt and costs being paid to his agent. *Jones v. Burton*, 3 Smith, 433.

The attorney employed by the petitioning creditor before the choice of assignees, and continued by the assignees afterwards, having delivered his bill to the assignees, including all the charges incurred by order of the petitioning creditor in the first instance, and having received a certain sum, on account of his bill generally, from the assignees, is bound, as the assignees themselves were, by 6 Geo. 4, c. 16, s. 25, to appropriate the sum so received in reduction of the charges incurred by order of the petitioning creditor, and for which he was originally responsible; and therefore the amount of such charges, covered by the sum so received, cannot be set off by the attorney against a debt due from him to the petitioning creditor on his own account. *Phillips v. Dicus*, 15 East, 248; 1 Rose, 345.

Where an attorney had claims on his client for conveyancing, and also for charges at law, and received payments on account, without specific appropriation to either head of debt:—Held, that the whole formed one entire demand, not to be separated, and that the plaintiff could not apply the payment to the common law items of his demand only, so as to deprive the defendant of the benefit of the taxation quoad the residue of the bill. *James v. Child*, 2 Tyr. 732.

## X. LIEN FOR COSTS.

1. *To what Extent.*

[For *Lien of Agents*, see post, AGENT IN TOWN, page 107.]

An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment. *Stevenson v. Blakelock*, 1 M. & S. 535.

But the lien which an attorney has on the papers in his hands is only commensurate with the right which the party delivering the papers to him has therein. *Hollis v. Claridge*, 4 Taunt. 807.

A solicitor has a lien on papers delivered to him in that character for all professional business, but no lien as a solicitor on papers delivered to him as steward. *Champernown v. Scott*, 6 Madd. 93.

Deeds deposited with a solicitor for a particular purpose, and after that had failed permitted to remain with him, are subject to the general lien. *Ex parte Pemberton*, 18 Ves. jun. 282.

A. is employed for some time by Messrs. B. as their attorney, and in the course of such employment a considerable debt becomes due to him;

Messrs. B. contract to sell an estate to C. who pays to them a part of the purchase money, and A. is employed in preparing the contract and making out the title. The solicitor of C. prepares the draft of the conveyance which is sent to A., and approved by him on behalf of Messrs. B., and the engrossment is afterwards executed by Messrs. B., and delivered by them to A. for the purpose of being handed over to C., on payment of the remainder of the purchase money. Before this is done, Messrs. B. become bankrupts, and the contract is rescinded:—Held, that A. has no lien on the deeds for the debt due to him from Messrs. B., but that C. is entitled to have the deeds delivered to him. *Ozenham v. Esdaile*, 2 Y. & J. 493; S. C. nom. *Esdaile v. Ozenham*, 5 D. & R. 49; 3 B. & C. 225.

Trover against an attorney for deeds; cause referred; award, a nonsuit, and each party to pay his own costs:—Held, that the attorney had no lien on the deeds for the costs:—Held, also, that the attorney had no lien on the deeds for expenses incurred by him in consequence of applications made to him for the deeds. *In re Sharpe*, 1 Dowl. P. C. 432.

Quere, whether an attorney's lien upon papers extends to the original will of his client. *Georges v. Georges*, 18 Ves. jun. 294.

In a late case it was held that a solicitor has no lien upon the will of his client. *Balch v. Symes*, 1 Turn. & Russ. 87.

A mortgagee's attorney having possession of the title deeds has a lien upon such deeds for costs due to him from the mortgagee. *Ogle v. Storey*, 1 Nev. & M. 474.

Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of taxation. *Clutton v. Pardon*, 1 Turn. & Russ. 304.

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title deeds, the court, upon motion, ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer as was not covered by any security. *Balch v. Symes*, 1 Turn. & Russ. 87.

A solicitor, who has declined to proceed with a cause, will be ordered, though his bills of costs are not paid, to deliver the papers up to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills. *Colegrave v. Manley*, 1 Turn. & Russ. 400.

Where an attorney has a lien upon the papers of two persons jointly, the court will not try the rights of the parties by directing to whom they shall be given up upon the lien being satisfied. *Duncan v. Richmond*, 1 Moore, 99; 7 Taunt. 391.

A solicitor is bound to produce papers of his client for him, or in case of his bankruptcy for his assignees, though not employed by them in the cause, for the purpose of which he received

them; but not bound without payment to deliver them up, or produce them in any other business. *Ross v. Laughton*, 1 Ves. & B. 349.

## 2. For what Costs.

An attorney has a lien upon deeds, papers, and writings belonging to a bankrupt, not merely for his bill for business done before the bankruptcy, but for the costs of an action brought against the bankrupt after the commission issued, to recover the amount of his bill, unless it appears that, as an attorney, he had improperly commenced the action for the purpose of increasing costs. *Lambert v. Buckmaster*, 4 D. & R. 125; 2 B. & C. 616.

A defendant being sued by bill as an attorney of the court of King's Bench, pleaded by an attorney who had not filed any warrant to defend, and on motion to stay the proceedings in the action (in which the plaintiff was nonsuited), the plaintiff undertook to set off the defendant's costs against a judgment debt due from him to the plaintiff:—Held, that the defendant's attorney or agent had no lien upon such costs for his own costs in defending the suit. *Van Sandau v. Burt*, 1 D. & R. 168; S. C. not S. P. 5 B. & A. 42.

A solicitor's lien does not extend to debts that are not due to him in his professional character. *Worrall v. Johnson*, 2 J. & W. 218.

Quære, whether a solicitor's lien for his costs on a fund in court is general, or is confined to the costs of the particular suit. *Id.*

A solicitor having in his possession the instrument on which his client's right to a fund in court rests, he has a general lien on that ground. *Id.*

## 3. On Debt and Costs recovered.

*On Debt recovered.*—An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment; and, if, after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a re-payment of it to himself. *Ormerod v. Tate*, 1 East, 464.

An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party, against whom the execution issued, to retain the money in his hands, and that the court would be moved to set aside the judgment for irregularity; and notwithstanding a docket has been struck against the client who has become a bankrupt. *Griffin v. Eyles*, 1 H. Black. 122.

The statute of limitations bars the remedy only, not the debt; and, therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fi. fa.* issued against his goods, upon which the sheriff levied the damages and costs; it was held, that the attorney, though he had taken no step in the cause, or to recover the amount of his

bill of costs, within six years, had still a lien on the judgment for his bill of costs; and the court directed the sheriff to pay him the amount out of the proceeds of the goods. *Higgins v. Scott*, 2 B. & Adol. 413.

*Where there are Cross Actions.*—It was formerly held in C. P. that the right between party and party was paramount to the rights between one of the parties and his attorney, where there were cross actions. *Lomas v. Mellor*, 5 Moore, 95.

Semble, in the Exchequer, that the lien of the attorney on the costs in the cause was not subject to the equity of the claim of the other party, for the costs of another suit. *Gabbit v. Chaytor*, 1 Anst. 279.

In another case it was held, that the attorney's lien was only on the balance, subject to the equitable rights of the parties inter se. *Lane v. Pearce*, 12 Price, 742.

In K. B. the lien of the plaintiff's attorney upon the debts and costs recovered in a cause, extended only to the general balance of the costs, where the defendant was entitled to set off costs recovered by him in another cause against the plaintiff. *Hovell v. Harding*, 8 East, 362; S. P. *Randle v. Fuller*, 6 T. R. 456.

Now, by rule of all the courts, no set off of damages or costs between parties shall be allowed, to the prejudice of the attorney's lien for costs in the particular suits against which the set off is sought: provided that interlocutory costs in the same suit awarded to the adverse party may be deducted. *Reg. Gen. K. B., C. P., and Exch.*, H. T. 2 Will. 4, 1 Dowl. P. C. 196; 8 Bing. 303; 1 M. & Scott, 429; 3 B. & Adol. 388; 2 C. & J. 195; 2 Tyr. 349; 4 Bligh, N. S. 604.

Where the defendant applied to set off the costs and damages recovered in an action brought by him against the costs and damages recovered in an action brought against him:—Held, in K. B., that the plaintiff's attorney had a lien upon the judgment obtained by his client against the defendant for the amount of his costs in that cause only. *Stephens v. Weston*, 5 D. & R. 399; 3 B. & C. 535.

Costs in error are costs in a cause, where an attorney has a lien on debt and costs recovered after affirmation in error, and the defendant is entitled to set off against them a judgment recovered by him in another cause against the plaintiff. *Middleton v. Hill*, 1 M. & S. 240.

Plaintiff obtained judgments against the defendant in two actions, in the court of C. P., and the defendant obtained judgment against the plaintiff in the court of K. B.:—Held, that the attorney had no lien for his costs upon the judgments in the court of C. P.; and having refused to allow them to be set off against the judgment in K. B., the court ordered him to pay the costs of the application. *Bridges v. Smith*, 1 Dowl. P. C. 242; 1 M. & Scott, 93; 8 Bing. 29.

*On Costs.*—An attorney has a lien on interlocutory costs under an order of a judge. *Aspinall v. Stamp*, 4 D. & R. 716; 3 B. & C. 108.

Where one party owing rent had obtained a verdict on a variance, and had become insolvent, the court of C. P. permitted the avowant to amend, and to pay the costs of the former trial into court, as a fund for payment of his rent, in derogation of the plaintiff's attorney's lien. *Brown v. Sayce*, 4 Taunt. 320.

#### 4. On Person of Defendant.

The plaintiff having charged the defendant in execution, died; the defendant's wife took out administration to the plaintiff; then the court of K. B. ordered the defendant to be discharged out of custody, saying, that the plaintiff's attorney had no lien on the judgment for his costs. *Pyne v. Erle*, 8 T. R. 407.

The plaintiff's attorney directed the sheriff's officer who had arrested the defendant, not to let him go at large without an express consent from him, as he had a lien for his costs; the sheriff's officer did, by the authority of the plaintiff, but without that of the attorney, let the defendant go at large:—Held, that the sheriff was not liable to the attorney for his costs. *Martin v. Francis*, 2 B. & A. 402; 1 Chit. 241.

#### 5. On Property recovered in Equity.

A solicitor prosecuting to a decree has a lien on the estate recovered, in the hands of the person recovering, for his bill, but not in the hands of the heir. *Barnesley v. Powell*, Amb. 102.

But, as he has no lien on a fund decreed to his client beyond his costs in that suit, he cannot claim the amount of other costs due to him in other suits. *Lann v. Church*, 4 Madd. 391.

A solicitor having declined to act for his client, has no lien for his costs upon a fund in court. *Creswell v. Byron*, 14 Ves. jun. 271.

A solicitor who receives rents in a cause without the authority of the court, cannot retain them on the ground of lien. *Wickens v. Townshend*, 1 Russ. & Mylne, 361.

#### 6. When extinguished.

##### (a) By Settlement of Parties.

*Collusive Compromise.*—A defendant settling a matter in dispute with the plaintiff, in the absence of the plaintiff's attorney, after having been served with process, does not bind the plaintiff's attorney. *Cole v. Bennett*, 6 Price, 15.

A plaintiff may, without consulting his attorney, compromise an action with the defendant, and take on himself the payment of the costs to the attorney, if there be no fraudulent conspiracy to cheat the attorney of his costs. *Chapman v. Haw*, 1 Taunt. 341.

If a plaintiff compromise an action with the defendant, without consulting his attorney, and the latter proceed in the action to secure his costs, he is bound to make out a clear case of collusion between the plaintiff and defendant to deprive him of such costs. *Nelson v. Wilson*, 4 M. & P. 385; 6 Bing. 568.

If a plaintiff compromise the debt and costs with the defendant before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him, unless he gave notice to the defendant not to settle with the plaintiff till his bill should be paid. *Welsh v. Hole*, 1 Dougl. 233.

If the defendant's attorney pay to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt and costs of the suit. *Read v. Duppa*, 6 T. R. 361.

Where the amount of damages sought to be recovered in an action is unliquidated, the parties may compromise, without regard to the plaintiff's attorney's claim to costs. *Ex parte Hart*, 1 Dowl. P. C. 324; 1 B. & Adol. 660.

In an action for excessive distress, the defendant compromised with plaintiff, after notice from plaintiff's attorney not to do so without his consent; the court refused to interpose on behalf of the attorney, the case being one of purely unliquidated damages. *Id.*

Where a plaintiff and defendant collude in the settlement of an action, in order to deprive the plaintiff's attorney of his costs, and a bill for debt and costs is given by the defendant in furtherance of that collusion, the court will compel the delivery up of that bill. *Gould v. Davis*, 1 Dowl. P. C. 288; 1 C. & J. 415; 1 Tyr. 380.

*Release.*—A release of all demands from the plaintiff to the defendant will not deprive the plaintiff's attorney of his lien upon the costs of an action awarded in favour of the plaintiff. *Gifford v. Gifford*, Forrest, 109; *S. P. Ormerod v. Tate*, 1 East, 464.

*Entry as Satisfaction.*—Where the plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record:—Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, 4 B. & A. 466.

Where an attorney, without a regular authority from the plaintiff, commenced an action of replevin, and the plaintiff, with a knowledge of the proceedings, suffered the cause to be carried down to trial, but afterwards concerting with the defendant, entered up satisfaction on the record without securing to the attorney his costs, the court refused to vacate the entry of satisfaction. *Abbott v. Rice*, 3 Bing. 132; 10 Moore, 489.

*What Course an Attorney may pursue.*—Payment of debt to plaintiff after action brought, without the knowledge of the attorney and without costs, is no stay to the action. *Toms v. Powell*, 7 East, 536; 3 Smith, 554; 6 Esp. 40; *S. P. Atkinson v. Thornton*, 1 Camp. 559, n.; *Holland v. Jourdain*, Holt, 6.

And if a defendant pays the plaintiff, after the writ is sued out, without discharging the costs,



the attorney may proceed in the cause notwithstanding. *Id.*

Yet he will not be allowed to make use of his client's name in proceeding in an action, for the purpose of trying whether, at the time of settlement, he was entitled to the costs of a declaration. *Charlwood v. Berridge*, 1 Esp. 345—Eyre.

An attorney is entitled to his costs for writing a letter demanding a debt from a defendant before writ issued. *Morrison v. Summers*, 1 Dowl. P. C. 325; 1 B. & Adol. 559.

A plaintiff's attorney in London, on 10th April, applied to defendant living in the country, for the payment of a debt, and of 5s. for a letter. The defendant replied that he would pay in a fortnight. On the 14th, the attorney, in answer, stated, if the debt was paid on the 21st no further expense would be incurred, and demanded 13s. 4d. for his costs. On the same day, and before the receipt of that letter, the defendant remitted the debt to plaintiff, through a banker; and on the following day the plaintiff received it, and gave a receipt. On the 15th, the attorney, with the view of receiving his costs, sued out a writ; and on discovering afterwards that the plaintiff had been paid, informed the defendant, that, unless 1l. 1s. was paid him, he should proceed in the action for his costs:—Held, that as the remitting of the money to the plaintiff, and not to the attorney, was a breach of good faith, the court would only stay the proceedings on the terms of paying the 13s. 4d., and the costs of the application. *Id.*

If the plaintiff and defendant collusively settle the debt and costs upon an execution, in order to defraud the plaintiff's attorney of his costs, the plaintiff's attorney cannot sue out a second execution on the same judgment to levy his costs, but must apply to the court. *Graves v. Eades*, 1 Marsh. 113; 5 Taunt. 429.

But if a plaintiff collude with the defendant's bail and his attorney, to deprive the plaintiff's attorney of his costs, by settling a debt, and accepting part payment without the intervention of the plaintiff's attorney, the court of C. P. will not restrain the plaintiff's attorney from proceeding against the bail in order to recover such costs. *Swin v. Senate*, 2 N. R. 99.

Upon a party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands, but cannot otherwise stop the progress of the cause till he is paid. *Merrywoether v. Mellish*, 13 Ves. jun. 161; *S. P. Twart v. Dayrell*, 13 Ves. jun. 195.

#### (b) By other Means.

Where C. gave his attorney a specific sum for the purpose of satisfying a debt, for which an execution had issued against his goods at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by C. with B. as a security for the debt:—Held, that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished by his having taken acceptances from C. for the amount of that balance before the lease came to his hands, some

of those acceptances, when the lease did come to his hands, having been dishonoured, and one of them taken up by the attorney. *Stevenson v. Blakelock*, 1 M. & S. 535.

A solicitor's lien is superseded by taking a security. *Balch v. Symes*, 1 Turn. & Russ. 92; *S. P. Cowell v. Simpson*, 16 Ves. jun. 275.

A solicitor relinquishes his lien on papers in his hands by obtaining an order to tax his bill, and to prove for the amount. *Ex parte Innes*, Buck, 357.

Though an order be made on a petition in bankruptcy, directing costs to be paid to the petitioner personally, this does not take away the lien of the solicitor for his costs. *Ex parte Bryant*, 1 Madd. 49.

The solicitor is not deprived of his lien on the funds in court, for his costs in the cause, by having issued an attachment against his client, and committed him to gaol for non-payment of his bill; but the costs which he may receive in the cause are to be taken in discharge of the attachment pro tanto. *Davies v. Bush*, 1 Younge, 358.

#### XI. AGENT IN TOWN.

*Authority of.*—The acts of an attorney's agent in town, in matters relative to the suit, are binding upon the parties. *Griffiths v. Williams*, 1 T. R. 710.

The death of a principal attorney, pending a suit, does not revoke his agent's authority to obtain possession of a postea, after a verdict found for the client of the former. *Taunton v. Goforth*, 6 D. & R. 384.

*Recovery of Costs.*—An attorney employing an agent to do business for his client, is primarily liable to such agent for his bill, though the latter knows the business to be done for the client; but to whom the credit is given is a question for the jury. *Scrace v. Whittington*, 3 D. & R. 195; 2 B. & C. 11.

An order was made in Chancery on the application of a solicitor to tax his own agent's bill. *Corner v. Hake*, 2 Cox, 173.

*Lien of.*—A town agent has no lien for the general balance due to him from a country attorney, upon money of a client of the latter coming to his hands in a cause in which he acts as such town agent, because he must have known that the money was received for the client's use; but quære, whether he has not a lien for his agency in recovering the money in the particular cause. *Moody v. Spencer*, 2 D. & R. 6.

Where the plaintiff's attorney was indebted to the plaintiff in a sum exceeding the attorney's costs in the cause:—Held, that the agent (to whom the plaintiff's attorney was indebted on a general account in a sum exceeding the amount of the attorney's costs) could not, as against the plaintiff, retain out of the sum recovered by him more than the charge for agency in that particular cause. *White v. Royal Exchange Assurance*, 7 Moore, 249; 1 Bing. 20.

An agent has a lien upon the papers in his hands for what was due to him as agent in the cause from the solicitor in the country. *Ward v. Hepple*, 15 Ves. jun. 297; *S. P. Ex parte Steele*, 16 Ves. jun. 164.

The town agents of a bankrupt country attorney have a lien against his assignees, on papers of the client placed in their (the agent's) hands for the conduct of the business, for the amount of their bill against the attorney for the business done on the part of the client. *Bray v. Hine*, 6 Price, 203.

An agent for an attorney plaintiff, dying intestate and insolvent pending a suit, has a lien for his costs upon a postea, of which he has obtained possession after the death of the intestate. *Tunston v. Goforth*, 6 D. & R. 384.

### XII. CHANGE OF ATTORNIES.

A party in a cause cannot change his attorney or solicitor without the leave of the court. *Macpherson v. Robinson*, 1 Dougl. 217; *S. P. Thwart v. Dayrell*, 13 Ves. jun. 196.

Where a defendant has appeared and pleaded to an action by one attorney, he cannot make any application to the court by another in the same cause, unless he has obtained an order for changing his attorney. *Ginders v. Moore*, 1 B. & C. 654.

An inoperative plea having been put in without authority, by a new attorney for the defendant, without any order to change the attorney, the judgment which had been signed as for want of a plea was set aside. *Perry v. Fisher*, 6 East, 549.

But taking a plea out of the office and keeping it waives the irregularity of its having been pleaded by a new attorney without an order. *Margerem v. Makilwaine*, 2 N. R. 509.

Notice of justification of bail by a new attorney, changed without a rule of court, is irregular. *Hill v. Roe*, 2 Marsh. 257; 6 Taunt. 532; *S. P. Kaye v. De Mattos*, 2 W. Black. 1325.

And the bail will not be permitted to justify. *Macpherson v. Robinson*, 1 Dougl. 217; *S. P. Anon.* 2 Chit. 87.

But in the case of a prisoner, notice of bail may be given by one attorney, and notice of justification by another. *Crow v. Watson*, 2 Chit. 93; *S. P. Anon.* 1 Tidd's Prac. 259; *Keys v. Tavernier*, 1 Chit. 29.

The court granted a rule nisi for an attachment against the sheriff, where bail was put in by a new attorney without an order to change the attorney. *Anon.* 2 Chit. 76.

It was no objection to the justification of bail in the Exchequer, that the bail were put in by one clerk in court, and the notice of justification and of added bail given by another, if there was an affidavit that the latter were added and notice given by the bail to the sheriff. *Hancock v. Grew*, 1 Y. & J. 456; *S. P. Hopkins v. Peacock*, 5 Price, 558.

But time was given to change the attorney regularly. *Malperson's Bail*, 2 Chit. 93.

A notice of bail given by the defendant's attorney, and bail above put in by an attorney employed by the bail to the sheriff, without an order having been made for changing, was held sufficient. *Plomer v. Houghton*, 2 B. & A. 604; *S. C. nom. Rex v. London (Sheriffs)*, 1 Chit. 201, 329.

Upon the death of the attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before he can proceed in the cause. *Ryland v. Noakes*, 1 Taunt. 342.

A party called on to shew cause may oppose the rule in person, or by a new attorney, without notice to the other party of the order to change his attorney. *Lovegrove v. Dymond*, 4 Taunt. 669.

Also, in C. P., a plaintiff may sue out execution by a different attorney without an order to change. *Tipping v. Johnson*, 2 B. & P. 357.

And in K. B. a defendant may bring a writ of error without such an order. *Batchelor v. Ellis*, 7 T. R. 337.

The Exchequer did not formerly take notice of the immediate attorney in the cause, the proceedings being carried on there in the names of the clerks of the court. *Hopkins v. Peacock*, 5 Price, 558.

In C. P., where there is an order for changing upon payment of the first attorney's bill upon taxation, and delivery up of papers, the first attorney is entitled to the possession of it to enforce payment of his bill. *Alger v. Hefford*, 1 Taunt. 38.

It is unnecessary to file a new warrant when the attorney has been changed. *Wood v. Plant*, 1 Taunt. 44.

The obtaining an order, by consent, to change the attorney is not a proceeding in the cause so as to make it unnecessary to give a term's notice. *Deacon v. Fuller*, 1 C. & M. 349; 1 Dowl. P. C. 675.

A party may change his solicitor who has a lien for his costs upon papers in his possession. *Thwart v. Dayrell*, 13 Ves. jun. 195; *S. P. Merryweather v. Mellish*, 13 Ves. jun. 161.

### XIII. ACTIONS AGAINST ATTORNIES.

*Process.*—On suing out an attachment of privilege, a præcipe must have been left with the prothonotary in C. P. *Proggatt v. Tapscot*, 2 W. Black. 919.

But the attorney's name need not be indorsed on the writ: the stat. 2 Geo. 2, c. 23, s. 22, only applying to cases where the attorney sues for another person. *Fields v. Leven*, 4 T. R. 275.

An attorney plaintiff may sue by common process, and indorse his own name on the copy as attorney, and may afterwards declare by another attorney. *Jackson v. Barnard*, 7 T. R. 35.

*Filing Bill.*—Before the uniformity of process act, attorneys must have been sued by bill, which might have been filed in vacation. *Waghorne v.*

*Fields*, 5 T. R. 173; *S. P. Lane v. Wheat*, 1 Dougl. 313, n.; *Dodsworth v. Bowen*, 5 T. R. 325. And see *Crank v. Eyles*, 2 Marsh. 49; 6 Taunt. 347; *Stock v. Eyles*, 2 Marsh. 54; *Parrott v. Spraggon*, 2 H. Black. 608; *Snell v. Phillips*, Peake, 209.

As to the mode of proceeding by bill, see *Hartop v. Jukes*, 1 M. & S. 709; *Constable v. Edwards*, 1 Tidd's Prac. 323; *Anon. Loft*, 653.

As to the service of bills, see *Anon. Loft*, 357; — *v. Hough*, 1 Tidd's Prac. 323.

ATTORNEY GENERAL—See BARRISTER.

ATTORNMENT—See LANDLORD AND TENANT.

AUCTION—See SALE.

### AUDITA QUERELA.

The writ of audita querela is of common right. *Giles v. Nathan*, 5 Taunt. 558; 1 Marsh. 226; *S. P. Lister v. Mandell*, 1 B. & P. 427.

Where a writ of audita querela clearly affords relief to the defendant, the court will relieve him on motion, without putting him to the audita querela. *Id.*

But where the relief is questionable, the court will not dispose of the case on motion, but leave the defendant to go to proceed that the plaintiff may demur or bring error. *Id.*

And therefore the court refused to dispose of a writ of audita querela by a motion in arrest of judgment, where the parties seriously argued the question. *Id.*

If bail, being fixed with the debt, and having paid it, sue the principal and obtain judgment, after a commission of bankrupt has issued against him, but before he has obtained his certificate; and after he obtains it, the bail in the second action apply to be exonerated, on the ground that the plaintiffs, the bail in the original action, might prove their debt under the commission, by virtue of stat. 49 Geo. 3, c. 121, s. 8: the court refused to interfere summarily, but left the bail to their writ of audita querela. *Heves v. Mott*, and *Dalby v. Same*, 2 Marsh. 37; 6 Taunt. 329; 2 Rose, 455.

The defendants being bankrupt were sued, and suffered judgment by default in Trinity Term, and final judgment was entered up and execution issued thereon in Michaelmas Term following; on the 13th November, in that term, the defendants obtained their certificate, and on the same day the sheriff's officer levied, and he, notwithstanding a notice that the defendant's certificate had been allowed, being about to sell the goods seized, the defendants paid the amount of the debt and costs into court under a judge's order, to abide the event of a motion. On application by the

defendants to have the money paid out to them, the court refused to interfere; but left the parties to their audita querela, although it was insisted that, by the 6 Geo. 4, c. 16, s. 126, the goods as well as the persons of bankrupts are protected. *Hanson v. Blakey*, 1 M. & P. 261; 4 Bing. 493.

Where fraud was imputed to the defendant, on affidavits, stating that he had fraudulently caused a commission of bankruptcy to be issued against the plaintiff, and there were counter-affidavits by the defendant, denying the existence of fraud, the court of C. P. refused to go into the question on motion, but left the party to his remedy by action, or audita querela. *Baker v. Ridgway*, 2 Bing. 41; 9 Moore, 114.

AUDITORS—See ACCOUNT.

AUTRE FOIS ACQUIT—See CRIMINAL LAW.

AVOWRY—See REPLEVIN.

AWARD—See ARBITRATION—COMMON.

### BAIL.

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not be avoided for any trifling informality or variance of the condition from the writ, in the description of the plea, or of the time or place of appearance, or of the sum. *Atkinson v. Saunders*, 1 Tidd's Prac. 223; 4 Dougl. 254.

Under a writ in a plea of trespass on the case upon promises, the sheriff took a bond conditioned for appearance in a plea of trespass; it was held good, for it is sufficient to state the names of the parties, and the time and place of appearance. *Owen v. Nail*, 6 T. R. 702.

Where the writ was to appear before the king, "whosoever he should then be in England," and the sheriff took a bond for appearance before the king "at Westminster:"—Held, that it was a substantial compliance with the statute. *Jones v. Sturdy*, 9 East, 55.

Where, in an action on a bail-bond, the special original was returnable before the king whosoever, &c., and the word "ubique" was omitted:—Held, that the omission was not fatal. *Shuttleworth v. Pilkington*, 1 T. R. 240, n.

But where a *capias ad respondendum* was returnable "before his Majesty's justices of the bench at Westminster," by virtue of which the sheriff issued his mandate to the bailiff of a liberty, commanding him to take the defendant, so that the sheriff might have his body "before his said Majesty at Westminster," and the bailiff took a bail-bond conditioned for the defendant's appearance "before his said Majesty at Westminster:"—Held, that the variance between the bail-bond and the writ was fatal, and the bond was void. *Renolds v. Smith*, 2 Marsh. 258; 6 Taunt. 551.

By the writ, the sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he and S. P. should have given him bail in an action of assumpsit at the suit of the plaintiff. The sheriff took a bail-bond conditioned for the appearance of W. P. alone:—Held (on general demurrer to a declaration on the bond) to be no variance. *Grattick v. Phillips*, 3 M. & Scott, 132; 9 Bing. 721.

Quere, if the demurrer had been special. *Id.*

## II. DISCHARGE OF BAIL-BOND.

### 1. By Surrender of Principal.

If the defendant, who has given a bail-bond, surrender himself to the sheriff, before or on the return of the writ, the bond may be given up, and it will be considered as if no such bond had been given. *Jones v. Lander*, 6 T. R. 753; *S. P. Stamper v. Milbourne*, 7 T. R. 122; *Galloway v. Seymour*, 1 Tidd's Prac. 225. But see *Harrison v. Davis*, 5 Burr. 2683.

But not unless he give notice of such surrender. *Maddocks v. Bullock*, 1 B. & P. 325.

It is optional with the sheriff, whether or not he will accept such surrender. *Hamilton v. Wilson*, 1 East, 383.

Where the principal surrendered to the jailor at the county jail, in discharge of his bail to the

sheriff, before twelve o'clock on the first day of term, being the return-day of the writ, and the under-sheriff signed his assent to the surrender by return of post the next day, at the distance of seventeen miles:—Held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment, with notice of the render, and the court stayed the proceedings. *Plimpton v. Howell*, 10 East, 100.

And where a defendant applied to the under-sheriff, before the return of the writ, to surrender himself in discharge of his bail, which he refused to accept, without assigning any reason for so doing, and the day after surrendered himself to the keeper of the county jail, which was also before the writ was returnable, and the bail-bond was afterwards assigned to the plaintiff; the court of C. P. ordered the proceedings on it to be stayed, without costs. *Lewis v. Davies*, 5 Moore, 267.

Where the principal surrendered in time, but the bail omitted to give regular notice of it to the plaintiff, in consequence of which he proceeded upon the bail-bond, the court, on the application of the bail, set aside the proceedings on payment of costs, even after execution levied, and the money in the sheriff's hands. *Lepine v. Barrett*, 8 T. R. 222.

If A., being arrested by B., on process of C. P., give bail to the sheriff, and before the return of the writ, being again arrested by C., is committed to the Fleet Prison, after which, and before the return of the first writ, B. takes an assignment of the bail-bond, and proceeds thereon, the court will stay such proceedings; but will not make B. pay costs, for they will not try upon affidavit, whether he knew or not that A. was in custody, but will consider him ignorant of that fact, unless notice of surrender has been regularly given. *Harding v. Hennem*, 3 B. & P. 232.

The court will stay the proceedings on a bail-bond without costs, if the notice of render be given before the assignment; but not otherwise. *Anon.* 2 Chit. 103.

A surrender after bail above put in, but not perfected, though before an assignment of the bail-bond, does not discharge the bail to the sheriff. *Turner v. Wheatley*, 1 Price, 262.

Where a plaintiff had proceeded on an assignment taken after the render of the defendant, who had put in bail, whom he had insufficiently described, so that time was necessarily given for furnishing a better description, during which interval such further description was not given, nor was any attempt afterwards made to justify, the court set aside the proceedings on the assignment of the bond. *Richardson v. Hodgson*, 11 Price, 633.

Seemle, that rendering the defendant to the King's Bench prison, before the return of the writ, will not discharge the bail to the sheriff. *Foster v. Hyde*, 1 Tidd's Prac. 225, 306.

The court of Exchequer will stay proceedings against bail, where the principal has rendered on terms. *Stonden v. Blake*, 13 Price, 114; *McClell* 44.

## 2. By other Means.

**Delay in Proceeding.**—The bail-bond cannot be assigned, when the original suit is out of court by not declaring in time. *Sparrow v. Naylor*, 2 W. Black. 876.

But if the assignment be taken before the suit is out of court, it may be proceeded upon afterwards. *Piggott v. Trusts*, 3 B. & P. 221; *Collett v. Blend*, 4 Taunt. 715.

But the court will stay such proceedings, if it appear that the plaintiff has been guilty of laches. *Id.*

Where the defendant neglects to put in and perfect bail, and the plaintiff omits to declare within two terms after the return of the writ, he is not out of court, but may take an assignment of the bail-bond. *Carmichael v. Chandler*, 3 Dougl. 432.

Proceedings against bail below will be stayed on motion (on payment of costs) where the plaintiff has not proceeded against them on the bond as early as he might have done, even where a trial has been lost, if there be reason, on their part, to think that the plaintiff did not mean to proceed in the action. *Ditchett v. Tollett*, 3 Price, 257.

**Giving Time to Principal.**—After a bail-bond has been forfeited, and an assignment thereof taken, time given to the principal is no discharge of the sureties. *Wootnam v. Price*, 1 C. & J. 352.

**Bankruptcy of Principal.**—Where the defendant was arrested on the 27th March, on a writ returnable on the 16th April, and became bankrupt on the 3d of that month, and obtained his certificate on the 26th June following:—Held, that as the bankruptcy took place before the bail-bond was forfeited, the bail were discharged. *Littlewood v. Crowther*, 3 D. & R. 533.

On a motion to cancel a bail-bond, on the ground that the defendant (a bankrupt) had since obtained his certificate, it being suggested that the certificate had been obtained by fraud, the court (the parties consenting) directed an issue to try that fact. *Duncan v. Everett*, 1 M. & Scott, 521.

After staying proceedings in an action on the bail-bond, there may be a plea of bankruptcy in the original action, where the bail-bond is not ordered to stand as security. *Sainsbury v. Gandon*, 3 M. & R. 16.

**Other Things.**—It is no ground for cancelling a bail-bond, that the attorney who sued out the writ had neglected to take out his certificate. *Welch v. Pribble*, 1 D. & R. 215.

If a defendant be sent out of the kingdom as an alien, after he has given a bail-bond, and before the return of the writ, the court will order the bail-bond to be cancelled. *Postel v. Williams*, 7 T. R. 517.

## III. FORFEITURE OF BAIL-BOND.

## 1. By not giving Bail.

No bail-bond taken in London or Middlesex shall be put in suit until after the expiration of four days; nor if taken elsewhere, till after the expiration of eight days exclusive from the appearance day of the process. *Reg. Gen. K. B. C. P. and Exchequer*, H. T. 2 W. 4, 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott. 418; 3 B. & Adol. 377; 2 C. & J. 174; 2 Tyr. 343; 4 Bligh, N. S. 595.

Before this rule, it was held that a bail-bond could not be put in suit till after four days from the appearance day of the return of the writ. *Bellis v. Mitford*, 2 W. Black. 1009.

But that it was forfeited on the quarto die post, the other four days being allowed merely as grace and favour. *Coulson v. Hammond*, 4 D. & R. 160; 2 B. & C. 626.

In C. P., no bail-bond taken in London or Middlesex, by virtue of any process returnable in C. P. on the first return of a term, could be put in suit until after the 5th day in full term, nor bonds taken in other places until after the 9th day; nor, if under process returnable on the 2d or subsequent returns, until after the end of four and eight days respectively, exclusive of the return day of the process. *Reg. Gen. C. P.*, T. T. 30 Geo. 3, 1 H. Black. 526.

If the fourth day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the court on that day, an assignment of the bail-bond to the plaintiff, in the evening of that day, is regular. *Dent v. Weston*, 8 T. R. 4.

So, if the bail do not justify in four days after exception, although, from the bail having been put in sooner than was necessary, the rule for bringing in the body has not expired. *Bond v. Evans*, 7 D. & R. 374; 4 B. & C. 864. See *Whittle v. Oldaker*, 7 B. & C. 478; 1 M. & R. 298—Bayley.

It seems that where bail do not appear to justify on the day mentioned in the notice, but on a subsequent day, according to further notice, and the plaintiff, on the morning of the last day, takes an assignment of the bail-bond, and sues out process, the proceedings are not premature, although the rule for the allowance of bail be served on the same day. *Edmond v. Ross*, 9 Price, 5.

After default made in not putting in special bail in time, it is not enough that bail are afterwards put in; but the plaintiff may take an assignment of the bail-bond, and proceed thereon, unless the bail be also justified, though not before excepted to. *Turner v. Cary*, 7 East, 607; *S. P. Nuun v. Rogers*, 2 Chit. 108. And see *Fuller v. Prest*, 7 T. R. 109; *Pariente v. Plumbtree*, 2 B. & A. 35; and *Murray v. Durand*, 1 Esp. 87.

Where bail above are put in, but not justified, and the sheriff, being fixed, brings an action on the bail-bond, to which the defendant pleads compert ad diem; the court of C. P. will, on motion by the sheriff, order the recognizance of bail

in the original action to be struck off the file; though the defendant alleges that the sheriff was fixed through his own negligence; for that should be the subject of a motion to stay the proceedings on the bail-bond. *Leigh v. Bertles*, 1 Marsh. 520; 6 Taunt. 167.

If the defendant do not justify his bail in due time, and comperuit ad diem be pleaded to a declaration on the bail-bond, the court will order the appearance of the defendant to be recorded as of the day on which the bail justified. *Ladd v. Arnaboldi*, 1 C. & J. 97.

So, where bail justified at chambers by consent, and no rule for allowance was served, nor notice that they had justified given. *Bignold v. Holding*, 2 D. & R. 436; S. C. nom. *Bignold v. Lee*, 1 B. & C. 285.

If the rule for allowance of bail be not served on the plaintiff, he may take an assignment of the bail-bond though he knows of the justification. *Holland v. White*, 2 B. P. 341.

The court will not stay proceedings upon a bail-bond, upon the ground that the affidavit upon which the bail above were rejected as founded on perjury, except upon the usual terms of paying the costs incurred by the assignment and subsequent proceedings. *Hobbs v. Miller*, 1 Y. & J. 403.

A rule nisi for setting aside bailable process, &c. "with a stay of proceedings," does not enlarge the time for the defendant to put in and perfect bail, until the rule is disposed of, so as to place him in the same situation as he was in at the time the rule nisi was granted. *St. Hanliare v. Byam*, 7 D. & R. 458; 4 B. & C. 970. And see *Meysey v. Carnell*, 5 T. R. 534.

Process being returnable on the 7th of November, the time to put in bail expired on the 11th. On the 10th, defendant obtained a rule nisi to set aside process and stay proceedings, on the ground of misnomer. This rule was discharged with costs on the 21st. On the 22d, an assignment of the bail-bond was taken, and proceedings had under it, and on the same day the defendant put in bail:—Held, that the defendant had not the whole of the 22d to put in bail, and that the assignment of the bail-bond, and the proceedings had under it, were regular. *Id.*

Since the uniformity of process act, suing out the writ of summons is the commencement of the action for all purposes. Where the defendant was arrested on the 1st of April, and, owing to Easter Monday and Tuesday falling on the 8th and 9th, had the 10th to put in bail, and the plaintiff on the 10th took an assignment of the bail-bond, and issued a writ of summons against the bail, the court set aside the proceeding on the bail-bond. *Alston v. Underhill*, 1 C. & M. 492.

## 2. By putting in disqualified Persons.

If a disqualified person be put in as bail and not excepted to, the plaintiff could not in K. B. proceed on the bail-bond as if no bail had been put in. *Thompson v. Roubell*, 2 Dougl. 467, n.

If bail be put in without any description, one of whom proves to be clerk to an attorney, and the

other a person in low situation, plaintiff may in C. P. take an assignment of the bail-bond. *Fenton v. Ruggles*, 1 B. & P. 356.

So, if both bail be attorney's clerks. *Wallace v. Arrowemith*, 2 B. & P. 49.

## 3. Irregular Proceedings.

Where the notice of bail is merely informal, and not an absolute nullity, the plaintiff cannot take an assignment of the bail-bond. *Bell v. Foster*, 1 M. & Scott, 518; 8 Bing. 334; 1 Dowl. P. C. 271.

Where a rule for staying proceedings on a bail-bond had been obtained by one of the bail on an affidavit, which stated an engagement between himself and the plaintiff, to absolve him from his obligation on payment of a sum of money at a future day, upon the ground of a breach of faith in proceeding before the time; and the plaintiff met the application by a distinct denial of the engagement on affidavit:—The court discharged the rule with costs. *Sweeting v. Weaver*, 11 Price, 735.

## IV. ASSIGNMENT OF BAIL-BOND.

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By 4 Anne, c. 16, s. 20, the sheriff or other officer, at the request and costs of the plaintiff, is to assign to the plaintiff the bail-bond or other security, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, which might be done without any stamp, provided the assignment were duly stamped before any action brought thereon; and if the bail-bond be forfeited, the plaintiff, after such assignment, may bring an action thereon in his own name, and the court where the action is brought may, by rule, give such relief to the plaintiff and defendant in the original action, and to the bail, as is agreeable to justice and reason.

The stamp required on the assignment is now no longer necessary, by 5 Geo. 4, c. 41.

Under this statute it has been held, that the seal to the assignment of a bail-bond, being a seal of office, is sufficient to give it validity, who ever signed it; and, therefore, it is no objection that it was signed by one of the under-sheriff's clerks. *Hams v. Ashby*, 1 Selw. N. P. 586, n.—Mansfield.

To a plea in an action on a bail-bond at the suit of the assignee of a sheriff, that the assignment of the bond was not stamped before the exhibiting of the plaintiff's bill in the cause, the plaintiff need merely reply that the assignment was stamped at or before the exhibiting of the bill, and conclude his replication to the country; and he need not take issue as to the time when the bill was exhibited, nor aver that the assignment was stamped "before the commencement of the suit," and if the action thereon be in the K. B., and if the plaintiff avers that it was stamped at Westminster, he may nevertheless conclude to the country. *Carter v. Yates*, 2 Chit. 533.

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If a plaintiff accept an assignment of a bail-bond, he cannot call upon the sheriff to return the writ, nor shall he have a rule for that purpose before it be determined whether or no the bond be good. *Brooke (Lord) v. Stone*, 1 Wils. 293.

Nor can he proceed in the original action after taking an assignment of the bail-bond, and whilst he retains his right to sue upon it. *Anon.* 1 Chit. 394.

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In an action by the assignees of a bail-bond, it is no objection to their recovering that the sheriff, after taking and before assigning the bond, returned non est inventus. *Taylor v. Clow*, 1 B. & Adol. 223.

## 3. Waiver of Assignment.

## (a) By excepting to Bail.

Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail-bond becomes forfeited, the plaintiff may except to bail put in to stay the proceedings on the bail-bond, and it will not be a waiver of the assignment. *Boldere v. Gray*, Cowp. 769.

Unless the bail below become bail above. *Babb v. Barber*, 1 Anst. 274.

It is not a waiver of the assignment, that the plaintiff attends to oppose the justification of bail. *Edmond v. Ross*, 9 Price, 5.

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A plaintiff shall not be at liberty to proceed on the bail-bond, pending a rule to bring in the body of the defendant. *Reg. Gen. K. B., C. P., and Exch., H. T.* 2 W. 4, 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 174; 2 Tyr. 343; 4 Bligh. N. S. 595; *Reg. Gen. M. T., Exch.* 1 W. 4; 1 C. & J. 281; 1 Tyr. 163.

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So, where the attachment has been set aside. *Brown v. Neave*, Wightw. 406.

Before the rule, a plaintiff might have taken an assignment of the bail-bond even after service of the rule to bring in the body, or suing for an attachment, but not after it was sued out. *Poideverrie v. Harvey*, and *Robinson v. Owen*, 1 Tidd's

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But must have waited till the rule expired. *Whittle v. Oldaker*, 1 M. & R. 298; 7 B. & C. 478.

If bail above justify before a rule to bring in the body expires, the bail below, to an action on the bond, may plead comperuit ad diem. *Id.*

On an issue of nul tiel record, joined on a plea of comperuit ad diem, in an action on a bail-bond, the plea is proved by the recognizance roll containing an entry of defendant's appearance generally. *Id.*

After an issue of nul tiel record, joined on a plea of comperuit ad diem, to an action on a bail-bond, the recognizance roll may be made up at any time before the day given for producing it. *Id.*

## V. ACTIONS ON BAIL-BONDS.

## 1. In what Court.

An action may be brought upon a bail-bond by the sheriff himself in any court. *Reg. Gen. K. B., C. P. and Exch. H. T.* 2 Will. 4; 1 Dowl. P. C. 186; 8 Bing. 292; 1 M. & Scott, 419; 3 B. & Adol. 377; 2 C. & J. 175; 2 Tyr. 343; 4 Bligh, N. S. 596.

Before the rule, it was so held in the Exchequer. *Yorke v. Ogden*, 8 Price, 174.

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But the Court of K. B. held, it was immaterial whether the action was brought by the assignee of the bail-bond, or by the officer to whom it was given, for that, in either case, the action must be brought in the court where the original action was brought. *Donatty v. Barclay*, 8 T. R. 152.

The action by the assignee of a bail-bond must be brought in the court where the original action was laid. *Morris v. Rees*, 2 W. Black. 838; 3 Wils. 348; *S. P. Walton v. Bent*, 3 Burr. 1223.

So, an action on a bail-bond given in a county-palatine, on an action brought there, must be brought in the court below, and not in K. B., unless special circumstances warrant it. *Chesterton v. Middlehurst*, 1 Burr. 642; 2 Ld. Ken. 369.

Although it is irregular to bring an action on a bail-bond in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this under the plea of non est factum. *Wright v. Walmsley*, 2 Camp. 396—Ellenborough.

## 2. Pleadings.

*Declaration.*—In an action on a bail-bond by the assignees of a sheriff, it is not necessary that

in the original action to be struck off the file; though the defendant allege that the sheriff was fixed through his own negligence; for that should be the subject of a motion to stay the proceedings on the bail-bond. *Leigh v. Bertles*, 1 Marsh. 520; 6 Taunt. 167.

If the defendant do not justify his bail in due time, and comperuit ad diem be pleaded to a declaration on the bail-bond, the court will order the appearance of the defendant to be recorded as of the day on which the bail justified. *Ladd v. Arnaboldi*, 1 C. & J. 97.

So, where bail justified at chambers by consent, and no rule for allowance was served, nor notice that they had justified given. *Bignold v. Holding*, 2 D. & R. 436; S. C. nom. *Bignold v. Lee*, 1 B. & C. 285.

If the rule for allowance of bail be not served on the plaintiff, he may take an assignment of the bail-bond though he knows of the justification. *Holland v. White*, 2 B. F. 341.

The court will not stay proceedings upon a bail-bond, upon the ground that the affidavit upon which the bail above were rejected as founded on perjury, except upon the usual terms of paying the costs incurred by the assignment and subsequent proceedings. *Hobbs v. Miller*, 1 Y. & J. 403.

A rule nisi for setting aside bailable process, &c. "with a stay of proceedings," does not enlarge the time for the defendant to put in and perfect bail, until the rule is disposed of, so as to place him in the same situation as he was in at the time the rule nisi was granted. *St. Hanliare v. Byam*, 7 D. & R. 458; 4 B. & C. 970. And see *Meysey v. Carnell*, 5 T. R. 534.

Process being returnable on the 7th of November, the time to put in bail expired on the 11th. On the 10th, defendant obtained a rule nisi to set aside process and stay proceedings, on the ground of misnomer. This rule was discharged with costs on the 21st. On the 22d, an assignment of the bail-bond was taken, and proceedings had under it, and on the same day the defendant put in bail:—Held, that the defendant had not the whole of the 22d to put in bail, and that the assignment of the bail-bond, and the proceedings had under it, were regular. *Id.*

Since the uniformity of process act, suing out the writ of summons is the commencement of the action for all purposes. Where the defendant was arrested on the 1st of April, and, owing to Easter Monday and Tuesday falling on the 8th and 9th, had the 10th to put in bail, and the plaintiff on the 10th took an assignment of the bail-bond, and issued a writ of summons against the bail, the court set aside the proceeding on the bail-bond. *Alston v. Underhill*, 1 C. & M. 492.

## 2. By putting in disqualified Persons.

If a disqualified person be put in as bail and not excepted to, the plaintiff could not in K. B. proceed on the bail-bond as if no bail had been put in. *Thompson v. Roubell*, 2 Dougl. 467, n.

If bail be put in without any description, one of whom proves to be clerk to an attorney, and the

other a person in low situation, plaintiff may in C. P. take an assignment of the bail-bond. *Fenton v. Ruggles*, 1 B. & P. 356.

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### 2. Pleadings.

*Declaration.*—In an action on a bail-bond by the assignees of a sheriff, it is not necessary that

the declaration should aver that the writ on which the defendant was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to. *Sharpe v. Abbey*, 5 Bing. 193; 2 M. & P. 312; *S. P. Dorrington v. Bucknell*, 11 Moore, 445. And see *Wilcoxon v. Nightingale*, 4 Bing. 501; and *Arundell v. White*, 14 East, 224; confirming *Whiskard v. Wilden*, 1 Burr. 330, on the same point, though disapproved of in *Hill v. Hele*, 2 N. R. 202.

A plea that there was no proper affidavit, is bad on special demurrer. *Hume v. Liversedge*, 1 C. & M. 332; 1 Dowl. P. C. 660.

The return of the writ, on which the defendant in the original action was arrested, must be stated with certainty. *Everett v. Tunnard*, 2 Chit. 624.

The declaration, in setting out the condition, stated, that if the defendant should appear to answer the plaintiff, "according to the custom of his Majesty's court of Common Bench here," the obligation should be void. On the production of the bond the former words were omitted:—Held, that this was no variance, as it was only necessary to set out the condition according to its legal effect. *Bonsfellow v. Steward*, 3 Moore, 214.

So, where the condition of a bail-bond was alleged in the declaration to be, "to appear before his Majesty's justices at Lancaster, on, &c." but on reference to the bond, it appeared to be "to appear before us, on, &c."—Held, that this was no variance, as the allegation was according to the legal effect of the condition. *Shaw v. Lee*, 3 Stark. 76—Holroyd.

Where a declaration on a bail-bond against four defendants, in reciting the writ, stated that the sheriff to whom it was directed was commanded to take "the said defendant T. A. to answer the plaintiffs of a plea of trespass, and also to a bill of the plaintiffs against the said defendant:"—Held, on special demurrer, that the declaration was bad, in not clearly shewing against whom the writ was issued, or who was the defendant in the plaintiff's suit on the writ. *Large v. Attwood*, 1 D. & R. 551.

Where, in an action on a bail-bond, the condition set out on the record was, "to answer the plaintiff in a plea of trespass, and also to a plea of the plaintiff, to be exhibited against the defendant for 60l. upon promises," and, on the production of the bond, it did not contain the words "upon promises:"—Held, that this was a fatal variance. *Baker v. Newbegin*, R. & M. 93—Abbott.

The declaration in an action on a bail-bond stated the issuing from the Common Pleas of a writ for the arrest of the principal, by which the sheriff was commanded to have his body "before the justices of our said Lord the King, at Westminster," &c., to answer, &c.; and also that he might answer, &c., "according to the custom of his said Majesty's court," &c., and alleged the condition of the said bond to be for the appearance of the principal, "according to the exigency of the said writ in the said court," &c.; and also to answer, &c., "according to the custom of his said Majesty's court of Common Bench." The condition, as proved at the trial, was for the appearance of the principal "before our said Lord

the King, at Westminster," &c., to answer, &c., and also to answer "according to the custom of the King's court of Common Bench:"—Held, that there was not any material variance. *Crofts v. Stockley* 5 Bing. 32; 2 M. & P. 81; 3 C. & P. 281.

In a declaration of debt on a bail-bond, at the suit of the assignee of the sheriff, it was stated, "that the plaintiff heretofore, to wit, on the 21st of July, sued out of the court of the Bench here (the said court being then and now at Westminster), a writ of *capias ad respondendum*, by which T. B. was to answer the plaintiff in a plea of trespass; and also in a certain plea of trespass on the case upon promises." On special demurrer, assigning for causes, that the 21st of July was a day in vacation, and on which no such court then was at Westminster; and that the declaration only stated the writ to be to answer the plaintiff in a "plea of trespass," instead of a plea "wherefore with force and arms, &c.:"—Held, first, as the averment that the court was sitting on a day in vacation was laid under a videlicet, it might be treated as surplusage; and, secondly, that it was unnecessary to set out or refer to the *clausum fregit* part of the writ. *Luckett v. Plummer*, 5 Moore, 538; 2 B. & B. 659. And see *Atkinson v. Saunderson*, 4 Dougl. 254; 1 Tidd's Prac. 223.

If a declaration on a bail-bond conclude, "whereby an action hath accrued to the plaintiff, to demand and have of the principal" (instead of the bail), and state non-payment by the principal, it is bad on a special demurrer. *Morgan v. Sergeant*, 1 B. & P. 58. And see *Renalds v. Smith*, 2 Marsh. 258; 6 Taunt. 551.

It is not necessary to make profert of an assignment of a bail-bond, nor need the witnesses' names thereto be set forth in a declaration. *Lease v. Box*, 1 Wils. 131.

*Pleas, &c.*—Nil debet is not a good plea on demurrer to debt on bond. *Rawlins v. Drovers*, 5 Esp. 38—Ellenborough.

Bail sued on the bail-bond cannot traverse the arrest. *Taylor v. Clow*, 1 B. & Adol. 223.

If the plea to an action on a sheriff's bond on the stat. 23 Hen. 6, c. 9, conclude with a verification, it will be bad upon special demurrer. *Boyce v. Whitaker*, 1 Dougl. 94.

After judgment against the principal, where the bail-bond stands as a security, the bail are entitled to a rule to plead and demand of a plea before judgment against them. *Phillips v. Whitehead*, 1 Chit. 270.

### 3. Practice.

#### (a) As to Appearance.

In an action on a bail-bond, if the issue depend on the date of the appearance, the court of C. P. upon an application by the plaintiff, will order the day of the appearance to be entered in the filacer's book, although, before the application to the court, issue had been already joined on the plea of *comperuit ad diem*. *Austen v. Fenton*, 1 Taunt. 23.

But in a similar case, where the defendant's appearance had been entered generally, the court of K. B. refused to order the appearance to be entered according to the fact on the day when it took place. *Whittle v. Oldaker*, 7 B. & C. 478; 1 M. & R. 298.

Where an assignment of a bail-bond had been taken on the 30th January, for want of notice of bail being put in, but such notice was given on the 29th (the last day for putting in bail in the cause), and the plaintiff had proceeded against the defendant's bail on the bail-bond, and served process on the defendant and his bail, to which they appeared, and pleaded *compensuerunt ad diem*: the court of Exchequer made a rule absolute which had been obtained by the plaintiff, calling on the defendant in the original action to shew cause why his appearance thereto should not be recorded as of the day when notice of the bail being put in was served on the plaintiff's clerk in court, notwithstanding bail had been regularly put in, and notice had been given on the 30th, before the assignment of the bail-bond could have been in fact executed. *Allday v. George*, 9 Price, 406.

(b) *Staying Proceedings on Terms.*

*At what Time.*—The assignment of the bail-bond by the statute, gives a discretionary power to the court to stay the proceedings. *Anon. Loft*, 395.

A rule to stay proceedings on a bail-bond may be obtained the same day that the bail justified. *Shaw v. Johnston*, 2 Chit. 108.

An order to set aside and stay proceedings on the bail-bond assigned, will be made, on a motion made on the last day of term, if it could not have been made before. *MP Phedron v. Fitherington*, 2 Price, 143.

*Must put in and justify Bail.*—If the proceedings be irregular, or against good faith, it is unnecessary to put in bail before application is made to set them aside. But otherwise if they be regular, and the defendant applies to set them aside on terms. *Heath v. Gurley*, 4 Moore, 149; *S. P. Boughton v. Chaffey*, 2 Wils. 6.

Writ returnable 31st of October (essoign day), the time for putting in bail expires on the 5th of November, and bail put in on the 7th is not ground for setting aside proceedings on bond assigned same day. *Lewis v. Watson*, 1 Price's P. C. 176.

Proceedings may be stayed on a bail-bond, on payment of costs, though the bail surrender the principal without having justified. *Meysey v. Carnell*, 5 T. R. 534. And see *St. Hanlaire v. Byss*, 7 D. & R. 458; 4 B. & C. 970.

(c) *Necessary Affidavit.*

*What Affidavit necessary.*—No rule shall be drawn up for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded on an affidavit of merits, or (if made on the part of the sheriff, or bail, or any officer of

the sheriff) be grounded upon an affidavit, shewing that such application is really and truly made, on the part of the sheriff or bail, or officer of the sheriff (as the case may be), at his or their only expense, or for his or their only indemnity, and without collusion with the original defendant. *Reg. Gen. K. B.*, M. T. 59 Geo. 3, 2 B. & A. 240; 1 Chit. 128, (a).

There is no rule of court in the Exchequer, as in the King's Bench, that an application by bail for a rule to stay proceedings on the assignment of a bail-bond, should be grounded on an affidavit, that the application is bona fide made on the part of the bail, at their expense, for their indemnity only, and without collusion with the original defendant; and a rule nisi for that purpose, not grounded on such an affidavit, was made absolute; but an affidavit of that nature, as well as of merits, is usual, according to the practice, of that court. *Standen v. Blakie*, M'Clel. 44; 13 Price, 114; *S. P. Richardson v. Hodgson*, 11 Price, 633.

It is not sufficient for a defendant, on moving to set aside proceedings on a bail-bond, to swear that the defendant in the original action has a good defence, even though he be an infant; he must swear to merits. *Hallett v. Aubrey*, 1 Dowl. P. C. 688.

Regular proceedings on the bail-bond cannot be set aside, where the motion is made on behalf of the defendant, without an affidavit of merits, although the plaintiff had opposed the justification of bail, and received the costs of the opposition. *Hilton v. Jackson*, 1 Chit. 677.

The affidavit must state that the defendant had a good defence upon the merits: a good defence to the action is not sufficient. *Grottick v. Bailey*, 5 B. & A. 703.

On a motion to stay the proceedings on a bail-bond, where an affidavit of merits is produced, it is not necessary to state on whose behalf the motion is made. *Bell v. Taylor*, 1 Chit. 572, 721.

If the bail apply to stay proceedings upon the bail-bond, they need not in C. P. swear to merits, though a trial has been lost. *Hardisty v. Storer*, 1 N. R. 123.

But in K. B. they must shew that the application is bona fide on their behalf, and without collusion or indemnity from the defendant. *Res v. Middlesex (Sheriff)*, 3 M. & S. 199.

An affidavit to set aside the proceedings after notice of render had been given, must state that the application is made bona fide on behalf of the bail; but time was given for producing a further affidavit. *Merryman v. Quibble*, 1 Chit. 127.

*How Affidavit intitled.*—An affidavit in support of an application to set aside or stay proceedings on a bail-bond, may be intitled either in the original action, or in the action against the bail. *Lisle v. Chetwoode*, 2 Tyr. 177; *S. C. nom. Leyles v. Chetwood*, 2 C. & J. 339; 1 Dowl. P. C. 321; *S. P. Kelly v. Wrother*, 2 Chit. 109.

In C. P., if the bail-bond have been irregularly assigned, the affidavit must be intitled in the original action; but if it had been assigned regu-

larly, then in the action in the bail-bond. *Ham v. Philcox*, 7 Moore, 521; 1 Bing. 142; *S. P. Roberts v. Giddins*, 1 B. & P. 337.

And where the plaintiff has ruled the sheriff to bring in the body, the affidavits to set aside the proceedings on the bail-bond must be intitled in the action against the bail. *Blachford v. Hawkins*, 7 Moore, 600; 1 Bing. 181.

(d) *Bail-bond standing as Security.*

**Rule and Cases.**—Upon staying proceedings upon a bail-bond, on perfecting bail above, the bail-bond shall stand as a security if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial in a town cause in the term next after that in which the suit is returnable, and in a country cause at the ensuing assizes. *Reg. Gen. K. B., C. P., and Excheq., H. T.* 2 W. 4, 1 Dowl. P. C. 199; 8 Bing. 305; 1 M. & Scott, 432; 3 B. & Adol. 392; 2 C. & J. 200; 2 Tyr. 351; 4 Bligh, N. S. 607.

Where regular proceedings have been commenced upon a bail-bond, and the defendant has rendered after the time for perfecting bail above, the court will order the bail-bond to stand as a security under the rule. *Hodge v. Hopkins*, 1 Dowl. P. C. 431.

So held before the rule. *Whitehead v. Phillips*, 2 B. & A. 585; 1 Chit. 270.

In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. *Reg. Gen. K. B., C. P., and Excheq., H. T.* 2 Will. 4, 1 Dowl. P. C. 186; 8 Bing. 292; 1 M. & Scott, 419; 3 B. & Adol. 377; 2 C. & J. 176; 2 Tyr. 343; 4 Bligh, N. S. 596.

**Quære**, whether, the plaintiff having been delayed a term in obtaining upon a demurrer a judgment which, but for the delay in perfecting bail, he might have had, is insufficient ground for ordering the bail-bond to stand as a security on the ordinary motion for staying proceedings thereon. *Nash v. Barker*, 1 Price's P. C. 91.

There must be an affidavit of the state of the proceedings to support an application for making that a term of the order. *Id.*

The bail-bond will be ordered to stand as a security, if the bail have not applied to stay the proceedings on the earliest opportunity. *Ditchett v. Tollett*, 3 Price, 257.

A bail-bond, executed by one only of the bail, may be ordered to stand as a security. *Rex v. London (Sheriffs)*, 9 Moore, 422; 2 Bing. 227.

**Loss of Trial.**—Before the rule, the court would not stay the proceedings on a bail-bond on payment of costs, where a trial had been lost, except on the terms of the bond's standing as a security. *Phillips v. Whitehead*, 2 B. & A. 585; 1 Chit. 270; *S. P. Nias v. Gray*, 1 Chit. 270, (a).

Explanation of the terms relative to bail, "losing a trial," and "bail-bond standing as a security." *Id.*

The loss of a trial in term is the loss of a term. *Rex v. London (Sheriffs)*, 9 Moore, 422; 2 Bing. 227.

Where one defendant was arrested on a latitat returnable in Hilary Term, and the other on an alias writ returnable in Easter Term, and if bail above had been duly perfected, the plaintiff might have tried the cause at the last sittings in Hilary Term:—Held, that the bail-bond must stand as a security. *Rex v. London (Sheriffs)*, 1 Chit. 359.

Where the term has not been lost by neglect to put in bail, the court will set aside the proceedings on the bail-bond upon justification, although the plaintiff might have proceeded to trial at the first sitting in the term:—on payment of costs, pleading issuably, and taking short notice of trial for the sitting in term; and that without requiring the bail-bond to stand as security, or the debt to be paid into court. *Bevan v. Knight*, 1 Price's P. C. 13; 1 Tyr. 420.

A trial is not lost, unless judgment of the term is lost by the defendant's delay to put in and perfect bail in due time. *Id.*

Proceedings on a bail-bond were set aside, on justification and affidavit of merits, although the action was on a bill of exchange, merits denied, and object asserted to be delay. *Id.*

In a country cause, where the plaintiff has lost a trial, the court will not stay proceedings upon a bail-bond, unless upon the terms of its standing as a security. *Fillis v. Stabb*, 1 Y. & J. 373.

The court of Exchequer will, on motion, even where a trial has not been lost, stay proceedings on an assignment of a bail-bond, where the defendant has since perfected bail, without tender of costs, or any affidavit of merits, or that the application is made in case of the sheriff, or bail; and they will not, in such a case, order the bail-bond to stand as a security, requiring only that the plaintiff shall be put in the same situation as if bail had been put in in time, and duly perfected. *Searle v. Hale*, 3 Price, 52.

Where an opportunity of going to trial has not been lost, or if judgment could not have been obtained before the term in which the motion could be made, the court of Exchequer will not require it to be made part of the order for staying proceedings, that the bail-bond shall stand as a security; but it seems to be otherwise, if a trial has been lost. *Standen v. Blakie*, 13 Price, 114.

**Plaintiff's Diligence.**—Where upon setting aside the proceedings on a bail-bond, the plaintiff seeks to have the bail-bond stand as a security, he must shew that he used due means to expedite the cause, and that he declared as soon as it was in his power. *Anon.* 1 Chit. 271, (a).

Where a plaintiff who has taken an assignment of a bail-bond after bail have been put in but not perfected, consents by his clerk in court to an order for staying the proceedings on payment of costs, he is not entitled to have the security of the bond, although he may have lost the opportunity of going to trial, because it is in such a case the result of his own conduct. *Blair v. Mottram*, 7 Price, 535.

The court refused to order a bail-bond, (on which proceedings had been stayed by order on perfecting bail), to stand as a security for debt and costs, although the plaintiff had lost a trial, where the defendant had previously made an offer to the plaintiff, after the bail-bond had been assigned, and proceedings had in consequence of bail not being perfected in time, to justify at chambers, to pay the costs of the proceedings on the bond, to plead to the declaration, and take short notice of trial for the next assizes, to which the plaintiff refused to consent; so that he lost the opportunity of going to trial by his own conduct; and a rule to shew cause why an order made at chambers, for staying proceedings, should not be amended, by adding such terms, was discharged with costs. *Walker v. Mapowder*, 8 Price, 610.

(c) *Payment of Costs, and other Terms.*

*Number of Actions.*—Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more. *Reg. Gen. K. B., C. P., and Excheq.*, H. T. 2 Will. 4, 1 Dowl. P. C. 186; 8 Bing. 292; 1 M. & Scott, 419; 3 B. & Adol. 378; 2 C. & J. 176; 2 Tyr. 343; 4 Bligh, N. S. 596.

Before the rule, where three separate actions had been commenced without any sufficient reason, the court of K. B. stayed the proceedings upon payment of the costs of one action only. *Key v. Hill*, 2 B. & A. 598; 1 Chit. 337.

But in C. P. they would not do so, but upon payment of the costs in all the actions. *Anon.* 1 Chit. 338, n.

Where an attorney had become bail to the sheriff, and the bail-bond had been assigned, the court of Exchequer would, upon the usual affidavit, stay proceedings upon the bail-bond upon payment of costs. *Mann v. Nottage*, 1 Y. & J. 367.

*Other Terms.*—Proceedings on a bail-bond stayed where bail had justified, and where no trial had been lost, and the court would not impose the terms of accepting a declaration, pleading issuably, and taking short notice of trial. *Rees v. London (Sheriffs)*, 1 Chit. 357. And see *Eyton v. Beattie*, 2 Smith, 489.

When two only of three joint contractors are sued, the court of C. P. will not stay proceedings upon the bail-bond, unless the defendants will undertake not to plead in abatement. *Govett v. Johnson*, 2 B. & P. 465.

(f) *As to Judgment.*

Final judgment may be entered up on a bail-bond, without executing a writ of inquiry. *Moody v. Phœasant*, 2 B. & P. 446.

If it appear in a declaration by the assignee of the sheriff on such bond, that the bond is void, the court on motion will arrest the judgment after verdict against the defendant, upon a plea of non est factum. *Samuel v. Evans*, 2 T. R. 569.

VI. RIGHTS AND LIABILITY OF BAIL TO THE SHERIFF.

Bail to the sheriff have no right to take their principal into custody; nor have bail in the Palace Court. With respect, however, to bail above, it is otherwise. *Rees v. Hughes*, 3 C. & P. 373 —Tenterden.

Bail to the sheriff are liable for the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail-bond. *Stevenson v. Cameron*, 8 T. R. 28; *S. P. Mitchell v. Gibbons*, 1 H. Black. 76; *Orton v. Vincent*, Cowp. 71.

Scemle, where the bail are let in upon terms, to try the cause of the principal, the money levied to abide the event, and the bail-bond to stand as a security; the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security, when the bail were first let in to try upon terms. *Goss v. Harrison*, 2 Smith, 354.

Prima facie the bail to the sheriff are liable to the charges of putting in bail above; therefore, if a party, who is bail to the sheriff, apply to an attorney to put in bail above, he is liable for these expenses, but not for the subsequent expenses of the suit. *Hector v. Carpenter*, 1 Stark. 190—Ellenborough.

VII. DEPOSIT OF MONEY IN LIEU OF BAIL.

1. *Statutes.*

By 43 Geo. 3, c. 46, s. 2, all persons arrested on *meine process* may, in lieu of giving bail to the sheriff, deposit in his hands the sum indorsed on the writ, together with 10l. in addition, to answer costs, and shall be discharged from such arrest; and the sheriff, at or before the return of the writ, is to pay the same into court; upon bail being duly put in and perfected, the money deposited is, by order of the court, upon motion, to be repaid to the defendant; but if no bail be duly put in and perfected, it is, by like order on motion, to be paid over to the plaintiff, who may thereupon appear for the defendant: the payment is to be subject to such deductions from the 10l. as, upon taxation of the plaintiff's costs, shall be thought reasonable.

By 7 & 8 Geo. 4, c. 71, s. 2, the defendant may, instead of putting in and perfecting bail, allow the sum deposited with the sheriff, and by him paid into court, to remain in court to abide the event of the suit; and in all cases where a defendant is arrested and remains in custody, or gives bail to the sheriff, he may, instead of putting in and perfecting bail, pay the debt into court, with 20l. to answer costs, to abide the event of the suit, and thereupon enter a common appearance, or, in default, the plaintiff may do it for him, and proceed as if bail had been perfected: if plaintiff has judgment, he may, by order of court on motion, receive out of the money deposited sufficient to satisfy his judgment; and if defendant has judgment, or the plaintiff discontinue his suit, or be otherwise barred, the money, or if more than sufficient to satisfy the plain-

*tiff, the surplus, is to be returned to the defendant.*

Provided, by s. 3, that defendant may, at any time before issue joined or judgment signed, take the money out of court, by order on motion, upon putting in and perfecting bail, and payment of such costs as the court shall direct.

So, by s. 4, a defendant who has put in and perfected bail may make the deposit, and the bail shall be exonerated.

Before the statute, it was held in C. P. that a defendant might pay into court, to abide the event of the cause, a sufficient sum to cover the debt and costs, instead of giving bail. *Fowell v. Leo*, 1 Taunt. 425.

On payment of money to the sheriff upon an arrest, it will be presumed that it was paid as a deposit in lieu of bail, under the statute, unless a discharge or some acknowledgment in writing be given to the defendant for the debt and costs. The payment of the debt, with the particular sum of 10*l.*, raises a strong presumption that it is not an absolute payment in discharge of the debt and costs. *Wain v. Bradbury*, 1 Smith, 128.

A defendant was permitted to pay into court (before four o'clock) the debt, and 20*l.* costs, in lieu of bail, after two ineffectual attempts to justify original and added bail, on the payment of the costs of the two oppositions, on affidavits of the facts and of merits. *Thomas v. Gray*, 1 Price's P. C. 86.

The statute 43 Geo. 3, c. 46, s. 2. does not control the discretion of the court as to the time for putting in bail. Where, therefore, money was paid into court, in lieu of bail, which was not put in and perfected in due time, the court, on an affidavit of merits, granted further time to the defendant. *Parker v. Turner*, 2 Chit. 71.

Where money is paid into the hands of the sheriff in lieu of bail, the defendant has, under 7 & 8 Geo. 4, c. 71, till the day for perfecting special bail, for giving notice of his intention that the money shall remain in court to abide the event of the suit. *Rouse v. Softly*, 6 Bing. 634; 4 M. & P. 464.

## 2. When Defendant may take out of Court.

A defendant in K. B., who has put in bail, and rendered in their discharge, is entitled to have the money deposited repaid to him. *Chadwick v. Battye*, 3 M. & S. 283; 1 Chit. 145.

So in C. P. *Harford v. Harris*, 4 Taunt. 669.

Where a defendant, having applied to take out of court money deposited in lieu of bail, on the ground of his having put in and perfected bail; and a rule having been afterwards obtained by the plaintiff for setting aside the allowance of bail, the defendant was then rendered: the court directed the money to be paid out to the defendant, after deducting the costs of the two rules. *Gould v. Berry*, 1 Chit. 145.

Even although such money was deposited with the sheriff by a friend, and the defendant had become bankrupt after it was paid in. *Edelsten v. Adams*, 2 Moore, 610; 8 Taunt. 557.

The court refused to inquire whose money it actually was, and whether it belonged to the assignees of the defendant, on the ground that under the statute 43 Geo. 3, c. 46, they were empowered to refund it to the defendant alone. *Id.*

Upon bail being put in and perfected, the court will order it to be repaid to the bail, or any other person by whom it was actually deposited, instead of the defendant. *Nunn v. Powell*, 1 Smith, 13.

Where the defendant, on being arrested, deposited certain goods in the hands of the officer who arrested him, in lieu of bail, and afterwards surrendered himself; two days after which, the officer deposited with the prothonotary the amount of the original debt, and 10*l.* for costs:—Held, that the defendant was entitled to have those sums paid over to him, as, if they had been paid in under the statute 43 Geo. 3, c. 46, he would be entitled to them on his render; and if not, they must be taken to have been paid into court by mistake. *Hill v. Ching*, 7 Moore, 332; 1 Bing. 103.

Quære, whether the depositing goods with the officer on an arrest, instead of money, is a compliance with the terms of that statute? *Id.*

If money has been paid into court to abide the event of the suit, under the 7 & 8 Geo. 4, c. 71, s. 2, and the defendant wishes to take it out on perfecting special bail, under s. 3, he must do so before issue joined. *Ferrall v. Alexander*, 1 Dowl. P. C. 132.

## 3. When Plaintiff entitled.

If a defendant, who pays the debt, and 10*l.* for costs to the sheriff, in lieu of bail, under 43 Geo. 3, c. 46, puts in bail above, who, being excepted to, render him instead of justifying, the plaintiff is not entitled to receive out of court, under s. 2, the money so deposited. *Harford v. Harris*, 4 Taunt. 669.

Though the defendant may in such case receive back his deposit. *Id.*

If a defendant, being arrested by a wrong name, pay the amount of the sum sworn to, and 10*l.* for the costs, to the sheriff, the court will not permit the plaintiff to take it out of court on the defendant's omitting to perfect bail. *Cadby v. Parsons*, 5 Taunt. 623.

Nor will the court permit the defendant to take it out except on terms. *Id.*

Quære, whether the plaintiff is entitled to move to have the sum deposited in the hands of the sheriff and paid into court, paid out to him until he has obtained judgment? *Rowe v. Softly*, 4 M. & P. 464; 6 Bing. 634.

A plaintiff is entitled to have money paid into court in lieu of bail, paid out to him, if special bail be not perfected in due time, although the defendant has rendered since the time for perfecting bail, unless an affidavit of merits is produced. *Newman v. Hodgson*, 1 Dowl. P. C. 329; 1 B. & Adol. 422.

A defendant having been arrested, paid into court the sum indorsed on the writ, together with 20*l.* as a security for costs, pursuant to the stat.

7 & 8 Geo. 4, c. 71, s. 2. The court, on the application of the defendant, allowed the plaintiff to take out of court a given portion of the sum paid into court, and, unless he consented to accept thereof, with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any evidence at the trial as to that sum. *Hubbard v. Wilkinson*, 8 B. & C. 496.

#### 4. Practice.

**Costs.**—Where a defendant, on being arrested, deposited the amount of the debt, together with 10*l.* for costs, with the officer, who, four days afterwards informed the plaintiff's attorney of the circumstance, and the under-sheriff afterwards wrote to him that the deposit had been made; notwithstanding which, the sheriff was ruled to return the writ; and a declaration was filed, and notice thereof served on the defendant:—Held, that the plaintiff was entitled to the costs of those proceedings, as it was the duty of the sheriff to have paid the sum deposited into court at or before the return of the writ, and which he had omitted to do. *Offley v. Weaver*, 7 Moore, 557.

But where a defendant, on being arrested, paid the sheriff's officer the amount of the debt, and 10*l.* for costs, under the statute 43 Geo. 3, c. 46, s. 2, which latter sum was more than sufficient to cover the costs incurred up to the return of the writ; and the under-sheriff having omitted to pay over the amount to the plaintiff, after being requested so to do, in consequence of which he proceeded further in the action, and incurred further costs:—Held, that the defendant was not liable to pay such costs. *Clark v. Yates*, 7 Moore, 83; 3 B. & B. 273.

**Fees.**—The clerk of the dockets is not entitled, in C. P., to any poundage on money deposited with the sheriff, and by him paid into court. *Husa v. Brine*, 6 Moore, 124.

Nor in K. B. is the chief clerk. *Stewart v. Bracebridge*, 2 B. & A. 770; 1 Chit. 529.

**Other Matters.**—Where a defendant cannot be found in order to serve him personally with a rule for taking out money deposited in the hands of the sheriff, in lieu of bail, the court will allow the service to be good, by leaving a copy of the rule at the defendant's last place of abode, and sticking it up in the office. *Peate v. Tristcott*, 1 Chit. 675. And see *Id.* 170, 466.

If a defendant pay money into court under 7 & 8 Geo. 4, c. 71, to abide the event of the cause, the court will not grant a rule absolute in the first instance for repayment to the defendant, judgment being for him, but there must be a rule to shew cause. *Symes v. Rose*, 5 Bing. 269; 2 M. & P. 426.

In order to make it absolute, it is necessary to produce the record and certificates from the clerk of the judgments and prothonotary, that judgment had been duly signed, and the money paid into court. *Id.*

A motion for taking out of court money paid to

the sheriff by defendant on his arrest, under 7 & 8 Geo. 4, c. 71, and paid into court by the sheriff, was granted on no cause being shewn. *Trust v. Lovecroft*, 1 Price's P. C. 37.

The defendant having been arrested, paid into court the sum indorsed on the writ, and the further sum of 20*l.* as a security for costs, to abide the event of the suit, in pursuance of the statute 7 & 8 Geo. 4, c. 71, instead of putting in and perfecting special bail:—Held, that he was entitled to have the bail-bond delivered up to him to be cancelled. *Smith v. Jordan*, 2 M. & P. 428.

Leave given, by rule, to pay into court 10*l.* in addition to the deposit in the hands of the sheriff, in lieu of special bail. *Graves v. Bennett*, 1 Price's P. C. 14.

If money is deposited in court, in lieu of bail above, pursuant to the 7 & 8 Geo. 4, c. 71, and the plaintiff obtains a verdict, he must limit his execution to the surplus of his demand, beyond the sum deposited, which he is bound to take out of court. *Hewes v. Pyke*, 1 Dowl. P. C. 322; 2 C. & J. 359; 2 Tyr. 313.

### VIII. WHO MAY BE BAIL ABOVE.

#### 1. Attornies and their Clerks.

If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time. *Reg. Gen. K. B., C. P., and Exch., H. T. 2 W. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott, 417; 3 B. & Adol. 376; 2 C. & J. 171; 2 Tyr. 342; 5 Bligh, N. S. 594.*

Both before the rule and since, an attorney or attorney's clerk, or indeed any person, may be bail, for the purpose of rendering the principal. *Bell v. Gate*, 1 Taunt. 162.

Before this rule, no attorney, or person practising as such, could be bail in C. P. *Reg. Gen. C. P., M. T. 6 Geo. 2, 1 H. Black. 76, n.; Anon. Loft, 263, 280.*

Or in K. B. *Boulogne v. Vautrin*, 2 Dougl. 467, n.; Cowp. 828.

But there was no general rule of the court of Exchequer which prohibited attorneys or their clerks from becoming bail; the practice in that respect was, however, similar to that of the courts of K. B. and C. P. *Mann v. Nottage*, 1 Y. & J. 367, n.

The rule applies to bail to the action only, and not to bail to the sheriff.

It was held, that an attorney's articulated clerk could not be bail. *Laing v. Cundale*, 1 H. Black. 76.

Nor any other clerk, though not articulated. *Cornish v. Ross*, 2 H. Black. 350; *S. P. Boulogne v. Vautrin*, Cowp. 828; 2 Dougl. 467, n.

Even though he were not clerk to the defendant's attorney. *Redit v. Broomhead*, 2 B. & P.

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## I. FORM AND NATURE OF BAIL BOND.

## 1. General Requisites.

*Construction of Statute.*—By stat. 23 Hen. 6, c. 9, sheriffs or other officers are required to let out of prison all manner of persons by them arrested, being in their custody by force of any writ, bill, or warrant, in any action personal, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail, or mainprize, to keep their days in such place as the said writs, bills, or warrants shall require.

This statute is a public act; therefore the court will take notice of it, though it be not pleaded. *Samuel v. Evans*, 2 T. R. 569.

The sheriffs of London, to whom, as such, a writ of special capias was directed, under which they arrested the plaintiff, cannot be sued for damages for not having taken bail for his appearance, according to the stat. 23 Hen. 6, c. 9, the sufficiency of the bail tendered being only alleged to be within Middlesex and London taken together; though it was also averred, that, from time immemorial, the same persons had always been duly appointed to, and had exercised the office of sheriff of the two counties at the same time, and that the defendants were sheriffs of both at the time of the grievance complained of. *Locell v. London*, (Sheriffs), 15 East, 320.

Although the sheriff takes a bail-bond on the stat. Hen. 6, yet that is at his peril, and the plaintiff shall not be concluded thereby. *Wolfe v. Collingwood*, 1 Wils. 262.

If a plaintiff sue out writs into two counties, and arrest the defendant in both, who gives bail in both, the defendant does not thereby obtain the right of electing in which county the bail shall stand, but the bail first given continues liable. *Bullock v. Morris*, 2 Taunt. 67.

An undertaking by an attorney to give a bail-bond to the sheriff, is contrary to the 23 Hen. 6, c. 10, and therefore void. *Levis v. Knight*, 1 Dowl. P. C. 261; 1 M. & Scott, 353; 8 Bing. 271; *S. P. Sedgeworth v. Spicer*, 4 East, 568; 2 Smith, 305.

If a sheriff's officer, upon an arrest, take an undertaking for the appearance of the party, instead of a bail-bond, without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape; and the court will not relieve him by permitting him to put in and justify bail afterwards. *Fuller v. Prest*, 7 T. R. 109.

Where the sheriff suffers a person, who has been arrested, to go at large without taking a

bail-bond, the court of C. P. will not suffer him to render the defendant after an action commenced against him for an escape; though he should not have been ruled to return the writ, or bring in the body, before action commenced, and although the defendant was in custody in several other actions. *Birn v. Middlesex* (Sheriff), 2 Marsh. 261; *S. C. nom. Birn v. Bond*, 6 Taunt. 554. And see *Hamilton v. Wilson*, 1 East, 383.

*To whom given.*—A bail-bond must be given to the sheriff, as such, for the appearance of the party, and for no other purpose. *Rogers v. Reeves*, 1 T. R. 418, 422.

Therefore an obligation given to the sheriff's bailiff is bad, for it should be to such officer as has the return of process. *Id.*

A bail bond given to the sheriff of Durham, under a writ issued immediately from the court of K. B. to him, is not void. *Jackson v. Hunter*, 6 T. R. 71.

On demurrer to a declaration on a bail-bond, the court will not presume that the plaintiff had no authority to take bail, unless some case be made in pleading to it. *Say v. Ellis*, 2 W. Black. 955.

*Penalty and Sureties.*—A bail-bond taken in more than double the sum sworn to is good. *Norden v. Horsely*, 2 Wils. 69.

A sheriff is bound to let his prisoner arrested on meane process go at large, on having reasonable sureties. *Matson v. Booth*, 5 M. & S. 223.

A bond with five sureties, three of whom are respectively worth more than the penalty of the bond, is sufficient, though the other two are worth less than the penalty. *Id.*

The addition of another obligor in a bond given to the sheriff after the bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligors, does not vacate the bond nor make a new stamp necessary. *Id.*

Where a sheriff took a bail-bond executed by one surety only, the court refused to set aside an attachment issued against him for not bringing in the body, although he consented to pay the costs. *Rex v. London* (Sheriff), 9 Moore, 422; 2 Bing. 227.

*When to be given.*—If a bail-bond be dated and made after the return of the writ, the defendant may avoid it on non est factum. *Thompson v. Rock*, 4 M. & S. 338.

A bond, stated to have been taken on a certain day, conditioned for appearance on the day previous to the date of the bond, is void by the statute. *Samuel v. Evans*, 2 T. R. 569.

If a party executes a bail-bond before the condition is filled up, it is void. *Powell v. Duff*, 3 Camp. 181—Ellenborough. But see *Fezira v. Evans*, 1 Anst. 228, n.

*Sufficient, if substantially good, though informal.*—If the bail-bond be substantially good, it can-

not be avoided for any trifling informality or variance of the condition from the writ, in the description of the plea, or of the time or place of appearance, or of the sum. *Atkinson v. Saunders*, 1 Tidd's Prac. 223; 4 Dougl. 254.

Under a writ in a plea of trespass on the case upon promises, the sheriff took a bond conditioned for appearance in a plea of trespass; it was held good, for it is sufficient to state the names of the parties, and the time and place of appearance. *Owen v. Nail*, 6 T. R. 702.

Where the writ was to appear before the king, "wheresoever he should then be in England," and the sheriff took a bond for appearance before the king "at Westminster."—Held, that it was a substantial compliance with the statute. *Jones v. Sturdy*, 9 East, 55.

Where, in an action on a bail-bond, the special original was returnable before the king wheresoever, &c., and the word "ubique" was omitted:—Held, that the omission was not fatal. *Shuttleworth v. Pilkington*, 1 T. R. 240, n.

But where a capias ad respondendum was returnable "before his Majesty's justices of the bench at Westminster," by virtue of which the sheriff issued his mandate to the bailiff of a liberty, commanding him to take the defendant, so that the sheriff might have his body "before his said Majesty at Westminster," and the bailiff took a bail-bond conditioned for the defendant's appearance "before his said Majesty at Westminster":—Held, that the variance between the bail-bond and the writ was fatal, and the bond was void. *Renalds v. Smith*, 2 Marsh. 258; 6 Taunt. 551.

By the writ, the sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he and S. P. should have given him bail in an action of assumpsit at the suit of the plaintiff. The sheriff took a bail-bond conditioned for the appearance of W. P. alone:—Held (on general demurrer to a declaration on the bond) to be no variance. *Grottick v. Phillips*, 3 M. & Scott, 132; 9 Bing. 721.

Quære, if the demurrer had been special. *Id.*

## II. DISCHARGE OF BAIL-BOND.

### 1. By Surrender of Principal.

If the defendant, who has given a bail-bond, surrender himself to the sheriff, before or on the return of the writ, the bond may be given up, and it will be considered as if no such bond had been given. *Jones v. Lender*, 6 T. R. 753; *S. P. Stamper v. Milbourne*, 7 T. R. 122; *Galloway v. Seymour*, 1 Tidd's Prac. 225. But see *Harrison v. Davis*, 5 Burr. 2683.

But not unless he give notice of such surrender. *Maddecks v. Bullock*, 1 B. & P. 325.

It is optional with the sheriff, whether or not he will accept such surrender. *Hamilton v. Wilson*, 1 East, 383.

Where the principal surrendered to the jailor at the county jail, in discharge of his bail to the

sheriff, before twelve o'clock on the first day of term, being the return-day of the writ, and the under-sheriff signed his assent to the surrender by return of post the next day, at the distance of seventeen miles:—Held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment, with notice of the render, and the court stayed the proceedings. *Plimpton v. Howell*, 10 East, 100.

And where a defendant applied to the under-sheriff, before the return of the writ, to surrender himself in discharge of his bail, which he refused to accept, without assigning any reason for so doing, and the day after surrendered himself to the keeper of the county jail, which was also before the writ was returnable, and the bail-bond was afterwards assigned to the plaintiff; the court of C. P. ordered the proceedings on it to be stayed, without costs. *Lewis v. Davies*, 5 Moore, 267.

Where the principal surrendered in time, but the bail omitted to give regular notice of it to the plaintiff, in consequence of which he proceeded upon the bail-bond, the court, on the application of the bail, set aside the proceedings on payment of costs, even after execution levied, and the money in the sheriff's hands. *Lepins v. Barrett*, 8 T. R. 222.

If A., being arrested by B., on process of C. P., give bail to the sheriff, and before the return of the writ, being again arrested by C., is committed to the Fleet Prison, after which, and before the return of the first writ, B. takes an assignment of the bail-bond, and proceeds thereon, the court will stay such proceedings; but will not make B. pay costs, for they will not try upon affidavit, whether he knew or not that A. was in custody, but will consider him ignorant of that fact, unless notice of surrender has been regularly given. *Harding v. Hennem*, 3 B. & P. 232.

The court will stay the proceedings on a bail-bond without costs, if the notice of render be given before the assignment; but not otherwise. *Anon.* 2 Chit. 103.

A surrender after bail above put in, but not perfected, though before an assignment of the bail-bond, does not discharge the bail to the sheriff. *Turner v. Wheatley*, 1 Price, 262.

Where a plaintiff had proceeded on an assignment taken after the render of the defendant, who had put in bail, whom he had insufficiently described, so that time was necessarily given for furnishing a better description, during which interval such further description was not given, nor was any attempt afterwards made to justify, the court set aside the proceedings on the assignment of the bond. *Richardson v. Hodgson*, 11 Price, 633.

Seemle, that rendering the defendant to the King's Bench prison, before the return of the writ, will not discharge the bail to the sheriff. *Foster v. Hyde*, 1 Tidd's Prac. 225, 306.

The court of Exchequer will stay proceedings against bail, where the principal has rendered on terms. *Stenden v. Blakie*, 13 Price, 114; *McCl.* 44.

## 2. By other Means.

**Delay in Proceeding.**—The bail-bond cannot be assigned, when the original suit is out of court by not declaring in time. *Sparrow v. Naylor*, 2 W. Black. 876.

But if the assignment be taken before the suit is out of court, it may be proceeded upon afterwards. *Piggott v. Truste*, 3 B. & P. 221; *Collett v. Bland*, 4 Taunt. 715.

But the court will stay such proceedings, if it appear that the plaintiff has been guilty of laches. *Id.*

Where the defendant neglects to put in and perfect bail, and the plaintiff omits to declare within two terms after the return of the writ, he is not out of court, but may take an assignment of the bail-bond. *Carmichael v. Chandler*, 3 Dougl. 432.

Proceedings against bail below will be stayed on motion (on payment of costs) where the plaintiff has not proceeded against them on the bond as early as he might have done, even where a trial has been lost, if there be reason, on their part, to think that the plaintiff did not mean to proceed in the action. *Ditchett v. Tollett*, 3 Price, 257.

**Giving Time to Principal.**—After a bail-bond has been forfeited, and an assignment thereof taken, time given to the principal is no discharge of the sureties. *Wootnam v. Price*, 1 C. & J. 352.

**Bankruptcy of Principal.**—Where the defendant was arrested on the 27th March, on a writ returnable on the 16th April, and became bankrupt on the 3d of that month, and obtained his certificate on the 26th June following:—Held, that as the bankruptcy took place before the bail-bond was forfeited, the bail were discharged. *Littlewood v. Crouther*, 3 D. & R. 533.

On a motion to cancel a bail-bond, on the ground that the defendant (a bankrupt) had since obtained his certificate, it being suggested that the certificate had been obtained by fraud, the court (the parties consenting) directed an issue to try that fact. *Duncan v. Everett*, 1 M. & Scott, 521.

After staying proceedings in an action on the bail-bond, there may be a plea of bankruptcy in the original action, where the bail-bond is not ordered to stand as security. *Sainsbury v. Gandon*, 3 M. & R. 16.

**Other Things.**—It is no ground for cancelling a bail-bond, that the attorney who sued out the writ had neglected to take out his certificate. *Welch v. Pribble*, 1 D. & R. 215.

If a defendant be sent out of the kingdom as an alien, after he has given a bail-bond, and before the return of the writ, the court will order the bail-bond to be cancelled. *Postel v. Williams*, 7 T. R. 517.

## III. FORFEITURE OF BAIL-BOND.

## 1. By not giving Bail.

No bail-bond taken in London or Middlesex shall be put in suit until after the expiration of four days; nor if taken elsewhere, till after the expiration of eight days exclusive from the appearance day of the process. *Reg. Gen. K. B., C. P. and Exchequer*, H. T. 2 W. 4, 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott. 418; 3 B. & Adol. 377; 2 C. & J. 174; 2 Tyr. 343; 4 Bligh, N. S. 595.

Before this rule, it was held that a bail-bond could not be put in suit till after four days from the appearance day of the return of the writ. *Bellis v. Mitford*, 2 W. Black. 1009.

But that it was forfeited on the quarto die post, the other four days being allowed merely as grace and favour. *Coulson v. Hammond*, 4 D. & R. 160; 2 B. & C. 626.

In C. P., no bail-bond taken in London or Middlesex, by virtue of any process returnable in C. P. on the first return of a term, could be put in suit until after the 5th day in full term, nor bonds taken in other places until after the 9th day; nor, if under process returnable on the 2d or subsequent returns, until after the end of four and eight days respectively, exclusive of the return day of the process. *Reg. Gen. C. P., T. T.* 30 Geo. 3, 1 H. Black. 526.

If the fourth day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the court on that day, an assignment of the bail-bond to the plaintiff, in the evening of that day, is regular. *Dent v. Weston*, 8 T. R. 4.

So, if the bail do not justify in four days after exception, although, from the bail having been put in sooner than was necessary, the rule for bringing in the body has not expired. *Bond v. Evans*, 7 D. & R. 374; 4 B. & C. 864. See *Whittle v. Oldaker*, 7 B. & C. 478; 1 M. & R. 298—Bayley.

It seems that where bail do not appear to justify on the day mentioned in the notice, but on a subsequent day, according to further notice, and the plaintiff, on the morning of the last day, takes an assignment of the bail-bond, and sues out process, the proceedings are not premature, although the rule for the allowance of bail be served on the same day. *Edmond v. Ross*, 9 Price, 5.

After default made in not putting in special bail in time, it is not enough that bail are afterwards put in; but the plaintiff may take an assignment of the bail-bond, and proceed thereon, unless the bail be also justified, though not before excepted to. *Turner v. Cary*, 7 East, 607; *S. P. Nuun v. Rogers*, 2 Chit. 108. And see *Fuller v. Prest*, 7 T. R. 109; *Pariente v. Plumtree*, 2 B. & A. 35; and *Murray v. Durand*, 1 Esp. 87.

Where bail above are put in, but not justified, and the sheriff, being fixed, brings an action on the bail-bond, to which the defendant pleads compurgit ad diem; the court of C. P. will, on motion by the sheriff, order the recognizance of bail

in the original action to be struck off the file; though the defendant allege that the sheriff was fixed through his own negligence; for that should be the subject of a motion to stay the proceedings on the bail-bond. *Leigh v. Bertles*, 1 Marsh. 520; 6 Taunt. 167.

If the defendant do not justify his bail in due time, and comperuit ad diem be pleaded to a declaration on the bail-bond, the court will order the appearance of the defendant to be recorded as of the day on which the bail justified. *Ladd v. Arnaboldi*, 1 C. & J. 97.

So, where bail justified at chambers by consent, and no rule for allowance was served, nor notice that they had justified given. *Bignold v. Holding*, 2 D. & R. 436; S. C. nom. *Bignold v. Lee*, 1 B. & C. 285.

If the rule for allowance of bail be not served on the plaintiff, he may take an assignment of the bail-bond though he knows of the justification. *Holland v. White*, 2 B. P. 341.

The court will not stay proceedings upon a bail-bond, upon the ground that the affidavit upon which the bail above were rejected as founded on perjury, except upon the usual terms of paying the costs incurred by the assignment and subsequent proceedings. *Hobbs v. Miller*, 1 Y. & J. 403.

A rule nisi for setting aside bailable process, &c. "with a stay of proceedings," does not enlarge the time for the defendant to put in and perfect bail, until the rule is disposed of, so as to place him in the same situation as he was in at the time the rule nisi was granted. *St. Hanliare v. Byam*, 7 D. & R. 458; 4 B. & C. 970. And see *Meysey v. Carnell*, 5 T. R. 534.

Process being returnable on the 7th of November, the time to put in bail expired on the 11th. On the 10th, defendant obtained a rule nisi to set aside process and stay proceedings, on the ground of misnomer. This rule was discharged with costs on the 21st. On the 22d, an assignment of the bail-bond was taken, and proceedings had under it, and on the same day the defendant put in bail:—Held, that the defendant had not the whole of the 22d to put in bail, and that the assignment of the bail-bond, and the proceedings had under it, were regular. *Id.*

Since the uniformity of process act, suing out the writ of summons is the commencement of the action for all purposes. Where the defendant was arrested on the 1st of April, and, owing to Easter Monday and Tuesday falling on the 8th and 9th, had the 10th to put in bail, and the plaintiff on the 10th took an assignment of the bail-bond, and issued a writ of summons against the bail, the court set aside the proceeding on the bail-bond. *Alston v. Underhill*, 1 C. & M. 492.

## 2. By putting in disqualified Persons.

If a disqualified person be put in as bail and not excepted to, the plaintiff could not in K. B. proceed on the bail-bond as if no bail had been put in. *Thompson v. Roubell*, 2 Dougl. 467, n.

If bail be put in without any description, one of whom proves to be clerk to an attorney, and the

other a person in low situation, plaintiff may in C. P. take an assignment of the bail-bond. *Fenton v. Ruggles*, 1 B. & P. 356.

So, if both bail be attorney's clerks. *Wallace v. Arrowsmith*, 2 B. & P. 49.

## 3. Irregular Proceedings.

Where the notice of bail is merely informal, and not an absolute nullity, the plaintiff cannot take an assignment of the bail-bond. *Bell v. Foster*, 1 M. & Scott, 518; 8 Bing. 334; 1 Dowl. P. C. 271.

Where a rule for staying proceedings on a bail-bond had been obtained by one of the bail on an affidavit, which stated an engagement between himself and the plaintiff, to absolve him from his obligation on payment of a sum of money at a future day, upon the ground of a breach of faith in proceeding before the time; and the plaintiff met the application by a distinct denial of the engagement on affidavit:—The court discharged the rule with costs. *Sweeting v. Weaver*, 11 Price, 735.

## IV. ASSIGNMENT OF BAIL-BOND.

### 1. Statute, and Form.

By 4 Anne, c. 16, s. 20, the sheriff or other officer, at the request and costs of the plaintiff, is to assign to the plaintiff the bail-bond or other security, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, which might be done without any stamp, provided the assignment were duly stamped before any action brought thereon; and if the bail-bond be forfeited, the plaintiff, after such assignment, may bring an action thereon in his own name, and the court where the action is brought may, by rule, give such relief to the plaintiff and defendant in the original action, and to the bail, as is agreeable to justice and reason.

The stamp required on the assignment is now no longer necessary, by 5 Geo. 4, c. 41.

Under this statute it has been held, that the seal to the assignment of a bail-bond, being a seal of office, is sufficient to give it validity, who ever signed it; and, therefore, it is no objection that it was signed by one of the under-sheriff's clerks. *Hams v. Ashby*, 1 Selw. N. P. 586, n.—Mansfield.

To a plea in an action on a bail-bond at the suit of the assignee of a sheriff, that the assignment of the bond was not stamped before the exhibiting of the plaintiff's bill in the cause, the plaintiff need merely reply that the assignment was stamped at or before the exhibiting of the bill, and conclude his replication to the country; and he need not take issue as to the time when the bill was exhibited, nor aver that the assignment was stamped "before the commencement of the suit," and if the action thereon be in the K. B., and if the plaintiff avers that it was stamped at Westminster, he may nevertheless conclude to the country. *Carter v. Yates*, 2 Chit. 533.

## 2. Effect of Assignment.

If a plaintiff accept an assignment of a bail-bond, he cannot call upon the sheriff to return the writ, nor shall he have a rule for that purpose before it be determined whether or no the bond be good. *Brooke (Lord) v. Stone*, 1 Wils. 223.

Nor can he proceed in the original action after taking an assignment of the bail-bond, and whilst he retains his right to sue upon it. *Anon.* 1 Chit. 394.

Although the rule to return a writ cannot be had after the plaintiff has taken a valid assignment of the bail-bond, it is otherwise if the bond from any cause be void. *Williams v. Jacques*, 1 Tidd's Prac. 307.

If a plaintiff sue the bail by action, and take them in execution, he cannot afterwards take the principal, though one of the bail become bankrupt and be discharged, and the other also be discharged on payment of 5s. in the pound, and upon an understanding that the plaintiff was at liberty to proceed against the principal. *Allen v. Snow*, 2 M. & S. 341.

In an action by the assignees of a bail-bond, it is no objection to their recovering that the sheriff, after taking and before assigning the bond, returned non est inventus. *Taylor v. Clow*, 1 B. & Adol. 223.

## 3. Waiver of Assignment.

## (a) By excepting to Bail.

Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail-bond becomes forfeited, the plaintiff may except to bail put in to stay the proceedings on the bail-bond, and it will not be a waiver of the assignment. *Belders v. Gray*, Cowp. 769.

Unless the bail below become bail above. *Bebb v. Barber*, 1 Anst. 274.

It is not a waiver of the assignment, that the plaintiff attends to oppose the justification of bail. *Edmond v. Ross*, 9 Price, 5.

## (b) By proceeding against Sheriff.

A plaintiff shall not be at liberty to proceed on the bail-bond, pending a rule to bring in the body of the defendant. *Reg. Gen. K. B., C. P., and Exch., H. T.* 2 W. 4, 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 174; 2 Tyr. 343; 4 Bligh. N. S. 595; *Reg. Gen. M. T., Exch.* 1 W. 4; 1 C. & J. 281; 1 Tyr. 163.

The plaintiff may abandon an attachment, and take an assignment of the bail-bond, and proceed thereon. *Pope v. Wyatt*, 15 East, 215. And see *Leigh v. Bertles*, 1 Marsh. 590; 6 Taunt. 167.

So, where the attachment has been set aside. *Brown v. Neave*, Wightw. 406.

Before the rule, a plaintiff might have taken an assignment of the bail-bond even after service of the rule to bring in the body, or suing for an attachment, but not after it was sued out. *Poideserie v. Harvey*, and *Robinson v. Owen*, 1 Tidd's

Prac. 297; *S. P. Cunningham v. Chambers*, 1 Chit. 394, n.

But where the plaintiff had ruled the sheriff to bring in the body, he could not take an assignment pending such rule. *Blackford v. Hawkins*, 7 Moore, 600; 1 Bing. 181.

But must have waited till the rule expired. *Whittle v. Oldaker*, 1 M. & R. 298; 7 B. & C. 478.

If bail above justify before a rule to bring in the body expires, the bail below, to an action on the bond, may plead comperuit ad diem. *Id.*

On an issue of nul tiel record, joined on a plea of comperuit ad diem, in an action on a bail-bond, the plea is proved by the recognizance roll containing an entry of defendant's appearance generally. *Id.*

After an issue of nul tiel record, joined on a plea of comperuit ad diem, to an action on a bail-bond, the recognizance roll may be made up at any time before the day given for producing it. *Id.*

## V. ACTIONS ON BAIL-BONDS.

## 1. In what Court.

An action may be brought upon a bail-bond by the sheriff himself in any court. *Reg. Gen. K. B., C. P. and Exch. H. T.* 2 Will. 4; 1 Dowl. P. C. 186; 8 Bing. 292; 1 M. & Scott, 419; 3 B. & Adol. 377; 2 C. & J. 175; 2 Tyr. 343; 4 Bligh, N. S. 596.

Before the rule, it was so held in the Exchequer. *Yorke v. Ogden*, 8 Price, 174.

And in C. P. *Newman v. Faucitt*, 1 H. Black. 631.

But the Court of K. B. held, it was immaterial whether the action was brought by the assignee of the bail-bond, or by the officer to whom it was given, for that, in either case, the action must be brought in the court where the original action was brought. *Donatty v. Barclay*, 8 T. R. 152.

The action by the assignee of a bail-bond must be brought in the court where the original action was laid. *Morris v. Rees*, 2 W. Black. 838; 3 Wils. 348; *S. P. Walton v. Bent*, 3 Burr. 1923.

So, an action on a bail-bond given in a county-palatine, on an action brought there, must be brought in the court below, and not in K. B., unless special circumstances warrant it. *Chesterton v. Middlehurst*, 1 Burr. 642; 2 Ld. Ken. 369.

Although it is irregular to bring an action on a bail-bond in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this under the plea of non est factum. *Wright v. Walmsley*, 2 Camp. 396—Ellenborough.

## 2. Pleadings.

*Declaration.*—In an action on a bail-bond by the assignees of a sheriff, it is not necessary that

the declaration should aver that the writ on which the defendant was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to. *Sharpe v. Abbey*, 5 Bing. 193; 2 M. & P. 312; *S. P. Dorrington v. Bucknell*, 11 Moore, 445. And see *Wilcoxon v. Nightingale*, 4 Bing. 501; and *Arundell v. White*, 14 East, 224; confirming *Whiskard v. Wilden*, 1 Burr. 330, on the same point, though disapproved of in *Hill v. Hele*, 2 N. R. 202.

A plea that there was no proper affidavit, is bad on special demurrer. *Hume v. Liversedge*, 1 C. & M. 332; 1 Dowl. P. C. 660.

The return of the writ, on which the defendant in the original action was arrested, must be stated with certainty. *Everett v. Tunnard*, 2 Chit. 624.

The declaration, in setting out the condition, stated, that if the defendant should appear to answer the plaintiff, "according to the custom of his Majesty's court of Common Bench here," the obligation should be void. On the production of the bond the former words were omitted:—Held, that this was no variance, as it was only necessary to set out the condition according to its legal effect. *Bonfellow v. Steward*, 3 Moore, 214.

So, where the condition of a bail-bond was alleged in the declaration to be, "to appear before his Majesty's justices at Lancaster, on, &c." but on reference to the bond, it appeared to be "to appear before us, on, &c."—Held, that this was no variance, as the allegation was according to the legal effect of the condition. *Shaw v. Lee*, 3 Stark. 76—Holroyd.

Where a declaration on a bail-bond against four defendants, in reciting the writ, stated that the sheriff to whom it was directed was commanded to take "the said defendant T. A. to answer the plaintiffs of a plea of trespass, and also to a bill of the plaintiffs against the said defendant."—Held, on special demurrer, that the declaration was bad, in not clearly shewing against whom the writ was issued, or who was the defendant in the plaintiff's suit on the writ. *Large v. Attwood*, 1 D. & R. 551.

Where, in an action on a bail-bond, the condition set out on the record was, "to answer the plaintiff in a plea of trespass, and also to a plea of the plaintiff, to be exhibited against the defendant for 60*l.* upon promises," and, on the production of the bond, it did not contain the words "upon promises."—Held, that this was a fatal variance. *Baker v. Newbegin*, R. & M. 93—Abbott.

The declaration in an action on a bail-bond stated the issuing from the Common Pleas of a writ for the arrest of the principal, by which the sheriff was commanded to have his body "before the justices of our said Lord the King, at Westminster," &c., to answer, &c.; and also that he might answer, &c., "according to the custom of his said Majesty's court," &c., and alleged the condition of the said bond to be for the appearance of the principal, "according to the exigency of the said writ in the said court," &c.; and also to answer, &c., "according to the custom of his said Majesty's court of Common Bench." The condition, as proved at the trial, was for the appearance of the principal "before our said Lord

the King, at Westminster," &c., to answer, &c., and also to answer "according to the custom of the King's court of Common Bench."—Held, that there was not any material variance. *Crofts v. Stockley* 5 Bing. 32; 2 M. & P. 81; 3 C. & P. 281.

In a declaration of debt on a bail-bond, at the suit of the assignee of the sheriff, it was stated, "that the plaintiff heretofore, to wit, on the 21st of July, sued out of the court of the Bench here (the said court being then and now at Westminster), a writ of capias ad respondendum, by which T. B. was to answer the plaintiff in a plea of trespass; and also in a certain plea of trespass on the case upon promises." On special demurrer, assigning for causes, that the 21st of July was a day in vacation, and on which no such court then was at Westminster; and that the declaration only stated the writ to be to answer the plaintiff in a "plea of trespass," instead of a plea "wherefore with force and arms, &c."—Held, first, as the averment that the court was sitting on a day in vacation was laid under a videlicet, it might be treated as surplusage; and, secondly, that it was unnecessary to set out or refer to the clausum fregit part of the writ. *Luckett v. Plummer*, 5 Moore, 538; 2 B. & B. 659. And see *Atkinson v. Sanderson*, 4 Dougl. 254; 1 Tidd's Prac. 223.

If a declaration on a bail-bond conclude, "whereby an action hath accrued to the plaintiff, to demand and have of the principal" (instead of the bail), and state non-payment by the principal, it is bad on a special demurrer. *Morgan v. Sergeant*, 1 B. & P. 58. And see *Renolds v. Smith*, 2 Marsh. 258; 6 Taunt. 551.

It is not necessary to make profert of an assignment of a bail-bond, nor need the witnesses' names thereto be set forth in a declaration. *Lease v. Box*, 1 Wils. 121.

*Pleas, &c.*—Nil debet is not a good plea on demurrer to debt on bond. *Rawlins v. Dancers*, 5 Esp. 38—Ellenborough.

Bail sued on the bail-bond cannot traverse the arrest. *Taylor v. Clow*, 1 B. & Adol. 223.

If the plea to an action on a sheriff's bond on the stat. 23 Hen. 6, c. 9, conclude with a verification, it will be bad upon special demurrer. *Boyce v. Whitaker*, 1 Dougl. 94.

After judgment against the principal, where the bail-bond stands as a security, the bail are entitled to a rule to plead and demand of a plea before judgment against them. *Phillips v. Whitehead*, 1 Chit. 270.

### 3. Practice.

#### (a) As to Appearance.

In an action on a bail-bond, if the issue depend on the date of the appearance, the court of C. P. upon an application by the plaintiff, will order the day of the appearance to be entered in the filacer's book, although, before the application to the court, issue had been already joined on the plea of *comperuit ad diem*. *Austen v. Fenton*, 1 Taunt. 23.

But in a similar case, where the defendant's appearance had been entered generally, the court of K. B. refused to order the appearance to be entered according to the fact on the day when it took place. *Whittle v. Oldaker*, 7 B. & C. 478; 1 M. & R. 298.

Where an assignment of a bail-bond had been taken on the 30th January, for want of notice of bail being put in, but such notice was given on the 29th (the last day for putting in bail in the cause), and the plaintiff had proceeded against the defendant's bail on the bail-bond, and served process on the defendant and his bail, to which they appeared, and pleaded *comperuerunt ad diem*: the court of Exchequer made a rule absolute which had been obtained by the plaintiff, calling on the defendant in the original action to shew cause why his appearance thereto should not be recorded as of the day when notice of the bail being put in was served on the plaintiff's clerk in court, notwithstanding bail had been regularly put in, and notice had been given on the 30th, before the assignment of the bail-bond could have been in fact executed. *Allday v. George*, 9 Price, 406.

#### (b) Staying Proceedings on Terms.

*At what Time.*—The assignment of the bail-bond by the statute, gives a discretionary power to the court to stay the proceedings. *Anon. Loft*, 395.

A rule to stay proceedings on a bail-bond may be obtained the same day that the bail justified. *Shaw v. Johnston*, 2 Chit. 108.

An order to set aside and stay proceedings on the bail-bond assigned, will be made, on a motion made on the last day of term, if it could not have been made before. *MP Phedron v. Fitherington*, 2 Price, 143.

*Must put in and justify Bail.*—If the proceedings be irregular, or against good faith, it is unnecessary to put in bail before application is made to set them aside. But otherwise if they be regular, and the defendant applies to set them aside on terms. *Heath v. Gurley*, 4 Moore, 149; *S. P. Boughton v. Chaffey*, 2 Wils. 6.

Writ returnable 31st of October (essoign day), the time for putting in bail expires on the 5th of November, and bail put in on the 7th is not ground for setting aside proceedings on bond assigned same day. *Lewis v. Watson*, 1 Price's P. C. 176.

Proceedings may be stayed on a bail-bond, on payment of costs, though the bail surrender the principal without having justified. *Meysey v. Carnell*, 5 T. R. 534. And see *St. Hanslaire v. Byam*, 7 D. & R. 458; 4 B. & C. 970.

#### (c) Necessary Affidavit.

*What Affidavit necessary.*—No rule shall be drawn up for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded on an affidavit of merits, or (if made on the part of the sheriff, or bail, or any officer of

the sheriff) be grounded upon an affidavit, shewing that such application is really and truly made, on the part of the sheriff or bail, or officer of the sheriff (as the case may be), at his or their only expense, or for his or their only indemnity, and without collusion with the original defendant. *Reg. Gen. K. B.*, M. T. 59 Geo. 3, 2 B. & A. 240; 1 Chit. 128, (a).

There is no rule of court in the Exchequer, as in the King's Bench, that an application by bail for a rule to stay proceedings on the assignment of a bail-bond, should be grounded on an affidavit, that the application is bona fide made on the part of the bail, at their expense, for their indemnity only, and without collusion with the original defendant; and a rule nisi for that purpose, not grounded on such an affidavit, was made absolute; but an affidavit of that nature, as well as of merits, is usual, according to the practice, of that court. *Standen v. Blakie*, Mc Clel. 44; 13 Price, 114; *S. P. Richardson v. Hodgson*, 11 Price, 633.

It is not sufficient for a defendant, on moving to set aside proceedings on a bail-bond, to swear that the defendant in the original action has a good defence, even though he be an infant; he must swear to merits. *Hallett v. Aubrey*, 1 Dowl. P. C. 688.

Regular proceedings on the bail-bond cannot be set aside, where the motion is made on behalf of the defendant, without an affidavit of merits, although the plaintiff had opposed the justification of bail, and received the costs of the opposition. *Hilton v. Jackson*, 1 Chit. 677.

The affidavit must state that the defendant had a good defence upon the merits: a good defence to the action is not sufficient. *Grottick v. Bailey*, 5 B. & A. 703.

On a motion to stay the proceedings on a bail-bond, where an affidavit of merits is produced, it is not necessary to state on whose behalf the motion is made. *Bell v. Taylor*, 1 Chit. 572, 721.

If the bail apply to stay proceedings upon the bail-bond, they need not in C. P. swear to merits, though a trial has been lost. *Hardisty v. Storer*, 1 N. R. 123.

But in K. B. they must shew that the application is bona fide on their behalf, and without collusion or indemnity from the defendant. *Res v. Middlesex (Sheriff)*, 3 M. & S. 199.

An affidavit to set aside the proceedings after notice of render had been given, must state that the application is made bona fide on behalf of the bail; but time was given for producing a further affidavit. *Merryman v. Quibble*, 1 Chit. 127.

*How Affidavit intitled.*—An affidavit in support of an application to set aside or stay proceedings on a bail-bond, may be intitled either in the original action, or in the action against the bail. *Lisle v. Chetwoode*, 2 Tyr. 177; *S. C. nom. Leyles v. Chetwood*, 2 C. & J. 339; 1 Dowl. P. C. 321; *S. P. Kelly v. Wrother*, 2 Chit. 109.

In C. P., if the bail-bond have been irregularly assigned, the affidavit must be intitled in the original action; but if it had been assigned regu-

larly, then in the action in the bail-bond. *Ham v. Philcox*, 7 Moore, 521; 1 Bing. 142; *S. P. Roberts v. Giddins*, 1 B. & P. 337.

And where the plaintiff has ruled the sheriff to bring in the body, the affidavits to set aside the proceedings on the bail-bond must be intitled in the action against the bail. *Blackford v. Hawkins*, 7 Moore, 600; 1 Bing. 181.

(d) *Bail-bond standing as Security.*

*Rule and Cases.*—Upon staying proceedings upon a bail-bond, on perfecting bail above, the bail-bond shall stand as a security if the plaintiff shall have declared de bene esse, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial in a town cause in the term next after that in which the suit is returnable, and in a country cause at the ensuing assizes. *Reg. Gen. K. B., C. P., and Excheq., H. T.* 2 W. 4, 1 Dowl. P. C. 199; 8 Bing. 305; 1 M. & Scott, 432; 3 B. & Adol. 392; 2 C. & J. 200; 2 Tyr. 351; 4 Bligh, N. S. 607.

Where regular proceedings have been commenced upon a bail-bond, and the defendant has rendered after the time for perfecting bail above, the court will order the bail-bond to stand as a security under the rule. *Hodge v. Hopkins*, 1 Dowl. P. C. 431.

So held before the rule. *Whitehead v. Phillips*, 2 B. & A. 585; 1 Chit. 270.

In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. *Reg. Gen. K. B., C. P., and Excheq., H. T.* 2 Will. 4, 1 Dowl. P. C. 186; 8 Bing. 292; 1 M. & Scott, 419; 3 B. & Adol. 377; 2 C. & J. 176; 2 Tyr. 343; 4 Bligh, N. S. 596.

Quære, whether, the plaintiff having been delayed a term in obtaining upon a demurrer a judgment which, but for the delay in perfecting bail, he might have had, is insufficient ground for ordering the bail-bond to stand as a security on the ordinary motion for staying proceedings thereon. *Nash v. Barker*, 1 Price's P. C. 91.

There must be an affidavit of the state of the proceedings to support an application for making that a term of the order. *Id.*

The bail-bond will be ordered to stand as a security, if the bail have not applied to stay the proceedings on the earliest opportunity. *Ditchett v. Tollett*, 3 Price, 257.

A bail-bond, executed by one only of the bail, may be ordered to stand as a security. *Rez v. London (Sheriffs)*, 9 Moore, 422; 2 Bing. 227.

*Loss of Trial.*—Before the rule, the court would not stay the proceedings on a bail-bond on payment of costs, where a trial had been lost, except on the terms of the bond's standing as a security. *Phillips v. Whitehead*, 2 B. & A. 585; 1 Chit. 270; *S. P. Nias v. Gray*, 1 Chit. 270, (a).

Explanation of the terms relative to bail, "losing a trial," and "bail-bond standing as a security." *Id.*

The loss of a trial in term is the loss of a term. *Rez v. London (Sheriffs)*, 9 Moore, 422; 2 Bing. 227.

Where one defendant was arrested on a latitat returnable in Hilary Term, and the other on an alias writ returnable in Easter Term, and if bail above had been duly perfected, the plaintiff might have tried the cause at the last sittings in Hilary Term:—Held, that the bail-bond must stand as a security. *Rez v. London (Sheriffs)*, 1 Chit. 359.

Where the term has not been lost by neglect to put in bail, the court will set aside the proceedings on the bail-bond upon justification, although the plaintiff might have proceeded to trial at the first sitting in the term:—on payment of costs, pleading issuably, and taking short notice of trial for the sitting in term; and that without requiring the bail-bond to stand as security, or the debt to be paid into court. *Bevan v. Knight*, 1 Price's P. C. 13; 1 Tyr. 420.

A trial is not lost, unless judgment of the term is lost by the defendant's delay to put in and perfect bail in due time. *Id.*

Proceedings on a bail-bond were set aside, on justification and affidavit of merits, although the action was on a bill of exchange, merits denied, and object asserted to be delay. *Id.*

In a country cause, where the plaintiff has lost a trial, the court will not stay proceedings upon a bail-bond, unless upon the terms of its standing as a security. *Fillis v. Stabb*, 1 Y. & J. 373.

The court of Exchequer will, on motion, even where a trial has not been lost, stay proceedings on an assignment of a bail-bond, where the defendant has since perfected bail, without tender of costs, or any affidavit of merits, or that the application is made in case of the sheriff, or bail; and they will not, in such a case, order the bail-bond to stand as a security, requiring only that the plaintiff shall be put in the same situation as if bail had been put in in time, and duly perfected. *Searle v. Hale*, 3 Price, 52.

Where an opportunity of going to trial has not been lost, or if judgment could not have been obtained before the term in which the motion could be made, the court of Exchequer will not require it to be made part of the order for staying proceedings, that the bail-bond shall stand as a security; but it seems to be otherwise, if a trial has been lost. *Standen v. Blakie*, 13 Price, 114.

*Plaintiff's Diligence.*—Where upon setting aside the proceedings on a bail-bond, the plaintiff seeks to have the bail-bond stand as a security, he must shew that he used due means to expedite the cause, and that he declared as soon as it was in his power. *Anon.* 1 Chit. 271, (a).

Where a plaintiff who has taken an assignment of a bail-bond after bail have been put in but not perfected, consents by his clerk in court to an order for staying the proceedings on payment of costs, he is not entitled to have the security of the bond, although he may have lost the opportunity of going to trial, because it is in such a case the result of his own conduct. *Blare v. Mottram*, 7 Price, 535.



The court refused to order a bail-bond, (on which proceedings had been stayed by order on perfecting bail,) to stand as a security for debt and costs, although the plaintiff had lost a trial, where the defendant had previously made an offer to the plaintiff, after the bail-bond had been assigned, and proceedings had in consequence of bail not being perfected in time, to justify at chambers, to pay the costs of the proceedings on the bond, to plead to the declaration, and take short notice of trial for the next assizes, to which the plaintiff refused to consent; so that he lost the opportunity of going to trial by his own conduct; and a rule to shew cause why an order made at chambers, for staying proceedings, should not be amended, by adding such terms, was discharged with costs. *Walker v. Mapowder*, 8 Price, 610.

(e) *Payment of Costs, and other Terms.*

*Number of Actions.*—Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more. *Reg. Gen. K. B., C. P., and Excheq.*, H. T. 2 Will. 4, 1 Dowl. P. C. 186; 8 Bing. 292; 1 M. & Scott, 419; 3 B. & Adol. 378; 2 C. & J. 176; 2 Tyr. 343; 4 Bligh, N. S. 596.

Before the rule, where three separate actions had been commenced without any sufficient reason, the court of K. B. stayed the proceedings upon payment of the costs of one action only. *Key v. Hill*, 2 B. & A. 598; 1 Chit. 337.

But in C. P. they would not do so, but upon payment of the costs in all the actions. *Anon.* 1 Chit. 338, n.

Where an attorney had become bail to the sheriff, and the bail-bond had been assigned, the court of Exchequer would, upon the usual affidavit, stay proceedings upon the bail-bond upon payment of costs. *Mann v. Nottage*, 1 Y. & J. 367.

*Other Terms.*—Proceedings on a bail-bond stayed where bail had justified, and where no trial had been lost, and the court would not impose the terms of accepting a declaration, pleading issuably, and taking short notice of trial. *Rez v. London (Sheriffs)*, 1 Chit. 357. And see *Evans v. Beattie*, 2 Smith, 489.

When two only of three joint contractors are sued, the court of C. P. will not stay proceedings upon the bail-bond, unless the defendants will undertake not to plead in abatement. *Govett v. Johnson*, 2 B. & P. 465.

(f) *As to Judgment.*

Final judgment may be entered up on a bail-bond, without executing a writ of inquiry. *Moody v. Phœasant*, 2 B. & P. 446.

If it appear in a declaration by the assignee of the sheriff on such bond, that the bond is void, the court on motion will arrest the judgment after verdict against the defendant, upon a plea of non est factum. *Samuel v. Evans*, 2 T. R. 569.

VI. RIGHTS AND LIABILITY OF BAIL TO THE SHERIFF.

Bail to the sheriff have no right to take their principal into custody; nor have bail in the Palace Court. With respect, however, to bail above, it is otherwise. *Rez v. Hughes*, 3 C. & P. 373—Tenterden.

Bail to the sheriff are liable for the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail-bond. *Stevenson v. Cameron*, 8 T. R. 28; *S. P. Mitchell v. Gibbons*, 1 H. Black. 76; *Orton v. Vincent*, Cowp. 71.

Semble, where the bail are let in upon terms, to try the cause of the principal, the money levied to abide the event, and the bail-bond to stand as a security; the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security, when the bail were first let in to try upon terms. *Goss v. Harrison*, 2 Smith, 354.

Prima facie the bail to the sheriff are liable to the charges of putting in bail above; therefore, if a party, who is bail to the sheriff, apply to an attorney to put in bail above, he is liable for these expenses, but not for the subsequent expenses of the suit. *Hector v. Carpenter*, 1 Stark. 190—Ellenborough.

VII. DEPOSIT OF MONEY IN LIEU OF BAIL.

1. *Statutes.*

By 43 Geo. 3, c. 46, s. 2, all persons arrested on *meane process* may, in lieu of giving bail to the sheriff, deposit in his hands the sum indorsed on the writ, together with 10l. in addition, to answer costs, and shall be discharged from such arrest; and the sheriff, at or before the return of the writ, is to pay the same into court; upon bail being duly put in and perfected, the money deposited is, by order of the court, upon motion, to be repaid to the defendant; but if no bail be duly put in and perfected, it is, by like order on motion, to be paid over to the plaintiff, who may thereupon appear for the defendant: the payment is to be subject to such deductions from the 10l. as, upon taxation of the plaintiff's costs, shall be thought reasonable.

By 7 & 8 Geo. 4, c. 71, s. 2, the defendant may, instead of putting in and perfecting bail, allow the sum deposited with the sheriff, and by him paid into court, to remain in court to abide the event of the suit; and in all cases where a defendant is arrested and remains in custody, or gives bail to the sheriff, he may, instead of putting in and perfecting bail, pay the debt into court, with 20l. to answer costs, to abide the event of the suit, and thereupon enter a common appearance, or, in default, the plaintiff may do it for him, and proceed as if bail had been perfected: if plaintiff has judgment, he may, by order of court on motion, receive out of the money deposited sufficient to satisfy his judgment; and if defendant has judgment, or the plaintiff discontinue his suit, or be otherwise barred, the money, or if more than sufficient to satisfy the plain-

tiff, the surplus, is to be returned to the defendant.

Provided, by s. 3, that defendant may, at any time before issue joined or judgment signed, take the money out of court, by order on motion, upon putting in and perfecting bail, and payment of such costs as the court shall direct.

So, by s. 4, a defendant who has put in and perfected bail may make the deposit, and the bail shall be exonerated.

Before the statute, it was held in C. P. that a defendant might pay into court, to abide the event of the cause, a sufficient sum to cover the debt and costs, instead of giving bail. *Fowell v. Leo*, 1 Taunt. 425.

On payment of money to the sheriff upon an arrest, it will be presumed that it was paid as a deposit in lieu of bail, under the statute, unless a discharge or some acknowledgment in writing be given to the defendant for the debt and costs. The payment of the debt, with the particular sum of 10*l.*, raises a strong presumption that it is not an absolute payment in discharge of the debt and costs. *Wain v. Bradbury*, 1 Smith, 128.

A defendant was permitted to pay into court (before four o'clock) the debt, and 20*l.* costs, in lieu of bail, after two ineffectual attempts to justify original and added bail, on the payment of the costs of the two oppositions, on affidavits of the facts and of merits. *Thomas v. Gray*, 1 Price's P. C. 86.

The statute 43 Geo. 3, c. 46, s. 2. does not control the discretion of the court as to the time for putting in bail. Where, therefore, money was paid into court, in lieu of bail, which was not put in and perfected in due time, the court, on an affidavit of merits, granted further time to the defendant. *Parker v. Turner*, 2 Chit. 71.

Where money is paid into the hands of the sheriff in lieu of bail, the defendant has, under 7 & 8 Geo. 4, c. 71, till the day for perfecting special bail, for giving notice of his intention that the money shall remain in court to abide the event of the suit. *Rowe v. Sefily*, 6 Bing. 634; 4 M. & P. 464.

### 2. When Defendant may take out of Court.

A defendant in K. B., who has put in bail, and rendered in their discharge, is entitled to have the money deposited repaid to him. *Chadwick v. Battye*, 3 M. & S. 283; 1 Chit. 145.

So in C. P. *Harford v. Harris*, 4 Taunt. 669.

Where a defendant, having applied to take out of court money deposited in lieu of bail, on the ground of his having put in and perfected bail; and a rule having been afterwards obtained by the plaintiff for setting aside the allowance of bail, the defendant was then rendered: the court directed the money to be paid out to the defendant, after deducting the costs of the two rules. *Gould v. Berry*, 1 Chit. 145.

Even although such money was deposited with the sheriff by a friend, and the defendant had become bankrupt after it was paid in. *Edelsten v. Adams*, 2 Moore, 610; 8 Taunt. 557.

The court refused to inquire whose money it actually was, and whether it belonged to the assignees of the defendant, on the ground that under the statute 43 Geo. 3, c. 46, they were empowered to refund it to the defendant alone. *Id.*

Upon bail being put in and perfected, the court will order it to be repaid to the bail, or any other person by whom it was actually deposited, instead of the defendant. *Nunn v. Powell*, 1 Smith, 13.

Where the defendant, on being arrested, deposited certain goods in the hands of the officer who arrested him, in lieu of bail, and afterwards surrendered himself; two days after which, the officer deposited with the prothonotary the amount of the original debt, and 10*l.* for costs:—Held, that the defendant was entitled to have those sums paid over to him, as, if they had been paid in under the statute 43 Geo. 3, c. 46, he would be entitled to them on his render; and if not, they must be taken to have been paid into court by mistake. *Hill v. Ching*, 7 Moore, 332; 1 Bing. 103.

Quære, whether the depositing goods with the officer on an arrest, instead of money, is a compliance with the terms of that statute? *Id.*

If money has been paid into court to abide the event of the suit, under the 7 & 8 Geo. 4, c. 71, s. 2, and the defendant wishes to take it out on perfecting special bail, under s. 3, he must do so before issue joined. *Ferrall v. Alexander*, 1 Dowl. P. C. 132.

### 3. When Plaintiff entitled.

If a defendant, who pays the debt, and 10*l.* for costs to the sheriff, in lieu of bail, under 43 Geo. 3, c. 46, puts in bail above, who, being excepted to, render him instead of justifying, the plaintiff is not entitled to receive out of court, under s. 2, the money so deposited. *Harford v. Harris*, 4 Taunt. 669.

Though the defendant may in such case receive back his deposit. *Id.*

If a defendant, being arrested by a wrong name, pay the amount of the sum sworn to, and 10*l.* for the costs, to the sheriff, the court will not permit the plaintiff to take it out of court on the defendant's omitting to perfect bail. *Cadby v. Parsons*, 5 Taunt. 623.

Nor will the court permit the defendant to take it out except on terms. *Id.*

Quære, whether the plaintiff is entitled to move to have the sum deposited in the hands of the sheriff and paid into court, paid out to him until he has obtained judgment? *Rowe v. Sefily*, 4 M. & P. 464; 6 Bing. 634.

A plaintiff is entitled to have money paid into court in lieu of bail, paid out to him, if special bail be not perfected in due time, although the defendant has rendered since the time for perfecting bail, unless an affidavit of merits is produced. *Newman v. Hodgson*, 1 Dowl. P. C. 329; 1 B. & Adol. 422.

A defendant having been arrested, paid into court the sum indorsed on the writ, together with 20*l.* as a security for costs, pursuant to the stat.

7 & 8 Geo. 4, c. 71, s. 2. The court, on the application of the defendant, allowed the plaintiff to take out of court a given portion of the sum paid into court, and, unless he consented to accept thereof, with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any evidence at the trial as to that sum. *Hubbard v. Wilkinson*, 8 B. & C. 496.

#### 4. Practice.

**Costs.**—Where a defendant, on being arrested, deposited the amount of the debt, together with 10*l.* for costs, with the officer, who, four days afterwards informed the plaintiff's attorney of the circumstance, and the under-sheriff afterwards wrote to him that the deposit had been made; notwithstanding which, the sheriff was ruled to return the writ; and a declaration was filed, and notice thereof served on the defendant:—Held, that the plaintiff was entitled to the costs of those proceedings, as it was the duty of the sheriff to have paid the sum deposited into court at or before the return of the writ, and which he had omitted to do. *Offley v. Weaver*, 7 Moore, 557.

But where a defendant, on being arrested, paid the sheriff's officer the amount of the debt, and 10*l.* for costs, under the statute 43 Geo. 3, c. 46, s. 2, which latter sum was more than sufficient to cover the costs incurred up to the return of the writ; and the under-sheriff having omitted to pay over the amount to the plaintiff, after being requested so to do, in consequence of which he proceeded further in the action, and incurred further costs:—Held, that the defendant was not liable to pay such costs. *Clark v. Yates*, 7 Moore, 83; 3 B. & B. 273.

**Fees.**—The clerk of the dockets is not entitled, in C. P., to any poundage on money deposited with the sheriff, and by him paid into court. *Hunn v. Brine*, 6 Moore, 124.

Nor in K. B. is the chief clerk. *Stewart v. Bracebridge*, 2 B. & A. 770; 1 Chit. 529.

**Other Matters.**—Where a defendant cannot be found in order to serve him personally with a rule for taking out money deposited in the hands of the sheriff, in lieu of bail, the court will allow the service to be good, by leaving a copy of the rule at the defendant's last place of abode, and sticking it up in the office. *Peate v. Trisett*, 1 Chit. 675. And see *Id.* 170, 466.

If a defendant pay money into court under 7 & 8 Geo. 4, c. 71, to abide the event of the cause, the court will not grant a rule absolute in the first instance for repayment to the defendant, judgment being for him, but there must be a rule to shew cause. *Symes v. Rose*, 5 Bing. 269; 2 M. & P. 426.

In order to make it absolute, it is necessary to produce the record and certificates from the clerk of the judgments and prothonotary, that judgment had been duly signed, and the money paid into court. *Id.*

A motion for taking out of court money paid to

the sheriff by defendant on his arrest, under 7 & 8 Geo. 4, c. 71, and paid into court by the sheriff, was granted on no cause being shewn. *Trust v. Lovecroft*, 1 Price's P. C. 37.

The defendant having been arrested, paid into court the sum indorsed on the writ, and the further sum of 20*l.* as a security for costs, to abide the event of the suit, in pursuance of the statute 7 & 8 Geo. 4, c. 71, instead of putting in and perfecting special bail:—Held, that he was entitled to have the bail-bond delivered up to him to be cancelled. *Smith v. Jordan*, 2 M. & P. 428.

Leave given, by rule, to pay into court 10*l.* in addition to the deposit in the hands of the sheriff, in lieu of special bail. *Graves v. Bennett*, 1 Price's P. C. 14.

If money is deposited in court, in lieu of bail above, pursuant to the 7 & 8 Geo. 4, c. 71, and the plaintiff obtains a verdict, he must limit his execution to the surplus of his demand, beyond the sum deposited, which he is bound to take out of court. *Hewes v. Pyke*, 1 Dowl. P. C. 322; 2 C. & J. 359; 2 Tyr. 313.

### VIII. WHO MAY BE BAIL ABOVE.

#### 1. Attornies and their Clerks.

If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time. *Reg. Gen. K. B., C. P., and Exch., H. T. 2 W. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott, 417; 3 B. & Adol. 376; 2 C. & J. 171; 2 Tyr. 342; 5 Bligh, N. S. 594.*

Both before the rule and since, an attorney or attorney's clerk, or indeed any person, may be bail, for the purpose of rendering the principal. *Bell v. Gate*, 1 Taunt. 162.

Before this rule, no attorney, or person practising as such, could be bail in C. P. *Reg. Gen. C. P., M. T. 6 Geo. 2, 1 H. Black. 76, n.; Anon. Loft, 263, 280.*

Or in K. B. *Boulogne v. Vautrin*, 2 Dougl. 467, n.; Cowp. 828.

But there was no general rule of the court of Exchequer which prohibited attornies or their clerks from becoming bail; the practice in that respect was, however, similar to that of the courts of K. B. and C. P. *Mann v. Nottage*, 1 Y. & J. 367, n.

The rule applies to bail to the action only, and not to bail to the sheriff.

It was held, that an attorney's articulated clerk could not be bail. *Laing v. Cundale*, 1 H. Black. 76.

Nor any other clerk, though not articulated. *Corrish v. Ross*, 2 H. Black. 350; *S. P. Boulogne v. Vautrin*, Cowp. 828; 2 Dougl. 467, n.

Even though he were not clerk to the defendant's attorney. *Redit v. Broomhead*, 2 B. & P.

564: *S. P. Stoneham v. Pink*, 3 Price, 263. See also *Richie v. Gilbert*, and *Cakish v. Ross*, 1 Taunt. 164, n.

But where an attorney was a defendant in a suit, his clerk might become bail above for him in the Exchequer, notwithstanding this practice. *Dixon v. Edwards*, 2 Anst. 356.

And an attorney who has not practised for six years may justify as bail. *Anon.* 1 Chit. 714, n.

So where he is uncertificated. *Anon.* 2 Chit. 98.

And, generally, an attorney might be put in as bail, but could not justify. *Anon.* 1 Chit. 714: *S. P. Jackson v. Trinder*, 2 W. Black. 1180.

So might an attorney's clerk. *Hill v. Thompson*, 7 Moore, 403.

And was good bail until excepted to. *Rez v. Surrey (Sheriff)*, 2 East, 181.

An attorney was liable to an action on his recognizance of bail, though contrary to the rule of court that he should be a bail at all; but he was nevertheless entitled to his privilege to be sued as an attorney. *Harper v. Tahourdin*, 1 Chit. 714, n.; 6 M. & S. 383.

A conveyancer engaged in partnership with an attorney of the court of K. B., and sharing in the general profits of the business of the office, though he did not himself practise as an attorney, was not allowed to justify as bail. — *v. Yates*, 1 D. & R. 9.

## 2. Officers of Courts.

The sixty sworn clerks of the Six Clerks' Office do not come within the operation of the rule of court which prohibits the officers of the court from becoming bail. *Dutton v. Welstead*, 2 Chit. 77.

No sheriff's officer of any kind, or other person concerned in the execution of process, shall be bail. *Anon.* Lofft, 153: *S. P. Bolland v. Pritchard*, 2 W. Black. 799.

But a sheriff's officer is good bail until excepted to, and the plaintiff cannot treat the proceeding as a nullity. *Bankes v. Levi*, 1 Chit. 713.

The Marshalsea court officers cannot be bail in K. B. *Anon.* 1 Tidd's Prac. 247.

Nor can the keeper of a prison. *Hawkins v. Magnall*, 2 Dougl. 466.

But it is not a sufficient ground for rejecting a person as bail, that he is described to be "of A. in the county of B., jail keeper," unless it appear that he is a county jail keeper. *Faulkner v. Wise*, 2 B. & P. 359.

Nor a turnkey. *Daly v. Brooshoft*, 5 Moore, 72; 2 B. & B. 359.

## 3. Bankrupts and Insolvents.

*Bankrupts.*—Bankruptcy is not a ground of rejection, if the bail have obtained his certificate. *Smith v. Roberts*, 1 Chit. 9.

But bankruptcy without a certificate is. *Anon.* 1 Chit. 9, (a).

And persons who have been twice bankrupt, and have not paid 15s. in the pound under the

second commission, cannot be bail. *Mountain v. Wilkins*, 1 Tidd's Prac. 247; 1 Chit. 9, (a).

Bail who had recently become a bankrupt, and obtained his certificate, but did not know whether his estate had paid any dividend, was not permitted to justify. *Probatt's bail*, 1 Chit. 288.

One of the bail having been recently bankrupt, was not permitted to justify, although worth 500*l.* at the time he offered to become bail. *Butler's bail*, 2 Chit. 78.

So, bail admitting he had been a bankrupt, and had been arrested several times, but did not know how often, was rejected, and no time allowed. *Rawlin's bail*, 1 Chit. 3.

Bail rejected, who could not say whether, during the interval of his bankruptcy and certificate, he had, or had not justified. *Bennett's bail*, 1 Chit. 289.

So bail was rejected who had compounded with his creditors and afterwards become bankrupt, and had not paid 15s. in the pound. *Wade's bail*, 1 Chit. 293.

*Insolvents.*—A discharge under an insolvent act disqualifies bail. *Smith v. Roberts*, 1 Chit. 9; 1 Tidd's Prac. 247; *S. P. Curtis v. Smith*, 1 Chit. 116.

## 4. Peers and Members of Parliament.

Bail rejected on the ground that one of them was a peer of the realm. *Burton v. Atherton*, 2 Marsh. 232.

Nor can a member of the House of Commons be allowed to justify, because he is not liable to the ordinary process of the courts. *Duncan v. Hill*, 1 D. & R. 126: *S. P. Graham v. Sturt*, 4 Taunt. 249.

## 5. Persons indemnified.

In C. P. it was held to be no objection to bail that they were indemnified. *Neat v. Allen*, 1 B. & P. 21.

But now in C. P. by special rule, H. T. 37 Geo. 3, no person who has been indemnified by the attorney can justify as bail. *Preston v. Bindley*, 1 Tidd's Prac. 269.

And this has been the settled practice in K. B. *Id.*

And that court rejected bail, who had received a verbal promise of indemnity from the defendant's attorney, although they gave time to put in fresh bail. *Greensill v. Hopley*, 1 B. & P. 103: *S. P. Capon v. Dillamore*, 8 Moore, 516; 1 Bing. 423.

But it is no objection to bail that they are indemnified by the sheriff's officer. *Chick's bail*, 1 Chit. 714, n.

It is no objection to bail that they became so at the request of the defendant's attorney, unless they are also indemnified by him. *Hunt v. Blaquier*, 4 Bing. 588.

A bail who expects the attorney for the defendant to indemnify him, though he has received no undertaking to that effect, cannot justify. *Anon.* 1 Dowl. P. C. 1.

A person once rejected cannot be bail again, though his circumstances have changed. *Snell's bail*, 1 Chit. 62, 676.

But where bail had been rejected on the ground of having been indemnified by the defendant's attorney:—Held, that this rule did not apply. — *v. Hallett*, 1 D. & R. 488.

#### 6. Persons under other Circumstances.

A person whose name is on the books of the K. B. prison as a prisoner, cannot be bail where the action, although supersedeable, has not been actually superseded. *Anon.*, 1 Tidd's Prac. 271.

It is no objection that bail had been transported thirty years ago. *Hatfield's bail*, 2 Chit. 98.

A servant in the king's household, who is liable to be called on to attend the person of his majesty, cannot be bail, for his person cannot be taken in execution. *Anon.* 1 D. & R. 127, n.

But quære, whether it is a sufficient objection to bail, that he lives within the verge of the court. *Glead v. Mackay*, 2 W. Black. 956.

The domestic servant of a foreign ambassador cannot become bail. *Lock's bail*, 1 Dowl. P. C. 124.

Bail rejected on the ground that his children were in the workhouse, and he would not assign a reason. *Anon.* 2 Chit. 77.

So, also for suffering his father to receive parish relief. *Holm v. Booth*, 2 Chit. 78.

Bail rejected where he was to receive a commission on the amount for which he proposed to justify. *Foxall's bail*, 1 D. & R. 783.

Where he had been bail in other actions, but did not know how often. *Anon.* 1 Chit. 3, (b); *S. P. Anon.* Lofft. 72, 194.

So, where he had been bail to the sheriff in a former action, and had not been excepted to, his property not being sufficient for both actions; but time was allowed. *Varden v. Wilson*, 1 Chit. 287.

So, where he had been rejected in the Palace Court, although the objection there was merely technical. *Monk's bail*, 1 Chit. 76.

The husband of the defendant, who had married after the arrest and before the return of the writ, was allowed to justify as one of the bail. *Salter v. Whitefield*, 2 Chit. 94.

It is no objection to the justification of bail, that he was not acquainted with the defendant. *Jameson's bail*, 2 Chit. 97.

A member of a corporation may justify as bail in error in an action brought against the corporation, if he be not a capital Burgess or a party on the record. *Henley v. Lyme Regis (Mayor, &c.)*, 3 M. & P. 450; 6 Bing. 195.

Bail rejected where he was liable upon outstanding dishonoured bills not renewed, and the right of proceeding against him is not suspended. *Barnesdall v. Stretton*, 2 Chit. 79.

A bail by affidavit was rejected, on an affidavit that he had dishonoured a note over due; no reason being stated on his behalf for so doing. *Croes v. Williams*, 1 Tyr. 531.

It is no objection to bail, that he is one of the indorsers of the bill of exchange upon which the action is brought. *Mitchell's bail*, 1 Chit. 287; *S. P. Stevens's bail*, 1 Chit. 305; and *Harris v. Manley*, 2 B. & P. 526.

The acceptor of a dishonoured bill of exchange is not competent to become bail in an action against the drawer. *Anon.* 1 Dowl. P. C. 183.

### IX. QUALIFICATION OF SPECIAL BAIL.

#### 1. Housekeepers.

*Rule.*—No bail will be allowed to justify unless he be a housekeeper or a freeholder. *Reg. Gen. M. T.* 10 Geo. 4, 3 M. & P. 761.

But the plaintiff may waive the qualification that the bail shall be housekeeper or freeholder. *Saggers v. Gordon*, 5 Taunt. 174.

Bail must swear themselves "housekeepers":—swearing themselves "householders" is not sufficient. *Anon.* 1 Dowl. P. C. 127.

*Within Jurisdiction.*—Bail must be housekeepers within the jurisdiction of the courts, so as to be amenable to their process. *Hughes v. Sterling*, 11 Price, 158.

A lodger in England, possessed of a house in Scotland, cannot justify as bail. *Anon.* 1 Dowl. P. C. 61.

*What an occupation.*—Where it appeared that the bail lived in lodgings, but that he paid part of the rent and taxes of a house occupied by his partner, as a trader:—Held, that he might be considered as a housekeeper, and was qualified to justify. *Savage v. Hall*, 8 Moore, 525; 1 Bing. 430.

But rejected, where it appeared that he had rented a house, and underlet the same to another, who paid the taxes, and let the first floor to the bail, but whom the landlord would not accept as tenant, and therefore he paid the full rent to the bail, who paid it to the landlord. *Anon.* 1 Chit. 502.

Where a person had taken a house occupied by lodgers, from one of whom he had received rent, he was held to be qualified, though he had never in fact occupied the house himself. *Coehn v. Waterhouse*, 8 Moore, 365.

But not where he occupied every room in the house except one, which was reserved for his landlord, who paid all the taxes. *Slade's bail*, 1 Chit. 502.

Nor in respect of a house which he had hired, but which he was prevented from occupying by illness in the family of the former tenant. *Bold's bail*, 1 Chit. 288.

Nor in respect of the occupation of a tap connected with a tavern, if the licence be taken out in the name of the tavern keeper. *Walker's bail*, 1 Chit. 316.

But the occupier of a house for a limited period, though he pays neither rent nor taxes, is sufficient. *Williams v. Dethick*, 2 Price, 8.

And the court of C. P. permitted a justifica-

tion, although the bail did not reside in the house in which he was described in the notice. *Hemming v. Plenty*, 1 Moore, 529.

A person renting a house, and underletting the basement part of it, is not, as a housekeeper, sufficient bail. *Topham v. Calpert*, 1 Price's P. C. 140.

Four days' time, excluding Sunday, given on such a rejection, for new notice. *Id.*

If it appear from the affidavit to oppose the justification of bail, that the person offering himself for that purpose has ceased to be actually a housekeeper, although he occupied a house when he signed the bail-piece, and is about to occupy another, he is not admissible. *Weale v. Will*, 12 Price, 770.

It is no objection that a man has not been assessed to the poor's rate; such assessment being only evidence of his being a housekeeper. *Anon. Lofft*, 328.

*Description of House.*—The value of the house is immaterial. *Anon. Lofft*, 148.

Keeping a gambling-house is no ground of opposition. *Anon.* 1 Dowl. P. C. 160.

*Non-payment of Taxes.*—Bail were rejected for not having paid the arrears of king's taxes, though in a condition to pay them. *Lewis v. Thompson*, 1 Chit. 309.

But where he had been in the habit of having the time for payment of taxes postponed, and his property was sufficient, time was given in order that he might pay the taxes, and produce the receipts on coming up again. *Spurdens v. Mahony*, 1 Chit. 309, (n).

## 2. Estate.

Seemle, that a bail may justify as a tenant by the curtesy of lands in the Isle of Man, without affidavit, or other evidence, that the law of tenancy by curtesy prevails there. *Tbmsey v. Napier*, 8 Taunt. 148.

A leaseholder, not a housekeeper or freeholder, cannot justify as bail. *Smith's bail*, 1 Dowl. P. C. 1.

In one case previously it was doubted, if a beneficial lease is sufficient to qualify as bail, where he is neither freeholder nor householder. *Anon.* 2 Chit. 96.

A freeholder for ninety-nine years was admitted as bail by consent. *Id.*

A copyhold estate in right of the wife is not sufficient property to constitute a qualification. *Anon.* 2 Chit. 97.

Bail cannot be rejected because he swears to an estate in a distant place, although, if untrue, he may be indicted for perjury. *Anon. Lofft*, 145.

## 3. Property.

It seems that where the court orders bail to submit their property to inspection, in order to ascertain its sufficiency to enable them to justify,

the plaintiff may cause it to be appraised by a broker. *Tudor v. Simpkin*, 2 Chit. 80.

Good debts, although merely choses in action, may be considered as part of the effects of bail. *Anon. Lofft*, 144.

So mortgage money secured on an estate in Ireland. *Anon.* 1 Tidd's Prac. 246.

The possession of effects abroad to any amount, held not to be sufficient on justification. *Anon. Lofft*, 34, 147: *S. P. Levy's bail*, 1 Chit. 258. *Wightwick v. Pickering*, Forrest, 138.

So landed property in Jamaica. *Boddy v. Leyland*, 4 Burr. 2526.

But, in one case, held, that having no effects in England was not an objection to bail, without other suspicious circumstances. *Smith v. Scandrett*, 1 W. Black. 444.

And seemle, that a British subject resident in this country may justify though his property be abroad. *Anon.* 1 Chit. 286, n.

So also where the property is partly in England and partly abroad. *Graham v. Anderson*, 4 M. & S. 371.

So, where part of the property is daily expected in a ship from abroad, the bill of lading having arrived. *Welsford's bail*, 1 Chit. 286, n.

So, bail was allowed to justify in respect of property, consisting partly of cash and partly of a freehold house at Gibraltar. *Beardmore v. Phillips*, 4 M. & S. 173.

So, a Portuguese who owned a ship trading between London and Portugal, and which was then at Cadiz, and expected to return, being insured in London, was allowed by K. B. to justify, although he did not swear to effects in England. *Colson v. Cashedy*, 1 Tidd's Prac. 272.

So a foreigner of credit, though he has few effects in England, may justify as bail, especially where the defendant is a foreigner also. *Christie v. Filliol*, 2 W. Black. 1323.

## X. PUTTING IN BAIL.

### 1. When to be put in.

A sheriff might put in bail before the return of a writ. *Evans v. Sweet*, 2 Bing. 271; 9 Moore, 556.

So held in K. B. and consequently the plaintiff could not afterwards proceed on the bail-bond. *Hyde v. Whiskard*, 8 T. R. 436. *But see Newton v. Lewis*, and *Huggins v. Bambridge*, 8 T. R. 457, 458, n.

The bail to the sheriff cannot put in bail to the action before the return of the process, without consent of the defendant. *Birt v. Roberts*, M. & M. 177—Tenterden.

In the Exchequer, where bail has been put in by a defendant, and not perfected, the sheriff's officer may put in and justify bail for his own indemnity. *Hopkins v. Peacock*, 5 Price, 558.

Where special bail have been put in, but have omitted to justify, the sheriff may put in fresh bail to render the defendant, even after an attach-

ment has issued against him for not obeying the rule to bring in the body. *Hamilton v. Jones*, 4 M. & P. 454; 6 Bing. 628.

Where the action was by original, the defendant had till four days after the quarto die post to put in bail. *Frampton v. Barber*, 4 T. R. 377.

Which were exclusive of the return day, and if the last day was Sunday, the defendant had the whole of Monday. *Anon. Lofft*, 190.

So, where a writ was returnable on the first return of a term, in a country cause, the defendant, in C. P. had eight days after the quarto die post to put in bail. *Rolfe v. Steele*, 2 H. Black. 276.

Bail above may be put in on a dies non jurisdictionis. *Baddeley v. Adams*, 5 T. R. 170.

Bail may be taken after final judgment. *Stanton's bail*, 2 Chit. 73.

## 2. How put in.

### (a) Number.

Notice of more bail than two shall be deemed irregular, unless by order of the court, or a judge. *Reg. Gen. K. B., C. P., and Exch.*, Hil. Term, 2 W. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott, 417; 3 B. & Adol. 376; 2 C. & J. 173; 2 Tyr. 342; 4 Bligh, N. S. 595.

Where a poor defendant was arrested for 700l. the court granted a rule to justify three bail instead of two. *Easter v. Edwards*, 1 Dowl. P. C. 39.

Before the rule, where the sum sworn to was large, the Court of Exchequer would permit more than two bail to be put in. *De Tastet v. Kroger*, Wightw. 110; *Wightwick v. Pickering*, Forrest, 138; *Anon.* 13 Price, 448.

So, also in K. B. *Fell v. Douglas*, 1 Chit. 601; *Anon. Lofft*, 26.

But not in C. P. *Allen v. Keyt*, 2 W. Black. 1122.

### (b) Court.

The bail-piece must be intitled of the court, and in the cause. *Hall's bail*, 1 Chit. 79.

Where bail had been put in by mistake in the wrong court, the defendant was ordered to rectify the mistake by putting in and perfecting bail in the right court of the proper term. *Boyce v. Rust*, 1 Tidd's Prac. 251.

If a defendant be arrested by process of K. B., and removed by habeas corpus into C. P., he may put in and justify bail in either court. *Knowlly v. Reading*, 1 B. & P. 311.

### (c) County.

A recognizance of bail shall not express where it was taken. *Reg. Gen. K. B., C. P., Ex.*, Hil. Term, 2 W. 4, 1 Dowl. P. C. 193; 8 Bing. 300; 1 M. & Scott, 426; 3 B. & Adol. 385; 2 C. & J. 190; 2 Tyr. 348; 4 Bligh, N. S. 602.

All proceedings are to be in Middlesex only. *Id.*

Declaration for an escape stated that the debtor was arrested, and gave bail; that bail above

was put in before a judge at chambers, prout patet per recordum, and that the debtor surrendered in discharge of his bail, and afterwards escaped. The examined copy of the entry of the recognizance of bail stated it to have been taken before the court at Westminster:—Held, first, that plaintiff was bound to prove the bail to have been taken as alleged, and therefore that the variance was fatal; and, secondly, that an entry in the filacer's book, stating the recognizance to have been taken before a single judge, was not admissible in evidence, and would not cure the objection, even if admitted. *Bevan v. Jones*, 6 D. & R. 483; 4 B. & C. 403.

Bail are not regularly put in, unless the name of the proper county be inserted in the bail-piece. *Smith v. Miller*, 7 T. R. 96.

Where special bail is put in by mistake in a wrong county, it is as no bail; and the plaintiff, if he enter a common appearance for the defendant, and file a declaration in the office de bene esse, may serve notice of it on the defendant in person. *Fisher v. Levi*, 2 W. Black. 1061.

And if bail be put in with the filacer of the county where the defendant is arrested on a testatum capias, the bill may be treated as a nullity, unless it appear that the plaintiff was aware that bail had been put in. *Clemson v. Knox*, 2 B. & P. 516.

But if the county from which the testatum issued appear in the margin of the bail-piece, it is not a nullity. *Anon.* 1 Chit. 79, (a); *S. P. Res v. Middlesex (Sheriff)*, 3 M. & S. 532.

If bail be put in in the county palatine of Lancaster for a defendant who is arrested upon a testatum capias from London, and it appear on the face of the bail-piece that they had been put in at Lancaster:—Held, that the bail-piece was wrong, as it should have stated that the testatum issued from London into the county palatine; but the court of C. P. gave time for a proper bail-piece to be transmitted, and directed that the same bail might then justify. *Longworth v. Healey*, and *Lee v. Same*, 3 Moore, 76. And see *Hartley v. Hodson*, 1 Moore, 514, 430; 2 Moore, 66; 8 Taunt. 171.

It is not irregular, where the defendant has been arrested under an original capias, and original bail has been put in in Middlesex, for added bail afterwards taken before a commissioner in Denbighshire to be put in before the filacer for Middlesex. *Moore v. Kenrick*, 3 Bing. 603; 11 Moore, 488.

### (d) Action.

The Court of Exchequer will permit justification, where the title of the cause is not correctly set out in the bail-piece. *Calvert v. Bowater*, 1 Price, 385.

If in an action, at the suit of two plaintiffs, bail be put in as in an action at the suit of one only, such bail may be treated as a nullity. *Anon.* 2 Chit. 77; *S. P. Anon. Lofft*, 237.

So, in a joint action against two, if the bail be put in as in an action against one only. *Holt v. Frank*, 1 M. & S. 199.

If in the bail recognizance the cause be rightly named, it is sufficient, though in the affidavits of the sufficiency of the bail, and of the acknowledgment of the bail, the cause be misnamed. *Love v. Galloway*, 5 Taunt. 663. And see *Austen v. Fenton*, 1 Taunt. 23.

### 3. Recognizance.

In all actions requiring bail, the defendant shall not be permitted to enter into the recognizance, but the bail shall each of them enter into a recognizance of double the sum sworn to. *Reg. Gen. C. P.*, E. T., 36 Geo. 3, 1 B. & P. 530.

All recognizances of bail in actions in the Exchequer of Pleas, when taken or allowed by a baron, shall be left by the attorney for the defendant or defendants with the sworn or side clerks, or their deputy, in the office of pleas, until duly allowed; who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference; which book shall be open to the inspection of the attorneys of the court, or their clerks; and notice of such bail being allowed and filed in the said office of pleas, with the names, descriptions, and address of the bail, shall be given by the attorney for the defendants to the attorney for the plaintiff or plaintiffs, within the times prescribed for giving notice of bail by the former rules of the court, and proceedings may be thereupon had for excepting to and perfecting such bail within the times, and in like manner as is and are prescribed by the existing rules and practice of the court, except so far as the same may be altered by the present or any subsequent rule of the court. *Reg. Gen. M. T.* 1 W. 4, Ex., 1 Price's P. C. 6; 1 C. & J. 275; 1 Tyr. 158.

One of the bail may be taken by affidavit before a commissioner in the country, and the other in the regular way in town. *Mandorf's bail*, 2 Chit. 90.

Or before different commissioners in the country. *Anon.* 2 Chit. 91.

In an action against a sheriff, for not assigning a bail-bond, the Court of Exchequer will not grant a motion to enter the recognizance of bail on the record, as taken on the true day, (it being always entered generally as of the term,) to enable the plaintiff to proceed with his action. *Anon.* 3 Price, 36.

### 4. Bail-piece.

The clerk of the bails in the court of K. B. shall mark the bail-pieces numerically, as they are received. *Reg. Gen. K. B.*, E. T. 30 Geo. 3, 3 T. R. 660.

In the case of country bail, the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London, and, in that case, within fifteen days after the taking thereof. *Reg. Gen. K. B.*, C. P., and Ex., Hil. Term, 2 W. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott. 417; 3 B. & Adol. 376; 2 C. & J. 172; 2 Tyr. 342; 4 Bligh, N. S. 594.

Where bail have been rejected for insufficiency, the bail-piece is a nullity, and a new one is necessary. *Lewis v. Gadderer*, 1 D. & R. 350; 5 B. & A. 704.

If one of the bail be a material witness, his name may be struck out of the bail-piece, and another added. *Anon.* 2 Chit. 103.

### 5. Officer's Fees.

A commissioner appointed by the 4 & 5 W. & M. is not bound by the letter of that act to take no more than 2s. for taking bail, if he have been put to expense by travelling, or has taken extraordinary trouble, at the instance of the parties, to effect the taking of the recognizance; or where there are other circumstances in the case which afford reasonable ground for a further charge. *Watson v. Edmonds*, 5 Price, 2.

And where more had been received by a commissioner by the voluntary payment of the bail, a rule obtained to shew cause why he should not refund the extra money was discharged with costs. *Id.*

Such applications where proper must be made by the party who has paid the money. *Id.*

## XI. NOTICE OF BAIL.

### 1. When necessary.

In actions where special bail is required, notice in writing of bail put in must be given. *Reg. Gen. C. P.*, E. T. 49 Geo. 3, 1 Taunt. 616.

Where bail are put in in due time, the defendant is not bound to give notice, but the plaintiff must search in the filacer's book: otherwise, if they be not put in in due time. *Darokins v. Reid*, 1 H. Black. 529.

### 2. Description of Bail.

Notice of bail must correctly describe them; and where one of the bail was described as a housekeeper, and it turned out that his father was the occupier, the court would not permit him to justify; but time was granted to add and justify another bail, an affidavit being afterwards produced, repelling all intention to mislead. *Coleman v. Roberts*, 1 Chit. 88.

It must contain their addition, as well as place of abode. — *v. Costar*, 5 Taunt. 554.

And a false addition is a fatal objection. *Wood v. Chadwick*, 2 Taunt. 173.

A schoolmaster is well described as "gentleman." — *v. Pasman*, 5 Taunt. 759.

Bail was rejected because described as a hatter when in fact the servant of a hatter. *Anon. Loft*, 187.

To describe bail as "jewellers," when they are merely clerks in a jeweller's shop, is a misdescription. *Hamlet's bail*, 1 Dowl. P. C. 501.

Gentleman not an objectionable description of one who deals by commission. *Anon. Loft*, 281.

Nor of a clerk in the custom-house. *Anon.* 1 Chit. 492, n.



But it would be bad to describe a servant as a gentleman. *Anon.* 1 Chit. 492, n.

An agent for the sale of Scotch ale, who described himself as a gentleman, was held to be misdescribed. *Fleming's bail*, 1 Dowl. P. C. 641; 1 C. & M. 111.

"Manufacturer" is a bad description. *Fearnley's bail*, 1 Dowl. P. C. 40.

The misnomer of a Christian name of one of the bail in a notice, is fatal. *Anon.* 1 Moore, 126.

Notice of J. M. as bail, was held not good notice for J. M. the younger, and the plaintiff need not swear there are two of the name. *Smith v. Mellon*, 5 Taunt. 854; S. C. nom. — *v. Meller*, 1 Marsh. 386; *Anon.* 1 Chit. 88, (a).

The want of a description of bail is cured by the plaintiff's excepting to them. *Bigg v. Dick*, 1 Taunt. 17.

### 3. Residence.

**Rule.**—Every notice of bail shall, in addition to the description of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder. *Reg. Gen. K. B., C. P., and Exchequer*, T. T. 1 W. 4, 2 B. & Adol. 788; 7 Bing. 782; 4 C. & P. 602; 1 C. & J. 470; 1 Dowl. P. C. 103; 1 Tyr. 590; 5 M. & P. 813; 1 Price's P. C. 109; 4 Bigh. N. S. 581.

The rule applies to both town and country bail. *Anon.* 1 Dowl. P. C. 259; 1 M. & Scott, 296.

An omission to describe the bail, as housekeepers or freeholders, can only be objected to when the bail come up to justify. *Bell v. Foster*, 1 M. & Scott, 518; 8 Bing. 334; 1 Dowl. P. C. 271.

In one case, where the bail omitted to state in the affidavit that they were housekeepers, the court permitted them to justify, as the plaintiff did not interpose. *Martin v. Gell*, 2 Tyr. 166.

**Sufficiency of Description.**—The court cannot take judicial notice of the size of the place where bail are described to reside; if it is too large, that fact must be made to appear by affidavit. — *v. Coates*, 5 Taunt. 554.

Notice of bail residing at Liverpool is too general, but time was allowed. *Jackson's bail*, 1 Chit. 492.

So, it is insufficient to describe bail as of Leeds, Lancaster, Leicester, &c., but time allowed to amend and make further inquiry. *Anon.* 1 Chit. 492, n.

Although the bail had been found to be resident there. *Baxter's bail*, 6 Moore, 44.

So, bail were allowed to justify where they were described of Lancaster generally, because the plaintiff had had time for inquiry. *Well's bail*, 1 Chit. 493, n.

Bail about to justify by affidavit were described in the notice as "of the town and county

of the town of Nottingham."—Held, too general, and that the street in which they resided should have been inserted in the notice; and that new bail could not be substituted, as the former were brought up under a rule, and not a notice. *Anon.* 3 Moore, 318; 1 Tidd's Prac. 266.

The residence of a bail is sufficiently described by stating it to be at a place well known as a village, without mentioning any street in it. *Smith's bail*, 1 Dowl. P. C. 499.

A description of bail, as of one of the large villages near London, is too general, if the bail live in a lieu connu within the village. *Rickman v. Hawes*, 5 Taunt. 173.

Walworth, generally, is not a sufficient description; nor Surrey Cottage, Kent Road. *Anon.* 1 Chit. 493.

So, Battle Bridge is insufficient. *King's bail*, 2 Chit. 81.

But Clapham is sufficient, if the bail live in Clapham Road. *Pieese v. Gibson*, 6 Moore, 322.

A misdescription of the number of the house in which the bail resided was held to be a ground of rejection, but time was allowed. *Anon.* 1 Chit. 493.

Notice of bail residing in Cannon-street Road, which is nearly a mile in length, without giving any number of the house:—Held, sufficient, when it was sworn that the plaintiff had found the bail so as to serve him with process. *Taylor's bail*, 1 Chit. 503.

The name of the parish only, without the street, is not a sufficient designation of residence. *Anon.* Lofft, 72, 194.

Hatton Street, Middlesex, without any parish, was held sufficient, although the name had recently been changed from Hatton Garden. *Anon.* Lofft, 418.

Where the notice of bail omitted to mention the numbers of the houses where the bail resided, in a place where the houses are numbered, the plaintiff had the option of having further time to make further inquiries, or the costs of his affidavit and appearance in court. *Muir v. Smith*, 2 Tyr. 742.

**What Residence.**—Under rule T. T. 1 Will. 4, the actual and not the constructive residence of the bail must be stated. *Thomson v. Smith*, 1 Dowl. P. C. 340.

It is not necessary that a bail should sleep in the house described in the notice of bail as his residence. *Thomson's bail*, 1 Dowl. P. C. 497.

If a bail has two places of residence, it is only necessary under the rule to give one of them in the notice. *Anon.* 1 Dowl. P. C. 159.

If a man carry on his business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient. *Weddall v. Berger*, 1 B. & P. 325.

So, a notice of bail as of his place of business is sufficient. *Tanner v. Nash*, 1 Price, 400.

Bail described as of three different places, in

three different notices, were rejected. *Proteus's bail*, 1 Chit. 493.

**Six Months.**—By the rule it is only necessary in the notice of bail to state the residence of the bail for the last six months, without going on to state that the bail has resided there for that period; but it must state the bail to be a house-keeper or freeholder, although accompanied by the affidavit under rule T. T. 1 Will. 4. *Anon.* 1 Dowl. P. C. 160; *S. P. Fenton v. Warre*, 1 Dowl. P. C. 295; 2 C. & J. 54; 2 Tyr. 158; 1 Price's P. C. 140.

Notice of bail, describing the bail to have resided within the last six months (instead of for the last six months) at a particular place is bad; but if the affidavit of justification be correct, it may be connected with the notice, so as to make the notice sufficient. *Ward's bail*, 1 Dowl. P. C. 596; 1 C. & M. 28; *S. P. Johnson's bail*, 1 Dowl. P. C. 438.

#### 4. Service of Notice.

Affidavit of service of notice of bail, by leaving it at the chambers of the plaintiff's attorney, is insufficient where there is no acknowledgment of the receipt. *Jones's bail*, 1 Chit. 294.

So, service on the master of a house in which the attorney had an office, is not sufficient unless some privy can be shewn to exist between them. *Freeman's bail*, 2 Chit. 88.

Service, by sticking up a copy in the King's Bench office, and putting another under the door of the attorney's office, was held sufficient where the attorney could not be personally served. *Atkinson v. Thompson*, 2 Chit. 81; *S. P. Anon.* 1 Chit. 294, (a).

So, it is sufficient to leave the notice at a stationer's, where the plaintiff's attorney's papers were usually left for him. *Anon.* 2 Chit. 82.

A continuance of notice of bail, where time is not given by the court, need not be served before three o'clock, as specified in the rule of C. P. *Williams v. Taylor*, 5 Moore, 472.

#### 5. Irregular Notice.

Notice of bail as put in before one judge, when in fact they were put in before another, is irregular, and the court will not stay the proceedings on the bail-bond. *Kelly v. Wrother*, 2 Chit. 109.

Where the notice of bail, being put in, named the defendant by his right name "sued by" the wrong name, and the bail-piece described him by the wrong name only:—Held sufficient. *Anon.* 2 Chit. 81.

Where the sheriff, to avoid an attachment for not bringing in the body, gave the plaintiff notice of putting in bail, but omitted to state the names of the proposed bail in such notice:—Held, that the notice could not be treated as a nullity, so as to entitle the plaintiff to move for an attachment. *Pugh v. Emery*, 4 D. & R. 30.

An informality in the notice of bail does not render the proceeding null, so as to justify the plaintiff in issuing an attachment against the sheriff. *Rex v. Middlesex (Sheriff)*, 1 C. & M. 482.

A defendant being arrested, employed on the sudden one attorney to put in bail for him, and another to carry on the subsequent proceedings at the return of the writ; each attorney gave notice of bail above, describing himself as the defendant's attorney: the plaintiff excepted to one set of bail; and that set not justifying, he attached the sheriff, without regarding the notice given by the second attorney:—Held, that he was bound to attend to both notices, and the attachment was set aside for irregularity. *Gilmour v. Brindley*, 7 D. & R. 259.

### XII. EXCEPTION.

**When allowed.**—When bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond. *Reg. Gen. K. B. C. P.*, and Excheq., H. T. 2 Will. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott, 417; 3 B. & Adol. 376; 2 C. & J. 172; 2 Tyr. 342; 4 Bligh, N. S. 595. *Boughton v. Chaffey*, 2 Wils. 6.

If the bail to the sheriff be put in above, and exception taken before an assignment of the bail bond, they are bound to justify notwithstanding such assignment. *Hill v. Jones*, 11 East, 321.

Where bail are put in in due time, an exception must first be entered before the sheriff can be ruled to bring in the body; and the adding bail afterwards does not supersede the necessity of such exception, before an attachment can issue against the sheriff on account of the added bail not having justified in time. *Rex v. Middlesex (Sheriff)*, 8 T. R. 258; *S. P. Rex v. Same*, 7 D. & R. 264; *Anon.* Loft, 159.

If a sheriff's officer, or any attorney or his clerk, or other disqualified person, be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a mere nullity. *Banks v. Levi*, 1 Chit. 714; *Rex v. Surrey (Sheriff)*, 2 East, 181; *S. P. Foxall v. Bowerman*, 2 East, 182.

The defendant gave a notice of bail, accompanied by an affidavit of justification, pursuant to the form subjoined to the third rule of T. T. 1 Will. 4, but without the four days' notice of justification required by the first rule:—Held, that the plaintiff had twenty days to except to the bail, as under the old practice. *Goddard v. Jarvis*, 2 M. & Scott, 169; 9 Bing. 68; 1 Dowl. P. C. 278.

If the plaintiff shall not give one day's notice of exception to the bail, by whom such affidavit shall have been made, the recognizance of such bail may be taken out of court without other justification than such affidavit. *Reg. Gen. K. B. C. P.*, and Excheq., T. T. 1 Will. 4, 2 B. & Adol. 788; 7 Bing. 783; 4 C. & P. 602; 1 C. & J. 470; 1 Dowl. P. C. 103; 1 Tyr. 521; 5 M.

& P. 814; 1 Price's P. C. 109; 4 Bligh, N. S. 581.

This rule does not apply to the case of a prisoner. *Webb's bail*, 1 Dowl. P. C. 446.

*Must be entered.*—The exception must also be entered in the bail-book before the body rule can be served on the sheriff. *Rex v. Middlesex (Sheriff)*, 7 D. & R. 264; *S. P. Rex v. Middlesex (Sheriff)*, 8 D. & R. 149; 5 B. & C. 389.

And the irregularity is not waived by the defendant's acting upon the notice. *Thwaites v. Gillington*, 4 D. & R. 365.

Where the plaintiff took an assignment of the bail-bond, and afterwards gave notice of exception to the bail without entering it:—Held, that the plaintiff's irregularity in not entering an exception was not waived by the defendant's having given two notices of justification, under one of which the bail justified; and therefore held that the proceedings should be stayed, but the bail-bond was not to be delivered up to be cancelled. *Hodson v. Garrett*, 1 Chit. 174.

*Notice must be given.*—It is no exception until the defendant have had notice. *Oldham v. Burrell*, 7 T. R. 26.

Parol notice of exception to bail is not sufficient, it must be written. *Rex v. Middlesex (Sheriff)*, 8 D. & R. 149; 5 B. & C. 389.

Although an exception to bail has been regularly entered, and the defendant's attorney, having had verbal notice of it, proceeds by giving notice of justification, and attempting to justify; yet notice in writing of such exception must have been given to make the sheriff liable to an attachment for not bringing in the body. *Cohn v. Davis*, 1 H. Black. 80.

In C. P. notice of justification of bail is a waiver as between the parties of a neglect to give notice of exception, though it is not a waiver so as to support a rule to bring in the body. *Anon.* 1 Chit. 174; *S. P. Rogers v. Mapleback*, 1 H. Black. 106.

So it is a waiver of an irregularity in giving an imperfect notice of exception. *Aldridge v. Schroder*, 2 Smith, 75.

*Form of Notice.*—Notice of exception to bail intitled in a wrong court is a nullity. *Anon.* 1 Chit. 375.

Attachment against the sheriff set aside, on the ground that the notice of exception to bail was not intitled in the cause, though the notice was served upon the defendant's attorney at the same time with the declaration. *Rex v. Middlesex (Sheriff)*, 1 Chit. 741.

### XIII. NOTICE OF JUSTIFICATION.

#### 1. Description of Bail.

In every case wherein the same bail as have

been already put in, or wherein other bail are intended to be added to the original bail put in, the names and descriptions, or name and description, of such same original bail intended to justify, or added bail to be put in and justify, shall be inserted in every notice of such same or added bail to be justified, or to be put in and justified pursuant to such notice; and in default thereof, in either of the cases aforesaid, no rule for the allowance of such same or added bail shall be drawn up. *Reg. Gen. C. P.*, M. T. 7 Geo. 4, 4 Bing. 51.

This rule does not apply to bail by affidavit, but only to bail in town causes. *Martin v. Bird*, 12 Moore, 299.

Notice of justification must contain the names, and in general the addition of the bail. *Jeffrey's bail*, 1 Chit. 351. *And see Atkinson's bail*, 2 Chit. 86; 1 Taunt. 18, n.

So the christian names. *Taylor v. Halliburton*, 1 Chit. 494, n.

It is a good ground of rejection, that one of the bail is described in the notice of justification as the bail put in before, and is described by a different christian name from that which was before given. *Anon.* 1 Chit. 494, n.

Bail by affidavit rejected, on the ground that one of them was described in the notice of justification as A. B. generally, but in the affidavit of justification as A. B. the younger. *Smith v. Mellon*, 5 Taunt. 854; *S. C. nom.* — *v. Meller*, 1 Marsh. 386; *Anon.* 1 Chit. 88, (a).

Where one of the bail had been misnamed in the notice of justification, and was sworn accordingly, the court of C. P. permitted him to justify, on his swearing that he had sufficient property; and it appeared that he had been found by the party inquiring after him with reference to his becoming bail. *Levi's bail*, 7 Moore, 252.

"Gentleman" is a sufficient description for a clerk in the custom-house, or for a schoolmaster; but a servant must not be described as a gentleman. *Anon.* 1 Chit. 494, n.; 5 Taunt. 759.

But a clerk in a mercantile house, described in the notice of justification by the addition of "gentleman," was rejected. *Moss v. Heavyside*, 7 D. & R. 772.

So "shopkeeper" is an insufficient addition, where the bail had been before described as a grocer, and there were other circumstances of suspicion. *Anon.* 1 Chit. 494, n.

"Manufacturer" is a bad description of bail. *Fearnley's bail*, 1 Dowl. P. C. 40.

Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. *England v. Kerwan*, 1 B. & P. 335.

It is no objection to the notice of justification, that it states that two were added bail, when, in point of fact, one only was added. *Anon.* 2 Chit. 86.

In an action against several, it is no objection to the notice of justification, that it states, that the bail will justify for three, bail for two only

having been put in. *Denton's bail*, 1 Dowl. P. C. 2.

The notice of justification stated that the two persons seeking to justify were bail of the defendant to the sheriff; in fact, there were three defendants, and they had been bail for two of them: they were allowed to justify. *Anon.* 1 Tyr. 378.

It is sufficient under the rules of Trinity Term 1 Will. 4, to state the residence of the bail for the last six months in the notice of bail, without repeating it in the notice of justification. *Higgs's bail*, 1 Dowl. P. C. 124. *But see Johnson's bail*, 1 Dowl. P. C. 438.

### 2. For what Day.

In K. B., if the time allowed for justifying expire on a day in term which happens on any holiday when the court does not sit, the notice should be for the day they ought to justify, to prevent an assignment of the bail-bond, and the bail may justify the next day as a matter of course. *Anon.* 1 Tidd's Prac. 269.

Notice of justifying bail in C. P. on a dies non juridicus is bad, as it ought to have been given for them to justify on the following day, but the court gave time on a proper affidavit being filed. *Heath v. Harris*, 8 Moore, 528; 1 Bing. 430.

But, in another case, where a notice was given for a dies non without any continuance of notice for the following day, the bail were allowed to justify. *Pratt v. Oddy*, 2 Bing. 440; 10 Moore, 95.

A notice to justify bail in the Exchequer on an equity day was bad. *Partridge v. Rose*, 2 Chit. 84.

### 3. What Notice.

It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification. *Reg. Gen. K. B., C. P., & Excheq.*, H. T. 2 W. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott, 417; 3 B. & Adol. 376; 2 C. & J. 172; 2 Tyr. 342; 4 Bligh, N. S. 595.

In C. P. two days' notice of justification must have been given, whether the bail originally put in or added bail were brought up. *Nation v. Barrett*, 2 B. & P. 30.

Notice of bail given on the 10th of November; on the 12th, notice that other bail would be added, who would justify on the 15th; on the 14th the latter notice countermanded, and notice again given of the original bail; they appearing to justify on the 15th:—Held, that the last notice would be sufficient, if notice of justification had been given. — *v. Marshall*, 1 Marsh. 322.

Bail above having been put in, and exception entered in the vacation, notice of justification for the first day of the next term must be given within four days after such exception. *Millson v. King*, 9 East, 434.

Bail being excepted to in vacation, the defendant gave four days' notice of justification for the first day of Hilary term; but, two days before that time, gave notice for justifying added bail:—Held, that the latter bail were entitled to justify.

*fy. Woodruffe v. Oldfield*, 1 D. & R. 7; & C. nom. *Hone v. Barker*, 1 Chit. 4.

Notice of justification of bail on *meeme process*, added in vacation, need not be given within four days. *Anon.* 2 Chit. 84.

Two days' notice of justification must be given in the case of added bail; and therefore where notice was given on Monday for Tuesday (by mistake for Wednesday), and on Wednesday notice was given for Thursday, the bail were rejected. *Morgan's bail*, 1 Chit. 308.

In K. B. one day's notice is sufficient where the bail already put in intend to justify. *Secus* in C. P. *Id.*

### 4. Form.

In the Exchequer, all notices, before the court was thrown open, must have been subscribed by and addressed to the clerks in court. *Fisher v. Fielding*, 1 Price, 384.

Therefore that court refused to allow bail to justify, where the notice of justification was signed by a person describing himself as the "defendant's agent," he not being an attorney of such court, nor a clerk in court. *Walker v. Rushbury*, 9 Price, 148; *S. C. not S. P.* 9 Price, 16.

It seems that the defendant's attorney may give notice of justification of bail put in by the sheriff, provided the exception has been properly entered. *Rex v. Middlesex (Sheriff)*, 8 D. & R. 149; 5 B. & C. 389.

Where one bail only had been rejected on account of insufficiency, and notice was given of adding and justifying another in lieu of the one rejected:—Held, that the original notice was a nullity, and that there should have been a fresh notice of putting in and justifying *de novo*, and not of adding bail. *Lewis v. Godderer*, 1 D. & R. 350; 5 B. & A. 704.

The plaintiff's and defendant's names in the notice of justification being transposed is not a ground of rejection. *Anon.* 2 Chit. 86.

Notice of added bail need not be a separate notice from that of their justifying. *Stone v. Stevens*, 3 Anst. 636. *But see Anon.* 2 Anst. 564.

### 5. Service of Notice.

*At what Time.*—[Notice for justifying bail in person, shall be served before eleven o'clock in the forenoon of the day on which the notice ought to be served, except in case of an order of the court for further time, in which case it shall be sufficient to serve the notice before three in the afternoon of the day on which such order shall be granted. *Reg. Gen. K. B., T. T.* 59 Geo. 3, 2 B. & A. 818; 1 Chit. 756; C. P., 4 Moore, 2; 1 B. & B. 469; and Excheq., 8 Price, 509.

Service must be made in all cases before nine at night. *Reg. Gen. K. B., C. P., & Excheq.*, H. T. 2 W. 4.

Before this rule, service must have been made in K. B. before ten at night; and in C. P. before nine. *Saunders's bail*, 1 Chit. 77.

Service after ten o'clock is bad, though the

person read and know the purport of the notice. *Anon.* 2 Chit. 88.

Where.]—Notice of justification must be personally served on the plaintiff's attorney, clerk, or servant at his office; and an affidavit that the door was shut, and the notice left before ten o'clock at night, held not sufficient. *Fowler's bail*, 1 Chit. 78.

So, though an endeavour to obtain an acknowledgment was made. *Hall's bail*, 1 Chit. 79.

Affidavit of service of the notice of justification by leaving it at the attorney's office, and stating an acknowledgment of the receipt, but not shewing by whom, held not sufficient; but bail were allowed to justify conditionally. *Jamerson's bail*, 1 Chit. 100.

So, where the deponent described himself as the agent of the plaintiff instead of the defendant. *Anon.* 1 Chit. 496, n.

Some privacy or connection must be shewn between the attorney and the person with whom the notice is left, if it be not served at the attorney's office. *Freeman's bail*, 2 Chit. 88.

So, where the notice was left at a law-stationer's where the plaintiff's attorney's papers were usually left. *Anon.* 2 Chit. 82.

If an attorney be not at chambers at office hours, service of the notice of justification of bail on a person with whom the attorney's papers were directed to be left is sufficient. *Thompson's bail*, 2 Chit. 87. And see *Atkinson v. Thompson*, 2 Chit. 81.

Notice of justification of bail stuck up in the King's Bench office for the plaintiff, an attorney, who had no known place of residence or business, is sufficient. *Anon.* 2 Chit. 89.

Service at the chambers of the attorney, no person being there, is bad; but a subsequent acknowledgment will make the service sufficient. *Saunders's bail*, 1 Chit. 77. And see *Jones's bail*, 1 Chit. 294.

Notice was served by leaving it at the office of the plaintiff's attorney, who returned it the next day, saying he should not accept the notice, because he had taken an assignment of the bail-bond; this acknowledgment was held sufficient. *Bailey v. Davy*, 1 Chit. 77, (b).

Service with any person belonging to the place entered in the master's book as the residence of the attorney is sufficient. *Reg. Gen. K. B., H. T.* 8 Geo. 3, 1 Chit. 77, (a).

Two notices of justification, one being of added bail, the affidavit of service did not designate which of the notices had been served on the plaintiff's attorney:—Held, that the affidavit was defective, and must be amended and re-sworn before the bail could justify. *Yates' bail*, 1 Chit. 43.

#### XIV. ADDING BAIL AND GIVING TIME.

##### 1. Changing Bail.

Bail of whom notice shall be given shall not be changed without leave of the court or a judge.

*Reg. Gen. K. B., C. P., & Excheq., T. T.* 1 W. 4; 2 B. & Adol. 788; 7 Bing. 783; 4 C. & P. 602; 1 C. & J. 470; 1 Dowl. P. C. 103; 1 Tyr. 521; 5 M. & P. 815; 1 Price's P. C. 109; 4 Bligh, N. S. 582.

Costs of bail changed by judge's order for that purpose, must be paid before the bail can justify. *Jourdain v. Gunn*, 2 Tyr. 491.

The court refused to allow the defendant to change the bail, of whom notice had been given (as empowered by the rule), upon an affidavit alleging as the reason for putting in insufficient bail in the first instance, that the defendant had expected to settle the action, although the defendant swore to merits. *Orchard v. Glover*, 2 M. & Scott, 396; 9 Bing. 318; 1 Dowl. P. C. 707.

It is not necessary to give four days' notice of bail, who are added by a judge's order. *Perry's bail*, 2 C. & J. 475; 1 Dowl. P. C. 564.

##### 2. When Bail become disqualified.

Generally.]—The defendant is bound to know the circumstances of his bail, and where notice had been given of one bail who was notoriously not a housekeeper, the court refused time to add and justify another. *Hunt v. Haynes*, 1 Chit. 7. And see *Vandermoolen's bail*, 1 Chit. 288.

Where one of the bail failed to appear to justify, and an affidavit was produced, stating that he was prevented from attending by an agreement which he had entered into with his partner never to become bail: the court of C. P. held that nothing but an unforeseen accident of a serious nature could be a sufficient excuse for non-attendance, and they refused to allow time to substitute another person in his stead. *Wells's bail*, 8 Moore, 378; 1 Bing. 359.

Where the notice of bail to add and justify at the same time was regularly served, and the new bail were substituted by a judge's order on the morning of justification, the court refused the costs of the plaintiff's opposition on that ground, but offered time to inquire after them. *Bowman v. Russell*, 2 Tyr. 744.

In what Cases allowed.]—Time is generally allowed, where the justification is prevented by subsequent insolvency or bankruptcy. *Anon.* 1 Chit. 2, (b).

Even where the bail were taken in the country. *Anon.* 1 Chit. 11.

But not where bail is rejected from personal insufficiency. *Id.*

If bail, after consenting to be put in, become insolvent, time will be allowed to add another. *Dixon v. Clarke*, 1 Chit. 3.

So, after a promise to justify. *Ayton's bail*, 1 Chit. 4.

Where bail cease to be housekeepers, time will be allowed. *Anon.* 1 Chit. 6.

So, where the bail was not a housekeeper in point of law. *Hughes v. Stirling*, 11 Price, 158.

So, where the bail had taken a house, but from an unforeseen accident was unable to take posses-

sion. *Bold's bail*, 1 Chit. 288. *And see Slade's bail*, 1 Chit. 502. *And see Coleman v. Roberts*, 1 Chit. 88.

Where a person who came up to justify as bail had recently taken the benefit of the Insolvent Debtors' Act, which was unknown to the defendant or his attorney until the morning of justification, the court would not allow time to add and justify another; as, if bail are opposed, time can only be granted where their justification is prevented by an act of God. *Walton's bail*, 8 Moore, 208.

The court refused time to add and justify, where one was an attorney. *George v. Barnley*, 1 Chit. 8.

If added bail be excepted on the ground that the original bail were attorney's clerks, the court of C. P. will give time to put in and justify fresh bail. *Hodges v. Meek*, 3 Moore, 240.

Time was given to enable bail to pay his king's taxes, where his property was sufficient, and it appeared that he had acted without bad faith in not paying them. *Spurdens v. Mahoney*, 1 Chit. 309, (a).

So, the court granted time to add and justify bail by habeas corpus, where one of the bail was so ill as to be unable to attend. *Gwillim v. Howes*, 2 Chit. 107.

So, where one of the bail of whom notice had been given was taken suddenly ill. *Gillbank's bail*, 9 D. & R. 6.

### 3. To amend Proceedings.

In general, time is allowed to correct errors in the notice of justification, or notice of bail, or jurat of bail-piece. *Anon.* 1 Chit. 2, (b); 1 Chit. 495, 351, (a).

Four days' time was given to correct a mistake in the bail-piece, which omitted to state that the bail were taken before a commissioner. *Simmons's bail*, 1 Chit. 9.

So, to correct the jurat of the bail-piece, in the place where sworn. *Simmons v. Morgan*, 1 Chit. 10: *S. P. Webster's bail*, 1 Chit. 10.

Where one of the bail was ordered to be struck out of the bail-piece, on the ground of his having been a material witness in the cause, time was allowed for another to justify in his stead. *Anon.* 2 Chit. 103.

In bail by affidavit, the court refused time to amend a mistake in the jurat, occasioned by the error of the commissioners in the country, unless the defendant produced an affidavit of merits. *Burford v. Holloway*, 2 D. & R. 352. *And see Parker v. Turner*, 2 Chit. 71.

But time was allowed, where the two deponents' names were not mentioned in the jurat. *Drabble v. Denhan*, 2 Chit. 92.

Time was given to correct mistakes in an affidavit of service of the notice of justification where the bail were not opposed. *Hayward's bail*, 1 Chit. 24.

Generally, time will not be allowed to amend errors in the notice of bail. *Rennell v. Atkins*, 2 Chit. 83.

But in C. P. time was allowed where there was too general a description of his residence. *Baxter's bail*, 6 Moore, 44.

The residence of one of the bail having been too generally given in the notice, the other was allowed to justify, and time afforded to give another notice. *Topham v. Calvert*, 1 Price's P. C. 140.

But an affidavit, that the omission proceeded from the mistake of the attorney's clerk, was required. *Id.*

In the case of bail by habeas corpus, or on writ of error, time to justify is not in general allowed for amending a defect in the notice of bail, or on account of the delay. *Darcy's and Atkins's bail*, 1 Chit. 76, (a).

Time was not allowed to correct a misnomer in the notice of justification in bail by habeas corpus. *Rufford's bail*, 1 Chit. 76.

Notice of bail named Lloyd, with a double L, and in the affidavit of justification with a single L, time allowed to amend. *Williams's bail*, 1 Chit. 494, n.

Time was allowed, where the affidavit of justification did not state the degree of the bail. *Anon.* 1 Chit. 292.

In the Exchequer, in bail by affidavit, the court will grant time to put in other bail, but will not allow the defendant merely to amend the affidavit, or justify the same bail. *Jones v. Ripley*, 3 Price, 261.

In the case of bail by affidavit, where time had been allowed to answer affidavits impeaching their sufficiency, the court refused to allow the defendant in the meantime to justify fresh bail. *Ling's bail*, 4 M. & P. 576: *S. C. nom. Cockburn v. Ling*, 6 Bing. 732: *S. P. Green v. Hartley*, 1 Chit. 354.

Where the time for putting in and justifying bail expired on Friday 18th, and one of the bail justified, and the other was rejected, time was given till Friday 25th, to add and justify another bail, on payment of costs. *Weemys v. Pearce*, 1 Price's P. C. 151.

Where, in bail by affidavit, the names of the bail were omitted in the notice of justification, through the neglect of the agent in the country, two days' time was given, the omission not appearing to have been made for the purpose of delay. *Jeffry's bail*, 1 Chit. 351.

So, where the surname was omitted. *Anon.* Loft, 187.

The court allowed time to justify bail, where the notice of justification did not state the addition of the bail, but described him (contrary to the fact) as bail of whom notice had before been given, on condition that the defendant should produce an affidavit that the error was accidental. *Atkinson's bail*, 2 Chit. 86; 1 Taunt. 18, n.

Where time was applied for to send an affidavit of justification into the country, to amend a mistake in the jurat, the court made the attorney pay the costs of the application. *Stilliter's bail*, 9 D. & R. 6.

Where the agent for the defendant had not

time to communicate with his principal in the country, so as to obtain the names of good bail, the court allowed the bail to be changed upon payment of costs, and upon putting the plaintiff in the same situation as if good bail had been put in in the first instance. *Whitehead v. Minn*, 2 C. & J. 54; 2 Tyr. 160; 1 Price's P. C. 138.

#### 4. Other Cases.

Time was allowed where the property was found to be insufficient, on a mistaken idea of the bail. *Vorden v. Wilson*, 1 Chit. 287.

Or to inquire, where the bail told the plaintiff that he would not justify. *Anon*. 1 Chit. 289.

Bail, of whom notice had been given, having been rejected in another cause on the day on which they were to justify, were not offered for justification according to the notice, and on the next day the defendant applied for time to add and justify, and to stay proceedings against the bail below; but the court refused the motion, because the plaintiff could not be aware of such proceeding. *Watson v. Hinton*, 1 Chit. 290.

Where bail had been put in by one attorney, and attempted to justify by another, time was given to change the attorney regularly. *Malpersen's bail*, 2 Chit. 93.

The court of Exchequer gave the defendant necessary time for putting in and justifying bail, where a question of doubt had been raised whether the party was properly held to bail, without prejudice to the plaintiff's proceedings. *Cope v. Joseph*, 9 Price, 155.

Where bail were rejected immediately upon hearing the affidavits in opposition, that court refused time to answer the affidavits, or for any other purpose. *Anon*. 10 Price, 8.

The court of Exchequer will now give time to justify bail at chambers. *Bell v. Horton*, 11 Price, 741.

#### 5. Practice.

*Affidavit*.]—A motion for time to justify must be supported by an affidavit of the facts, in excuse of the bail not attending. *Anon*. 1 Chit. 2, (b).

An affidavit for further time to justify, on the ground that one of the bail cannot attend, must state the consent of the party to become bail, and a belief of his sufficiency. *Hamilton v. Dainesford*, 3 Chit. 82; *S. P. West's bail*, 1 Chit. 292; 1 Chit. 2, (b).

*Other matters*.]—One judge will not interfere with another judge's order for time to justify bail. *Tomlinson v. Harvey*, 2 Chit. 83.

A defendant may put in fresh bail, where time has been granted to the plaintiff to inquire into the sufficiency of the former bail. *Freeman v. Oldham*, 2 Chit. 84; *S. P. Anon*. 1 Chit. 345, n.

A subsequent justification after leave for time given, operates in every respect as if the bail had justified on the proper day. *Sparrow v. Lewes (Ant.)*, 8 Taunt. 126.

And if the bail do not justify on the further day given, the plaintiff is to be in the same situation as if they had not justified on the first day. *Thompson's bail*, 1 Chit. 356. And see *Rez v. London (Sheriffs)*, 1 D. & R. 163.

A rule for further time to justify bail, drawn up as of a wrong day, was held an immaterial error, and they were permitted to justify. *Donaldson's bail*, 2 Chit. 83.

Where the court give time till a particular day to add and justify bail, and the bail does not attend on that day, he cannot justify on a subsequent day without a fresh rule. *Carter's bail*, 1 Chit. 42.

### XV. JUSTIFICATION OF BAIL.

#### 1. When necessary.

Bail who surrender their principal need not justify. *Anon*. 2 W. Black. 758.

Bail who have rendered in their discharge cannot afterwards justify, so as to relieve the defendant from imprisonment, without entering into a fresh bail-piece. *Payne's bail*, 2 Chit. 76.

When ruled to bring in the body, the sheriff must put in and perfect special bail, though not excepted to. *Poole v. Peate*, 2 W. Black. 1206.

Bail not put in in time are bound to justify, though not excepted to until twenty days afterwards. *Nuan v. Rogers*, 2 Chit. 108.

Where the defendant refused to move that his bail might justify till they had paid certain costs, the court permitted them to justify on their own motion. *Haggett v. Argent*, 2 Marsh. 365; 7 Taunt. 47.

Though two notices are given by different attorneys of two different sets of bail, and the bail put in by the sheriff have already justified, the defendant is entitled to have his bail justify, and be allowed. *Wheeler v. Rankin*, 1 Chit. 81.

Bail cannot justify for a defendant brought into court to be charged in execution in the cause. *Bircham v. Chambers*, 11 Moore, 343.

#### 2. When to be done.

*In ordinary Cases*.]—In C. P. the defendant has four days exclusive from the day of the exception to justify bail; and if an attachment be obtained on the fourth day, the court will set it aside, without first calling on the defendant to justify bail. *Maycock v. Solymen*, 1 N. R. 139.

Where the rule to bring in the body expires on the last day of a term, the bail have the whole of the first day of the next term to justify: and if the defendant surrender in discharge of his bail on any part of that day, the sheriff cannot be attached for not bringing in the body. *Rez v. Middlesex (Sheriff)*, 8 T. R. 464.

Bail may justify at any time before execution issues; though final judgment have been signed. *Todd v. Etherington*, 2 Marsh. 374.

In C. P., of the four days allowed to perfect bail, after exception, the first is reckoned exclu-

sively, and the last inclusively; so that where the exception was on Wednesday, an attachment could not regularly issue against the sheriff till the Tuesday following (Sunday being no day); but though the attachment did issue on the Monday, the court would not set it aside, because the bail were not perfected. *North v. Evans*, 2 H. Black. 35.

If bail above be put in and justified, within four days from the ruling the sheriff to bring in the body, the court of C. P. will set aside all proceedings upon the bail-bond, commenced previous to the time of justification. *Wright v. Walker*, 3 B. & P. 564. And see *Whittle v. Oldaker*, 7 B. & C. 478; 1 M. & R. 298.

Where no bail are put in at the expiration of the rule to bring in the body, bail afterwards put in are bound to justify within four days in a town cause, or six days in a country cause, without being excepted to. *Story's case*, 2 Chit. 82.

And the court of C. P. allowed the defendant to justify bail, after an attachment issued against the sheriff, but gave leave to the plaintiff to oppose them without prejudice. *Williams v. Waterfield*, 1 B. & P. 334.

The same court allowed bail to justify after the rule on the sheriff had expired, on payment of the costs of the opposition. *Weddall v. Berger*, 1 B. & P. 325.

But refused to permit a defendant to justify bail, after an action for an escape commenced against the sheriff, no bail-bond having been taken. *Webb v. Matthew*, 1 B. & P. 225.

*In Vacation.*—If bail are excepted to in vacation, and the notice of exception require them to justify before a judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term. *Reg. Gen. K. B.*, C. P., & Exchequer, H. T. 2 W. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott, 417; 3 B. & Adol. 376; 2 C. & J. 172; 2 Tyr. 342; 4 Bligh, N. S. 595.

The statute 43 Geo. 3, c. 46, authorizing the justifying bail in vacation, in an arrest upon mesne process, does not extend to a person in custody upon a habeas corpus removing the cause from the mayor's court into K. B. *Steer v. Smith*, 1 Chit. 44, 80.

*Effect of ruling the Sheriff.*—By giving the sheriff a rule to bring in the body, the time for justifying bail is extended till the rule expires. *Whittle v. Oldaker*, 7 B. & C. 478; 1 M. & R. 298.

Wherever a plaintiff shall rule the sheriff, on a return of cepi corpus, to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule. *Reg. Gen. M. T.* 1 Will. 4, Exchequer, 1 Price's P. C. 8; 1 C. & J. 281; 1 Tyr. 163.

Before the rule it was held, that, by ruling the sheriff to bring in the body before the time for justifying bail has expired, the plaintiff does not enlarge the time for justifying bail until the expiration of the body rule, if at that period, when,

independently of the body rule, the time for justification expires, he take an assignment of the bail-bond; for by so doing he waives the body rule. Bolland B. dissentiente. *Ladd v. Arnaboldi*, 1 C. & J. 97.

Time being given till 27th January to justify bail, on the 25th plaintiff ruled the sheriff to bring in the body in six days. On the 27th the plaintiff took an assignment of the bail-bond; on the 30th the bail justified. Proceedings on the bail-bond were staid without ordering it to stand as a security, for the time of perfecting bail was enlarged by the body rule, and plaintiff might have gone on to trial in the original action. *Ladd v. Wilson*, 1 Tyr. 18.

### 3. When waived.

In general, a demand of plea is a waiver of justification. *Rex v. London (Sheriffs)*, 1 D. & R. 163.

But after time given to justify upon the terms of the plaintiff being in the same situation, a demand of plea is no waiver of the justification. *Rex v. Middlesex (Sheriff)*, 4 D. & R. 834.

After the time for putting in and justifying bail had expired (one of the bail having been rejected), and time given to add and justify another without prejudice to the plaintiff in his proceedings, and in the interval he demanded a plea:—Held, that an attachment against the sheriff for not bringing in the body was regular, the added bail not having justified within the time for which indulgence was given. *Id.*

A rule to plead is not, like a demand of plea, a waiver of bail. *Crosby v. Davis*, 1 Price's P. C. 61.

### 4. Mode of Proceeding.

*At what Time.*—Bail who were not present at the first sitting of the court, must wait till the rising. *Anon. Loft*, 88.

Bail in Common Pleas shall justify at the sitting of the court only, and at no other time, except on the last day of term, when bail, who may have been prevented from attending at the sitting of the court, shall be permitted to justify at the rising of the court. *Reg. Gen. C. P.*, M. T. 51 Geo. 3, 3 Taunt. 569.

But bail were permitted to justify at the rising of the court, before the last day of the term, notwithstanding this rule. *Hopper v. Jacobs*, 8 Taunt. 56.

Special bail shall be permitted to justify in open court, although they did not actually become bail before the time that notice for justification was delivered to the plaintiff's attorney or agent. *Reg. Gen. C. P.*, M. T. 37 Geo. 3, 1 B. & P. 660.

Bail must actually have become so, before notice of justification is given. *Collier v. Godfrey*, 1 H. Black. 291.

In the Exchequer, justification of bail in open court must be taken at the sitting of the court, before the other ordinary business. *Reg. Gen. Exch.*, E. T. 56 Geo. 3, 2 Price, 337; and see 8 Price, 632.



Bail by affidavit is not within the rule. *Anon.* 3 Price, 35.

And the court desired that it might be understood that the rule of E. T. 56 Geo. 3, would be peremptorily enforced, and they announced that they would not admit bail to justify, unless the justification were moved, in conformity with that order, at the sitting of the court. *Mem.* 4 Price, 155.

The junior baron in the Court of Exchequer sits every day during term, a few minutes before 10 o'clock, for the purpose of taking the justification of bail and motions of course; and all such matters must be then brought on. *Reg. Gen. Exch. M. T.* 1 Geo. 4, 8 Price, 612. *And see Tomkinson's bail*, 2 Chit. 94.

And bail will not be permitted to justify, unless they are in attendance, and counsel instructed, by half-past 10 o'clock. *Reg. Gen. Exch. H. T.* 1 & 2 Geo. 4, 9 Price, 57.

On the first and last days of term bail may justify during the sitting of the court. *Mem.* 1 C. & J. 467.

Bail appearing to justify will be called in future from the bail-pieces by the officer of the court. *Reg. Gen. Exch. M. T.* 1 Will. 4, 1 Price's P. C. 118.

**Personal Attendance.**—Bail, who live within ten miles of the city of London or Westminster, must justify in person, and not by affidavit. *Anon.* 1 C. & J. 516; 1 Dowl. P. C. 293.

The rule extends to bail living within the bills of mortality. *Wilmut v. Eaton*, 1 Price's P. C. 91.

Where such an objection, and that of the description of Somers' Town as the residence of the bail, were taken and allowed, the court gave time, notice to be given forthwith. *Id.*

A defendant, usually residing in the country, arrested in London, in a town cause, may justify bail by affidavit. *White v. Thomas*, 5 Price, 13.

**At Chambers.**—By 1 Will. 4, c. 70, s. 12, bail may be justified before a judge at chambers, or in some other convenient place, to be by him appointed, as well in term as in vacation, and whether the defendant be actually in custody or not.

All special bail shall be justified in the Exchequer within four days after exception, before a baron at chambers, as well in term as in vacation. *Reg. Gen. Exch., M. T.* 1 Will. 4, Price's P. C. 9; 1 C. & J. 281; 1 Tyr. 163.

By a rule of the Court of Exchequer, made in Michaelmas term, 1830, last past, it was ordered that hereafter all special bail should be justified before a baron at chambers, as well in term as in vacation; and it being expedient to repeal as much of the said rule as relates to the justification of bail in term time, it is, therefore, ordered that, from and after the present term, the justification of bail in term time shall (unless by consent) take place as heretofore in open court, and that the justification of bail before a baron at chambers shall be confined to cases of consent, and to justification in vacation. *Reg. Gen. Exch., H. T.* 1 Will. 4, 1 C. & J. 385; 1 Tyr. 291.

A justification of bail at chambers in vacation without consent was held not good in the Exchequer; the plaintiff not objecting to an application to the court to permit such justification, considered tantamount to consent. *Sayers v. Telfree*, 1 Price, 2.

And in such case they are no bail, though examined by the plaintiff's attorney, unless they justify next term in court. *Hawkins v. Plomer*, 2 W. Black. 1064.

**Conditional Justification.**—Bail may justify conditionally, if, on inquiring at the places where he swears he has money, the affirmation of that fact should be ascertained. *Anon.* 2 Tyr. 158.

One of bail admitted to justify conditionally, but not to be finally allowed till the arrears of taxes and poor rates due should be paid, and receipt produced. *Terry v. Pearce*, 1 Price's P. C. 141.

#### 5. By Affidavit.

The affidavit must also give a true description of their place of residence. *Collins v. Goodyer*, 4 D. & R. 44; 2 B. & C. 563.

Bail by affidavit rejected, because the name of each deponent was not inserted in the jurat. *Wellings v. Marsh*, 11 Price, 509; *S. P. Drabble v. Denham*, 2 Chit. 92.

The jurat of an affidavit by a marksman must state that it was understood by him, as well as read over and explained to him. *Allworthy's bail*, 2 Chit. 92.

And the place at which it was sworn. *Boyd v. Straker*, 7 Price, 662.

And an affidavit by a marksman must state that the mark was made in the presence of the commissioner taking it. *Anon.* 2 Chit. 92.

The affidavit of justification of country bail ought to be taken before the bail commissioner; and the affidavit of caption before a commissioner for taking affidavits, or the baron to whom the bail shall be transmitted. *Salmon's bail*, M'Clel. & Y. 149.

But held in K. B. that the affidavit of justification need not be so taken. *Brealey v. Holt*, 2 Chit. 91.

It may be taken as to one bail in the country, and as to the other in town. *Mandorf's bail*, 2 Chit. 90.

Or before different commissioners. *Anon.* 2 Chit. 91.

An affidavit of justification of country bail, in the jurat of which it was stated to have been "sworn at Beverley," omitting the county, rejected for uncertainty. *Boyd v. Straker*, 7 Price, 662.

#### 6. In what Sum.

**Rule and Cases under it.**—Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is

then bail. *Reg. Gen. K. B.*, C. P., and Exch., Hil. Term, 2 W. 4, 1 Dowl. P. C. 185; 8 Bing. 290; 1 M. & Scott, 418; 3 B. & Adol. 376; 2 C. & J. 173; 2 Tyr. 342; 4 Bligh, N. S. 595.

An affidavit of justification may be sufficient if the rule of court is substantially complied with, though it may not be exactly conformable with the form given by the rule. *Perry's bail*, 1 Dowl. P. C. 606.

If the affidavit of justification states that the bail are "possessed" of a certain sum, instead of "worth," the affidavit is insufficient, and must be amended. *Rogers v. Jones*, 1 Dowl. P. C. 704; 1 C. & M. 323; *S. P. Hutchinson's bail*, 2 C. & J. 487; 1 Dowl. P. C. 571; *Simpson's bail*, 1 Dowl. P. C. 605.

Affidavit of justification of bail sworn in the country, stated the bail to be possessed of property of a certain amount, without further stating that each of the bail were worth double the sum for which defendant was held to bail above his own just debts, or every other sum for which he might be then bail:—Held, bad, but time given to amend, on payment of plaintiff's costs of the day occasioned by the affidavit. *Darling v. Hutchinson*, 2 Tyr. 491.

Time given to supply averments prescribed by new rules omitted, in affidavit of justification, on payment of costs. *Pitt v. Perry*, 1 Price's P. C. 171.

In the form of affidavit of justification, the word "just" is made to precede the word "debts." The old objection, consequently, can no longer be taken. *Topham v. Calvert*, 1 Price's P. C. 140.

Costs of opposition allowed. *Id.*

It is sufficient if bail swear that they are worth the amount required after payment of all their just debts. *Anon.* 2 Y. & J. 101.

The affidavit by bail in the country of competency to justify, should state them to be worth double the sum sworn to over and above all their debts, generally. If it have the words "just debts," it will be considered insufficient. But time will be given in such a case to frame another affidavit. *Senior v. Speight*, 12 Price, 393.

Where persons who are shewn to be bail in other actions, justify as bail by affidavit, they must swear that they are worth the sum required beyond what will satisfy their debts and their other engagements. *Henshaw v. Woolwich*, 1 C. & J. 150.

*Practice previously.*—In bail by affidavit in K. B. it need not be stated in the affidavit of justification, that they are worth double the debt sworn to in addition to their liability in other causes. *Stevens's bail*, 1 Chit. 395; *S. P. Attwood v. Emery*, 1 Chit. 306, (a). And see *Hobson's bail*, 2 Chit. 95.

Seem, that this is also unnecessary in C. P. *Reid v. Cornfoot*, 1 Chit. 306, (a); 1 Moore, 29; 7 Taunt. 324.

Secus in the Exchequer, where the affidavit must state that the bail are sufficient for all the actions. *Anon.* 1 Chit. 306, (a).

So, where the same persons are bail in more actions than one, each affidavit ought to state that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail. *Field v. Wainwright*, 3 B. & P. 39.

But where the same persons are bail in two actions on one bill of exchange, they are only bound to justify in double the amount of the sum sworn to in each action, and not in double the amount of the sum sworn to in both actions. *Reid v. Ellis*, and *Same v. Cornfoot*, 1 Moore, 29; 7 Taunt. 324; 1 Chit. 306, (a).

And it is not necessary for them to specify in either affidavit the relative order in which they are sworn, or that among their debts they include their liability as bail in the other action. *Id.*

An indorsee of the same bill of exchange on which the principal had been arrested, and another person who had justified as bail in other actions, neither of whom had sworn in the affidavit of justification, (which was in the common form, that he was worth double the sum sworn to over and above the aggregate of all the other sums,) were rejected as bail for the defendant. *Jones v. Ripley*, 3 Price, 261.

It is not sufficient for bail to swear they are worth a certain sum exclusive of their debts. *Hall v. Carr*, 4 Taunt. 704.

But held in K. B. that it was sufficient if they swore that they were worth double the sum sworn to in the affidavit of debt. *Hobson's bail*, 2 Chit. 95.

*Other matters.*—In bailable actions, for any cause exceeding 1000*l.*, it shall be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to. *Reg. Gen. K. B. M. T.* 51 Geo. 3, 13 East, 62; C. P., 3 Taunt. 341; Exchq., 8 Price, 508; Wightw. 115.

Where a verdict is found for the plaintiff in an action of crim. con. in a larger sum than in the judge's order to hold to bail, to procure the enlargement of the defendant, the bail must justify in such larger sum; but if a rule for a new trial be afterwards made absolute, the bail may justify in the smaller sum. *Dyott v. Dunn*, 2 Chit. 72.

## 7. Opposition.

### (a) How conducted.

Where bail are opposed, an affidavit of their insufficiency cannot be produced after questions have been put to them. *Anon.* 1 Chit. 374, (a).

And affidavits containing general slanderous statements injurious to the character of the bail cannot be received. *Sanderson's bail*, 1 Chit. 676.

But bail by affidavit were not allowed to justify, on the plaintiff's producing an affidavit of declarations which they had made of their insufficiency. *Anon.* 1 Chit. 676.

If the justification of bail by affidavit be opposed by another affidavit, stating the insolvency of one of the bail, the court of C. P. will not allow the matters of the latter affidavit to be answered. *Aplia v. Fox*, 5 Moore, 482.

Where it appears from the affidavits filed in

opposition to bail, that they are persons of low condition and desperate circumstances, and such as ought not to have been brought before the court to justify as bail, and they are rejected *instanter* on that ground, time will not be given to answer the affidavits, or for any other purpose. — v. —, 10 Price, 8.

Bail, though opposed in two actions, must be opposed in each separately. *Anon.* 2 Chit. 94.

Where the same bail came up to justify in several causes, and after having been opposed, justified in one, but were afterwards rejected in a second for clear insufficiency:—Held, that the same objection applied to all the causes, and that, as the matter was not concluded until the rule for allowance was drawn up, they might be rejected as to that cause in which they had justified. *Waterhouse's bail*, 1 Chit. 307.

Where bail were opposed on the ground that the defendant had been arrested, but no bail-bond had been taken, the writ appearing to have been returnable of a prior term, the court allowed the bail to justify. *Crow v. Watson*, 2 Chit. 93.

A foreigner being bail, may be sworn and examined by an interpreter. *Glead v. Mackay*, 2 W. Black. 957.

If bail justify without the observation of the counsel instructed to oppose them, the court of C. P. will not require them to come up again and justify *de novo*. *Haskins v. Wilson*, 4 Taunt. 666.

So in *K. B. Butler's bail*, 1 Chit. 83.

A rejection of one bail is a rejection of both. *Lewis v. Gadderer*, 1 D. & R. 350; 5 B. & A. 704.

#### (b) Costs.

*Rule and Cases under it.*—If the notice of bail shall be accompanied by an affidavit of each of the bail according to a form subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendants shall pay the costs of opposition, unless the court or a judge thereof shall otherwise order. *Reg. Gen. K. B., C. P., and Excheq.*, T. T. 1 W. 4, 2 B. & Adol. 788; 7 Bing. 783; 4 C. & P. 602; 1 O. & J. 470; 1 Dowl. P. C. 103; 1 Tyr. 521; 5 M. & P. 814; 1 Price's P. C. 109; 4 Bligh, N. S. 581.

If bail justify by affidavit in pursuance of the rule, the notice must be accompanied either by the original affidavit, or by a copy purporting upon the face of it to be a copy. *West v. Williams*, 3 B. & Adol. 345; 1 Dowl. P. C. 162.

Costs of justification will sometimes be refused although the bail have passed. *Thomson's bail*, 1 Dowl. P. C. 497.

Where bail having made the affidavit required by the rule, justify after exception, although the plaintiff does not appear to oppose, the defendant is still entitled to the costs of the justification. *Johnson's bail*, 1 Dowl. P. C. 514.

*Form of Affidavit.*—Though the form of the affidavit to be made by bail, according to the rule,

is several, it may be made jointly. *Anon.* 1 Dowl. P. C. 115.

An affidavit of sufficiency by country bail, purporting to be according to the rule, and not containing all its requisites, is good, if it be sufficient according to the old rules. *Id.*

Where bail were rejected on the ground of a defect in the affidavit of justification, in omitting to describe the bail as housekeepers or freeholders, the court refused to allow the plaintiff the costs of his opposition, or of the opposition to a former justification, on the ground of a defective notice. *Kibble v. Thorburn*, 2 M. & Scott, 359.

It is not enough, in the affidavit of sufficiency, that the bail should describe himself as possessed of "money in the funds," without stating in what fund it is. *Anon.* 1 Dowl. P. C. 159.

Where the property of which the bail describes himself possessed in his affidavit is insufficient, the court will not allow him to justify, without payment by the defendant of the costs of opposition, although possessed of sufficient other property. *Jackson's bail*, 1 Dowl. P. C. 172.

Where bail cannot justify in respect of the property described in the affidavit of justification, but are allowed to pass on justifying for other property, the plaintiff is entitled to the costs of the opposition. *Hemming v. Blake*, 1 Dowl. P. C. 179.

Where a bail swears, "that he is not bail for any," without adding other persons, it is sufficient. *Smith's bail*, 1 Dowl. P. C. 514.

*Costs of Justification.*—Keeping a gambling-house is not a ground for rejecting bail; and, if allowed, is not a ground for refusing the defendant the costs of justification under rule 3, T. T. 1 Will. 4. *Anon.* 1 Dowl. P. C. 160.

Where there is a defect in the notice of bail, and further time is given to inquire as to them, and they ultimately justify, the defendant is not entitled to the costs of justification. *Anon.* 1 Dowl. P. C. 126.

Costs of bringing bail up to justify allowed, when they have given notice of putting in and justifying at the same time, accompanied by an affidavit of justification, and after exception attend to justify, and are not opposed. *Bowman v. Russell*, 2 Tyr. 744.

If a plaintiff alarm bail who have been put in, and thus prevent them from justifying, the court will compel him to pay the costs of putting them in. *Gwynne v. Fuller*, 1 Dowl. P. C. 444.

*Costs of Opposition.*—The costs of opposing bail who have complied with rule 3, T. T. 1 Will. 4, but are rejected, are allowed as a matter of course to the plaintiff, unless some very strong ground is shewn on the part of the defendant for putting in bail, who could not justify. *Evans's bail*, 1 Dowl. P. C. 384.

One default in the justification of bail pursuant to notice subjects the party to the costs of opposition in the court of Exchequer. *Thomas v. Gray*, 1 Price's P. C. 86.

Where proceedings have been taken on the

bail-bond, before the bail come up to justify, the payment of those costs cannot be insisted on as a preliminary objection. *Wilson's bail*, 1 Dowl. P. C. 614.

**Costs of Opposition where several Notices.]—**Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent,) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or one of them, may not have been changed; and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected. *Reg. Gen. K. B.*, H. T. 2 & 3 Geo. 4; 1 D. & R. 196; 5 B. & A. 559; 2 Chit. 376.

The court has no power to order the payment of costs of vexatious notices of justifying bail at chambers, before the defendant is permitted to give a fresh notice, where there has been a change of the defendant's attorney. — *v. Clarke*, 2 Chit. 89.

It seems to be otherwise, where the same attorney has acted vexatiously in giving repeated notices. *Id.*

And in such case they may be recovered on motion. *Steer v. Smith*, 1 Chit. 44, 80.

Though three notices were given of the same bail to justify in vacation before different judges, and the plaintiff had incurred the expense of three oppositions, yet, upon their appearing to justify on a fourth notice, the court would not compel the payment of the costs of the opposition, as the bail justified, though the court afterwards referred the matter to the master on an application against the attorney for vexatious proceedings. *Id.*

Where six different notices of the same bail were given, the court compelled the defendant to pay all the costs incurred by the plaintiff in consequence thereof. *Aldiss v. Burgess*, 3 B. & A. 759.

By the practice of the court of Exchequer, the plaintiff is entitled to costs upon the second notice of justification, if a brief be delivered to counsel to oppose the bail upon the first notice. *Barrow v. Whitehead*, 2 Y. & J. 2.

**Costs of former Opposition.]—**In the Exchequer, if bail be once successfully opposed, they cannot justify, until 5*l.* has been deposited with the master to cover the costs. *Smith v. Cooper*, 1 Dowl. P. C. 287; 1 C. & J. 460; 1 Tyr. 378.

There must be three notices of justification and two changes of bail, to entitle the plaintiff to insist on a deposit of costs of opposition before the bail justify. *Mercer v. Sanby*, 1 Chit. 658.

The costs of a former opposition were allowed where there had been three notices and two changes of bail. *Thompson v. Davis*, 1 Chit. 658, n.

Costs of prior oppositions not allowed, though there had been three notices of justification, if one of the notices was of bail put in merely for

the purpose of a tender. *Wilson v. Kinerly*, 1 Chit. 658.

Where bail were opposed and rejected, and the defendant was surrendered on the next day, he was allowed to justify new bail without paying the costs of the former opposition. *Holward v. Andre*, 1 B. & P. 32.

But now bail are not permitted to justify till the costs of the former opposition are paid to the plaintiff, though the defendant is in custody. *Rex v. Middlesex (Sheriff)*, 1 Taunt. 57; *S. P. Mitchell v. Claridge*, 1 Taunt. 58, n.

**What Costs allowed.]—**A too general description of bail, although a sufficient ground for opposing the justification, is not in itself enough to call upon the court to fix the defendant with the costs of the opposition at the time; but the consideration of costs will be reserved till the bail justify. *Richardson v. Hodgson*, 11 Price, 379.

The plaintiff's costs of inquiries after sufficiency of bail, are costs in the cause. *Paine v. Munton*, 2 Tyr. 162; 1 Price's P. C. 168.

If time to justify bail be granted, the defendant must pay the plaintiff's costs of attending to oppose. *De Bodie's bail*, 1 Dowl. P. C. 368.

If the copy of the affidavit of sufficiency served on the plaintiff do not purport to be a copy, or do not state the names of the parties and the sums in the actions in which they are already bail, or the names of the occupants, and numbers of the houses stated by the bail to be in their possession; these defects are not grounds for rejecting the bail, but for disallowing the defendant his costs of justification. *Id.*

Costs of unsuccessful exception to bail disallowed, on the ground that a first notice of bail was informal, in not containing the requisite description of the bail, in compliance with the exigency of the new rules, although the notice was accompanied by the affidavit of justification prescribed by the general rules (no affidavit being made in verification of the statement so made at the bar), and the omissions in the original notice had been supplied in the second amended notice, which was given in due time. *Terry v. Pearce*, 1 Price's P. C. 141.

**Attorney's Liability.]—**Where time is applied for, to send an affidavit of justification into the country to amend a mistake in the jurat, the court will make the attorney pay the costs of the application. *Shilletoe's bail*, 9 D. & R. 6.

Where an attorney, knowing that bail were insufficient, caused them to be put in, and gave notice of justification, the court compelled him to pay the costs of the opposition. *Blundell v. Blundell*, 1 D. & R. 142; 5 B. & A. 533.

And where a defendant had been removed by habeas corpus from Lincoln Castle to the King's Bench prison, and the plaintiff had been put to the expense of inquiring after six sets of bail, as to one of whom a false description had been given, the court ordered the defendant's attorney to pay the costs incurred by the plaintiff, although it was sworn that such attorney had no personal

knowledge of the misdescription and insufficiency of the bail. *Blundell v. Blundell*, 1 D. & R. 142; 5 B. & A. 533.

(c) *Commitment.*

Bail, on coming up to justify, being guilty of gross prevarication, may be committed to the custody of the marshal. *Curtis v. Smith*, 1 Chit. 116.

Bail was committed to Newgate for prevarication as to the state of his circumstances and property on coming up to justify. *Wilson v. Bodkin*, 8 D. & R. 41.

## XVI. PUTTING IN AND JUSTIFYING AT SAME TIME.

A defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday; and if the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time. *Reg. Gen. K. B. C. P., and Exch.*, T. T. 1 Will. 4, 2 B. & Adol. 788; 7 Bing. 782; 4 C. & P. 601; 1 C. & J. 469; 1 Dowl. P. C. 109; 1 Tyr. 590; 5 M. & P. 813; 1 Price's P. C. 109; 4 Bligh, N. S. 581.

The notice must be a four days' notice exclusive of Sunday, and must be served before eleven o'clock, *A. M.* *Jenkins v. Malby*, 2 C. & J. 124; 1 Price's P. C. 150.

A notice given the 12th (Saturday) for the 16th, insufficient. *Id.*

But the court will allow time to give another notice. *Id.*

The rule is an enabling and not a disabling rule, and therefore a prisoner, who, before the rule, might put in and justify bail upon a two days' notice, may still do so. *Davies v. Grey*, 2 C. & J. 309; 2 Tyr. 277; *S. P. King's bail*, 1 Dowl. P. C. 509.

Where the defendant is a prisoner, a notice of putting in and justifying bail at the same time must state that the defendant is a prisoner. *Crighton's bail*, 1 C. & M. 335; 1 Dowl. P. C. 609.

A defendant in prison on a *capias* may put in and justify bail on the last day of term, although arrested in the beginning of the term, on a writ returnable 28th May. *Ball v. Owen*, 1 Price's P. C. 118.

The court will not require him, as the condition of justifying, to accept a declaration of the term. *Id.*

## XVII. ALLOWANCE OF BAIL.

### 1. *Necessity.*

Bail is not regularly put in till the rule for the allowance of it has been served, even though the plaintiff oppose the justification. *Rez v. Middlesex (Sheriff)*, 4 T. R. 493; 2 Chit. 99; *S. P. Booth v. Preston*, 4 T. R. 494, n.

And if such rule be not served on the plaintiff, he may take an assignment of the bail-bond, though he knows of the justification. *Holland v. White*, 2 B. & P. 341.

Although bail justify by consent at chambers, still a rule for the allowance of bail must be served on the plaintiff or his attorney: if not, the plaintiff may take an assignment of the bail-bond. *Bignold v. Holding*, 2 D. & R. 436; *S. C. nom. Bignold v. Lee*, 1 B. & C. 285.

The sheriff is liable to an attachment for not bringing in the body, if the rule for the allowance of bail be not served in time, although the bail justified after opposition of counsel, in the presence of the plaintiff's attorney. *Rez v. Middlesex (Sheriff)*, 2 Chit. 99; 4 T. R. 493.

Where a bail described himself as having property to a great extent, and the court directed an inquiry, which the bail eluded by running away, the court would not permit the rule for the allowance of bail to be intitled of the term the bail came up to justify; and the application was discharged with costs. *Market v. Gordon*, 1 Chit. 131.

### 2. *Setting aside.*

Allowance of bail may be set aside under circumstances of gross imposition and fraud on the part of bail. *Gould v. Berry*, 1 Chit. 143.

So, where bail are afterwards rejected in other causes, the allowance will be set aside. *Anon.* 1 Chit. 144.

The court of C. P. will not set aside the allowance of bail, on the ground that they have sworn to a false account of their property, without the privy of the defendant or his attorney. *Anon.* 1 Chit. 116, (a), 143, (a).

Allowance of bail discharged on affidavit of perjury by bail uncontradicted. *Barling v. Watters*, 6 Bing. 423; 4 M. & P. 125.

The rule for allowance of bail was discharged with costs to be paid by the defendant, on an affidavit that the bail had perjured himself on his justification, in swearing that an action in which he had been bail had been compromised. *Brown v. Gillies*, 1 Chit. 373.

In such case, held that the plaintiff might proceed on the bail-bond. *Brown v. Gillies*, 1 Chit. 496, n.

The court of C. P. will not discharge the rule for allowance of bail, on account of perjury in one of them, who had sworn on his justification that he was a housekeeper, and a few days before that he was not; the plaintiff's only remedy is by indictment. *Shee v. Abbott*, 5 Moore, 391; 2 B. & R. 619.

Where, on the justification of bail, one of them swore that his christian name was James, and that he had never been arrested, imprisoned, or insolvent; and the other, that he had never been in custody: upon an affidavit wholly denying these facts, the court of C. P. refused to set aside the allowances of bail, although the application for that purpose was made on the next dies juridicus; on the ground that such offence ought to be tried by indictment for perjury. *Stockham v. French*, 1 Bing. 365; 8 Moore, 381: S. P. *A'Beckett v. —*, 5 Taunt. 776.

Otherwise, if the defendant appeared to be privy to and implicated in the transaction. *Id.*

If bail be added, where the one already mentioned is an attorney, and justify without opposition, the court of C. P. will not set aside the allowance of bail. *Bell v. Gate*, 1 Taunt. 162.

In the Exchequer, the court will not set aside an order for allowance of bail, on the ground of an action having been previously commenced against the sheriff for an escape: though no bail-bond had been taken, nor bail above put in in due time after the return of the writ, if the defendant has been rendered. *Morley v. Cole*, 1 Price, 103.

Where bail has justified by mistake, and without any default of counsel, the allowance was staid, and the bail ordered to come up and justify on the following day. *Addison v. Foster*, 2 Chit. 98.

Where it appeared, after bail had justified, that money had been given to one of them for his trouble and loss of time in coming up to justify, the court would not set aside the allowance, but imposed on the defendant the terms of producing an affidavit of merits, bringing the sum sworn to into court, and taking short notice of trial. *Wyllie v. Jones*, 2 D. & R. 253.

But where, after bail had been opposed and allowed, it was discovered that one of them had previously been rejected for insufficiency, though he had since become possessed of property, the court set aside the rule for the allowance. *Pickard v. Dobson*, 3 D. & R. 5.

### XVIII. LIABILITY OF BAIL.

#### 1. When liable.

If bail enter into a recognizance, although they are excepted to and never justify, they are liable. *Bramwell v. Farmer*, 1 Taunt. 427.

They are only liable as a security for the original action; therefore, when judgment cannot be had, they are not liable. *Anon. Loft*, 545.

It is no objection to the liability of the bail, that the process against several defendants is bailable as to some, and seizable as to others. *Christie v. Walker*, 7 Moore, 362; 1 Bing. 48.

#### 2. To what Amount.

*Rule and previous Decisions.*—Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance. *Reg.*

*Gen. K. B., C. P., and Exchequer*, H. T. 2 W. 4, 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 173; 2 Tyr. 342; 4 Bligh, N. S. 595.

In C. P., where bail is taken under a judge's order, each of the bail is liable to double the sum ordered. *Dahl v. Johnson*, 1 B. & P. 205: S. P. *Howell v. Wyke*, 4 Moore, 167; 1 B. & B. 490.

So, to double the sum sworn to in case of affidavit. *Id.*

In debt on a recognizance of bail taken in C. P., where the plaintiff had recovered in the original action a sum exceeding that sworn to, the court of K. B. stayed the proceedings against the bail on payment of the debt sworn to, with interests and costs. *Wheelwright v. Simons*, 5 M. & S. 511.

In K. B., they are not liable beyond the sum sworn to and costs. *Jackson v. Hassel*, 1 Dougl. 330: S. P. *Stevenson v. Cameron*, 8 T. R. 29.

In sci. fa. on a recognizance, the court will stay the proceedings against both the bail, on payment of the sum sworn to, and costs, though less than the damages recovered, or than the sum named in the process. *Clarke v. Bradshaw*, 1 East, 86: S. P. *Tranel v. Rives*, 1 East, 91, n.

The court will enter an exoneretur on the bail-piece on payment of the sum sworn to, and costs, though less than the sum acknowledged to be due, as well where the action is by original as by bill. *Jacob v. Bowes*, 6 East, 312; 2 Smith, 402.

Where a defendant is held to bail in an action of tort, the bail are only liable, as for damages, to the sum in which he is held to bail, though more be given by the jury; but they are liable, beyond that sum, to the full taxed costs. *Parkin v. Sampson*, 4 Dougl. 17.

Bail in the Exchequer are only liable for the sum sworn to, and costs in the original action, and the costs of proceedings against themselves, where any shall have been taken. *Reg. Gen. Exch. H. T.* 38 Geo. 3, 8 Price, 502.

*What Costs.*—Where the principal is surrendered in time, the plaintiff cannot afterwards proceed against the bail in an action on the recognizance for the recovery of costs. *Dutton v. Shuter*, and *Bartrum v. Howell*, 1 Tidd's Prac. 581.

If costs have been incurred in the course of the proceedings, bail cannot get their recognizance discharged, without payment of them. *Rez v. Lyon*, 3 Burr. 1461.

So they must pay the costs of all actions, as well as the debt, before proceedings shall be stayed. *Walker v. Carter*, 2 W. Black 816.

If, upon the return of non est inventus to the ca. sa., the plaintiff proceed against the bail, and deliver a declaration conditionally, the bail cannot apply to the court to stay proceedings, on payment of the debt and costs of the original action only, but must also pay the costs of the second action, although the bail tendered the original damages and costs, before the end of eight days from the return of the ca. sa., within which time, by the practice of the court, they might

have discharged themselves, by surrendering their principal. *Perigal v. Mellish*, 5 T. R. 363.

If proceedings be commenced upon a recognizance of bail immediately upon the return of the ca. sa., the court of C. P. will not stay them but upon payment of the costs, though the principal be surrendered within the four days allowed by the practice of the court. *Abbott v. Rawsley*, 3 B. & P. 13. And see *Byrne v. Aquilas*, 3 East, 306.

Where the proceeding upon the recognizance of bail is by action, the plaintiff is entitled to the costs of such action, commenced after a return of non est inventus to the capias ad satisfaciendum against the principal, though the bail rendered their principal before the eight days allowed by the practice of the court after the return of the process against the bail. *Hughes v. Poidevin*, 15 East, 254.

Bail having rendered their principal within the eight days allowed by the rules of Trin. 1 Anne, are not liable to the costs in an action on the recognizance up to the time of the notice of render, when the proceedings were stayed. *Creswell v. Hern*, 1 M. & S. 742.

The bail to the action are not liable to pay the costs of a writ of error. *Yates v. Doughan*, 6 T. R. 288: *S. P. Anon. Loft*, 520.

Bail of an alien who was sent out of the kingdom under 33 Geo. 3, c. 4, applied to be discharged, on payment of 1000*l.* deposited with them, which sum the plaintiff had recovered by verdict; but the court held them liable for the costs also. *Coles v. De Hayne*, 6 T. R. 246.

Although a bail, having rendered the defendant, instigates him to vexatious attempts to obtain his discharge under an insolvent act, the court will not compel him to pay the costs of the plaintiff's resisting those attempts. *Winstanley v. Head*, 4 Taunt. 192.

If a plaintiff recover a judgment for money lent, and interest, he cannot therefore require the bail to pay him interest on the amount of the judgment as part of his costs. *Waters v. Rees*, 3 Taunt. 503.

**Other things.**—Where the defendant in the action gave a cognovit for the debt and costs, payable by seven instalments; and after the bail were fixed, an act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed, at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable: yet held, that the bail were liable for the whole condemnation money, the entire debt, qua debt, being due instantan, with a stay of execution only for certain portions at certain times. *Shakespeare v. Phillips*, 8 East, 433.

Bail are not to be considered as sureties for, or as liable for the debt of a bankrupt, within the meaning of 49 Geo. 3, c. 121, s. 8. *Heves v. Mott*, and *Dalby v. Mott*, 2 Marsh. 192; 6 Taunt. 329; 2 Roce, 455: *S. P. Newington v. Keeyes*, 4 B. & A. 493.

## XIX. DISCHARGE OF BAIL.

### 1. By Render of Principal.

#### (a) What Bail may render.

**Rejected Bail.**—Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance. *Reg. Gen. K. B. C. P.*, and Exchequer, H. T. 2 W. 4; 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 173; 2 Tyr. 349; 4 Bligh, N. S. 595.

Before the rule, in K. B. bail excepted to and rejected might render the defendant so long as they remained on the bail-piece. *Sayer v. Verdenham*, 6 M. & S. 218: *S. P. Rex v. Essex (Sheriff)*, 5 T. R. 633: *Anon.* 1 N. R. 138, n.; 1 Tidd's Prac. 277, 284.

As bail need not justify in order to render. *Mitchell v. Morris*, 9 W. Black. 1179: *S. P. Anon.* 2 W. Black. 758.

Although added bail have been rejected, they were competent in K. B. to render, and an attachment afterwards moved for was irregular. *Rex v. Middlesex (Sheriff)*, 1 Chit. 446.

Not so in C. P. *Cooper v. Jagger*, 1 Chit. 448.

Where bail had been rejected, the defendant could not be rendered without putting in fresh bail in C. P. *Mills v. Head*, 1 N. R. 137.

But they might enter into a new recognizance for the purpose of rendering. *Bell v. Gate*, 1 Taunt. 162.

Where after added bail had justified, the rule for allowance was set aside, on the ground of a subsequent discovery of perjury in one of the bail, who was rejected: the bail below are competent to render their principal at any time before the rule for setting aside the allowance is made absolute, if their names remain on the recognizance as such bail. *Rex v. Middlesex (Sheriff)*, 3 M. & P. 594; 6 Bing. 251.

**Bail who have not justified.**—In the Exchequer, bail who are excepted to, but do not justify, are still competent to render the principal. *Gore v. Williams*, 3 Anst. 653: *S. P. Jacques v. Holland*, 3 Anst. 655, n. But see *Perrott v. Hill*, 3 Wils. 59.

Bail who are excepted to, and do not justify on the day appointed, cannot afterwards render the principal, being thereby out of court; but the defendant being, in point of fact, in custody before the assignment of the bail-bond, the court set aside proceedings thereon upon payment of costs. *Hardwick v. Black*, 7 T. R. 297: *S. P. Rex v. Middlesex (Sheriff)*, 7 T. R. 527.

But in C. P. bail may render the principal, after having failed to justify on the day for which notice of justification was given; and if they do render, and the plaintiff take an assignment of the bail-bond, and proceed, after notice of such render, his proceedings will be set aside. *Seaver v. Spraggan*, 2 N. R. 85.

Though a rule to bring in the body has been served, they may render the defendant without justifying. *Hall v. Walker*, 1 H. Black. 638.

So, after an assignment of the bail-bond, they may render the defendant without justifying. *Edwin v. Allen*, 5 T. R. 401.

Bail may render without justifying, and where the rule expires in vacation, a render on the first day of the ensuing term, *sedente curia*, is good, though notice were not given till afterwards on the same day. *Wiggins v. Stephens*, 5 East, 533.

**Other Bail.**—Bail above, put in by the sheriff (who discharged the defendant without a bail-bond), may surrender the defendant. *Rex v. Butcher*, Peake, 169—Kenyon.

Bail surreptitiously put in cannot render the defendant. *Jackson v. Morris*, and *Richardson v. Same*, 2 W. Black. 1179.

A person who has enlisted may be rendered by his bail, in their own discharge. *Bond v. Isaac*, 1 Burr. 339.

(b) *When Render may be made.*

**Time of the Day.**—Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night. *Reg. Gen. K. B., C. P., and Exch.*, H. T. 2 Will. 4; 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 174; 2 Tyr. 343; 4 Bligh, N. S. 595.

In K. B. before the rule, a render must have been made during the sitting of the court on the last day. *Simmonds v. Middleton*, 1 Wils. 269; *S. P. Johnson v. Liney*, 2 D. & R. 385; 1 B. & C. 247.

So in C. P., the render must have been before the rising of the court. *Lardner v. Bassage*, 2 H. Black. 593.

But in Exch. they might render a defendant during the whole of the last day. *Rex v. London (Sheriffs)*, 1 Price, 338.

In K. B., where the rule expired in vacation, a render on the first day of the ensuing term, *sedente curia*, was good, though notice were not given till afterwards, on the same day, and after a writ of *procedendo* had issued to an inferior court, where the cause had originated. *Wiggins v. Stephens*, 5 East, 533.

**Proceedings against them.**—Where the plaintiff proceeds by action of debt on the recognizance of bail in any of the courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and upon such render being duly made, and notice thereof given, the proceedings shall be stayed, upon payment of the costs of the writ, and service thereof only. *Reg. Gen. K. B., C. P., and Exch.*, T. T. 3 Will. 4; 10 Bing. 154.

Formerly, bail had time to render the principal till the quarto die post, where the action was by original. *Bailey v. Smeathman*, 4 Burr. 2134.

They had eight days in which to render the principal, from the return of that writ, on which

there was an effectual proceeding against them. *Wilkinson v. Vass*, 8 T. R. 422.

Therefore, where the plaintiff sued the bail on their recognizance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail; it was ruled, that the bail had eight days from the return of the process in the second action, in which to render the principal. *Id.*

Bail may render their principal at any time before they are actually fixed. *Moorby v. Gudge*, 2 Chit. 104.

And they are allowed eight days for that purpose; and where the render was made in due time, the court set aside the proceedings against them, and held that the plaintiff was not entitled to the costs of the writs issued against the bail before the notice of render was given. *Smith v. Lewis*, 2 Chit. 100.

An intervening Sunday is to be reckoned as one of the eight days in full term given to bail to render their principal after the return of the writ. *Creswell v. Green*, 14 East, 537.

If bail be served with process on his recognizance, and die before the quarto die post, and fresh process issue against his executors, they have until the quarto die post of the second writ to render the principal. *Meddowcroft v. Sutton*, 1 B. & P. 61.

Bail sued on their recognizance by attachment of privilege, may render the principal on the appearance day of the return. *Fletcher v. Aingel*, 2 H. Black. 117.

Bail must render the principal in discharge of themselves on the quarto die of the return of the second sci. fa. *Simmonds v. Middleton*, 1 Wils. 269.

If an action be brought in K. B. against bail, on a recognizance of bail taken in C. P., they have the same indulgence (of eight days in full term after the return of the writ against them), to render the principal, as if the recognizance had been taken in K. B. *Fisher v. Branscombe*, 7 T. R. 355; *S. P. Fisher v. Sutton*, 7 T. R. 355.

If an action be brought in the court of Exchequer against bail upon their recognizance of bail entered into in the King's Bench, they must render their principal as if the recognizance had been taken in the former court. *Dibbins v. Taylor*, 1 Y. & J. 15.

The bail have only four days to render their principal, by the practice of the court of Exchequer, after the return of the writ, although there be not so many days remaining in the term. *Id.*

In proceedings against bail on the return of the ca. sa. in the court of Exchequer, by subpoena, the bail have only four days after the return of the writ in which to render their principal. Where the writ was returnable on the last day of term, and the bail had been unable to render the defendant, from the dangerous state of his health, within the four days; the court refused on their application, after the expiration of the four days, to allow them to render the principal on that



ground, in consideration of the shortness of the time allowed by that particular mode of proceeding, as abridging the usual time allowed in the other courts, and even in that court, by its ordinary process of quo minus. *Waring v. Jarvis*, 5 Price, 170.

Quære, if the application had been made before the expiration of the four days' notice? *Id.*

In the Exchequer they are not allowed four days for that purpose, after the determination of a writ of error, where the plaintiff has proceeded by subpoena, and error is brought before the ca. sa. *Rolfe v. Cheetham*, Wightw. 79.

A render after the return of the ca. sa. cannot be pleaded, although, if made in time, the bail may be relieved by motion. *Healey v. Medley*, 1 Tidd's Prac. 287.

On the quarto die post of the return of the ca. sa. against the principal, the bail are fixed; and if after that time they apply to stay proceedings against themselves, the court of C. P. will only grant the application on terms. *Copous v. Blyson*, 1 N. E. 67.

### (c) Enlargement of Time.

**Principal a Bankrupt.]**—Time enlarged for bail to surrender their principal, who had become a bankrupt, for the purpose of his examination. *Masde v. Jovett*, 3 East, 145; *S. P. Offley v. Dickens*, 6 M. & S. 348.

When their surrendering the bankrupt would be attended with expense to his estate, and inconvenience to him in making out his accounts, and passing his examination. *Id.*

So in C. P. where the principal had become bankrupt, and was required to appear to a commission in a distant county, the court enlarged the time of render until a reasonable time after the end of his last examination. *Glendinning v. Robinson*, 1 Taunt. 320.

Where the defendant became bankrupt after action brought, the court enlarged the time for him to surrender in discharge of his bail, until a fortnight after he had finished his last examination. *Stead v. Yates*, 3 M. & P. 272.

The court of Exchequer will, on application, enlarge the time for render, notwithstanding the provisions of the stat. 49 Geo. 3, permitting bankrupts in custody in execution to be brought before the commissioners. *Crump v. Taylor*, 1 Price, 74; 2 Rose, 149.

But not unless it be sworn that the application is made on behalf of the bail. *Harris v. Glossop*, 2 Chit. 101.

Where a defendant is in custody under a warrant of commissioners of bankrupt, the court will enlarge the time for rendering the defendant, though the bail have not justified. *Gibson v. White*, 1 Dowl. P. C. 297; 2 C. & J. 85; 2 Tyr. 162.

The time for rendering a bankrupt will be enlarged by the court, notwithstanding the provisions of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, authorizing the render of defendants in discharge

of bail, to the county prison. *Harris v. Alcock*, 1 Dowl. P. C. 568; 2 C. & J. 486; 2 Tyr. 418.

A defendant having been arrested in the country, and bailed, was declared bankrupt, and allowed until after the time for rendering him, to pass his final examination; the court enlarged the time to render until four days after the final examination of the bankrupt, but required an affidavit that it would be inconvenient for the commissioners to attend at the county jail, or in London to take the bankrupt's final examination. *Id.*

Where a bankrupt was about to be taken in execution, the court would not, upon an affidavit which omitted to state where the commission was sued out, or where the commissioners resided, enlarge, till a month after his final examination, the time for the bail's surrendering him. *Shaw v. Cash*, 4 Bing. 80; 12 Moore, 257.

**Other Reasons.]**—Bail shall have time to render, after a writ of error brought by the principal. *Capron v. Archer*, 1 Burr. 334.

If pending proceedings against bail, a writ of error be allowed, on application to the court of Exchequer, the same time will be given to the bail to render the principal, after judgment affirmed or writ of error nonprossed, as they would have had at the time the writ of error was allowed; and in the mean time the proceedings against the bail will be stayed. And that application will be granted, where the writ of error was allowed two days after the return of the subp. ad. resp. against the bail, and the motion not made till five days after (the fourth day being Sunday.) *Bennett v. Forester*, 2 Price, 296.

Where judgment was entered up against a defendant in C. P., on which he brought a writ of error in K. B., and judgment was there affirmed against the defendant, who thereupon brought a writ of error to the House of Lords; and the defendant, before the affirmance of the judgment by K. B., surrendered himself to the prison of that court, in discharge of his bail:—Held, that they were entitled to have an exoneretur entered on the bail-piece, although the appeal was still pending in the House of Lords; as the recognizance of bail still remained in the court of C. P., where the action was originally commenced. *Sherratt v. Floyer*, 2 Bing. 18; 9 Moore, 65.

In K. B. the time was refused to be enlarged for bail to render their principal, on an affidavit that he was a lunatic: it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or those about him. *Cock v. Bell*, 13 East, 355.

So, on an affidavit that he could not be removed without endangering his life. *Wynn v. Petty*, 4 East, 102; *S. P. Nightingale v. Lowry*, 4 East, 102, n.

The court will not enlarge the time for bail to render their principal, on an affidavit that he was ill and could not be removed without endangering his life. *Warrington v. Sammell*, 10 Moore, 170.

The court will allow time to the bail to render

their principal, where the principal being in custody, under process of another court, it appears, on the return made to a habeas corpus, issued by the bail, in order to render him, that he cannot be removed out of such custody, without danger to his life, and that such impossibility still continues. *Winstanley v. Gaitskell*, 16 East, 389.

#### (d) Defendant in Criminal Custody.

Where a defendant is in the criminal custody of K. B., the court of C. P. will not interfere summarily to procure him to be rendered in discharge of his bail. *Currie v. Kinnear*, 1 B. & P. 23; *S. P. Bennett v. Same*, 3 Moore, 259.

But the court of Exchequer allowed the time to be enlarged for bail to render their principal, for a week after the expiration of the term of his imprisonment in a county jail, under a conviction and sentence for a misdemeanor. *Ashmore v. Fletcher*, 10 Cl. 252; 13 Price, 523; *S. P. Rouch v. Boucher*, 10 Price, 104.

Where defendant, subsequently to arrest, and before perfecting special bail, was committed to criminal custody, in which he remained awaiting the decision of the twelve judges on a point of law arising out of his defence on the criminal charge, the court refused to enlarge, till the opinion of the judges should have been delivered, the time for perfecting special bail, or to permit the sheriff's bail to render him. *Joyce v. Pratt*, 6 Bing. 377; 4 M. & P. 55.

But granted an enlargement for four days. *Id.*

The court, on the application of bail, granted a habeas corpus to the sheriff in whose custody the defendant was under a charge of felony, to bring him up, in order that he might be surrendered. *Sharp v. Sheriff*, 7 T. R. 226.

The court, on application by the bail of the defendant, who was in custody on a charge of obtaining money upon false pretences, will grant a writ of habeas corpus to the gaoler, to bring him up, in order that he may be rendered in discharge of his bail. *Daniel v. Thompson*, 15 East, 78.

The court will enlarge the time for bail to render a defendant who is under imprisonment in a country jail upon a conviction for libel, until a week after the imprisonment under the sentence has expired; not until a week after the term for which he was sentenced to be imprisoned. *Campbell v. Ackland*, 1 C. & M. 73; 1 Dowl. P. C. 635.

In a case where a man was convicted of setting fire to his house and sentenced to be imprisoned, the court gave the bail time to render during the period of his imprisonment. *Rez v. Fearne*, 1 Marsh. 170, n.

One who was committed to Newgate, by commissioners of bankrupt, for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by habeas corpus, issued on the crown side of the court, on which side also must be taken the subsequent rule for his surrender in the action, his commitment pro forma

to the marshal, and his recommitment to Newgate, charged with the several matters. *Taylor's case*, 3 East, 232.

#### (e) Defendant in other Custody.

Where a man was held to bail in a civil action, and was afterwards committed to the custody of the sheriff upon an extent, the court, on an application by the bail for relief, held, that although they could not allow an exoneretur to be entered without the consent of the crown, they would give the bail time for surrendering the defendant. *Hodgson v. Temple*, 1 Marsh. 166; 5 Taunt. 503.

The defendant, having given bail to the action, and being in custody of the sheriffs of London, under an extent from the crown, the court of C. P. held, that they could not grant his bail a habeas corpus to bring him up, and render him in their discharge to the Fleet, without the consent of the crown. *Id.*

And the crown consenting that the defendant might be brought up in the sheriff's custody, and committed to the Fleet in discharge of his bail, on condition that he should be immediately remanded to the custody of the sheriffs: the Court of C. P. held, that it was not sufficiently clear that they had authority to remand him to the custody of the sheriffs, to authorize them to make the order. *Id.*

It is no objection to a motion on the part of bail to enlarge the time for rendering the principal, on good grounds, (as that the defendant is in custody quasi criminal), that the bail have not justified. *Tinson v. White*, 1 Price's P. C. 156.

The defendant being in custody of a messenger, under an order of the secretary of state, for the purpose of being sent out of the kingdom, by virtue of the alien act, 43 Geo. 3, c. 155, the court refused to issue a habeas corpus on the application of his bail, to bring him up that they might render him in their own discharge, on account of the public inconvenience, and of the probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port. *Folkein v. Critico*, 13 East, 457.

So, because of the unwarrantable arrest and detention of the principal as a prisoner of war by a foreign enemy. *Grant v. Fagan*, 4 East, 189; 1 Smith, 12.

#### (f) Mode of Render.

By 1 Will. 4, c. 70, s. 21, a defendant may be rendered in discharge of his bail, either to the prison of the court or to the jail of the county where he was arrested; for which purpose the defendant, or his bail, or one of them, is to obtain an order of a judge, and lodge it with the jailer, and a notice of such lodgment and of the defendant's being actually in custody by virtue of the order, signed by the defendant, or the bail, or either of them, or by the attorney or agent, or any or either of them, shall be delivered to the plaintiff's attorney or agent, and the sheriff, or other person re-

responsible for the custody of debtors in such county jail, shall, on such render so perfected, be duly charged with the custody of such defendant, and the bail shall be exonerated.

By s. 22, a defendant in custody of the sheriff may be rendered in the same manner.

On application by a defendant, or his bail, or either of them, for an order of one of the barons of the court to render a defendant to a county jail, it shall be specified on whose behalf such application shall be made, the state of the proceedings on the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that, on such order being lodged with the jailor of the county jail in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that, on such lodgment and render, a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or by the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any exoneretur. *Reg. Gen. Exch. M. T. 1 Will. 4, 1 Price's P. C. viii; 1 C. & J. 279; 1 Tyr. 162.*

If a defendant shall be in custody of the jailor of the county jail of any county in England or Wales, by virtue of any process issued out of any of his majesty's superior courts of record, he may be rendered in discharge of his bail in any action depending in the Exchequer, in like manner as before provided for a render in discharge of bail, and thereupon the bail shall be wholly exonerated from liability as such bail. *Reg. Gen. Exch. M. T. 1 Will. 4, 1 Price's P. C. viii; 1 C. J. 280; 1 Tyr. 162.*

On a render in discharge of bail, the committitur is made out by the judge, and sent with the defendant to the K. B. prison. The entry in the marshal's book is made by the clerk of the papers. *Reg. v. Middlesex (Sheriff)*, 1 Chit. 364.

And where a defendant is already in custody, and is sought to be charged in a new action, the committitur is entered with the clerk of the judgments. *Id.*

The entry of a committitur in the marshal's book is not necessary to make a perfect render. *Reg. v. Middlesex (Sheriff)*, 2 B. & A. 607; *S. C. nom. Anon.* 1 Chit. 360.

Even where the notice of render was not served until after an attachment against the sheriff had issued. *Reg. v. Middlesex (Sheriff)*, 2 D. & R. 225.

A render may be made by the party himself, and without an attorney. *Nethersole's bail*, 2 Chit. 99.

It is not necessary that the defendant should be taken to a judge's chambers, for the purpose of rendering himself in discharge of his bail, unless he desires it. *Davis v. Fowler*, 2 Chit. 74. *See also Stanton's bail*, 2 Chit. 73.

### (g) Notice of Render.

The render is not complete or effectual till notice served. *Reg. v. London (Sheriffs)*, 1 Price, 338.

On notice of render being given to the plaintiff or his attorney, all further proceedings against the bail are to cease. *Anon.* 1 Chit. 128, (a).

Where, after due notice of render of the principal, the plaintiff still proceeds against the bail in an action of debt upon the recognizance, because no offer was made by them to pay the costs in the suit against them, nor any rule obtained by them to stay proceedings in the action against them on payment of costs:—Held, that the subsequent proceedings were irregular, being contrary to the rule of court, *T. T. 1 Anne*, which says, that, on such notice of render, all further proceedings against the bail shall cease. *Bryne v. Aguilar*, 3 East, 306.

The court of K. B., upon payment of costs, entered an exoneretur on the bail-piece after execution against the bail, where the defendant in the original action was rendered in due time, but no notice of the render had been given until the goods of the bail had been taken in execution. *Thorn v. Hutchinson*, 4 D. & R. 712; 3 B. & C. 112.

Bail having rendered their principal in time, according to the practice of the court, are entitled to stay the proceedings in an action on their recognizance, without costs, though the plaintiff commenced his action before he was served with notice of the render. *Smith v. Lewis*, 16 East, 212.

The court of Exchequer will set aside an attachment against the sheriff, on payment of costs, if the defendant has rendered on the evening of the last day of the rule, and notice be given early next morning. *Reg. v. London (Sheriffs)*, 1 Price, 338.

Where time was given to the plaintiff to see whether bail were really possessed of the property in respect of which they professed their ability to justify, and on the day appointed for coming up again, the bail, being rejected, immediately rendered the defendant:—Held, that the sheriff was liable to an attachment; the notice of render not having been served until after the attachment had issued. *Reg. v. Middlesex (Sheriff)*, 2 D. & R. 225.

Where a defendant was rendered after the time for putting in bail had expired, but within the further time allowed him for that purpose by the court:—Held, that an attachment, issued after the notice of such render, was regular, and could not be set aside without an affidavit of merits, especially as no bail-bond had been taken. *Reg. v. London (Sheriffs)*, 1 Chit. 567.

A sheriff arrested A. B. on the 13th November, upon a writ returnable the 15th, and suffered him to go at large without giving a bail-bond, and afterwards returned cepi corpus; bail above were put in on the 17th December, and on the same day A. B. was rendered, but notice of render was not given until the 13th January. An action against the sheriff for the escape was commenced

on the 19th December. The court stayed proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion. *Brookhouse v. Derbyshire (Sheriff)*, 5 B. & C. 244.

Where the time for justifying bail expired on the 7th, and time was given till the 9th February to add and justify other bail, and on that day the defendant was rendered in discharge of his bail, and notice thereof was given on the same day to the plaintiff:—Held, that the sheriff was liable to be attached on the 10th, if the plaintiff had lost a trial for the sittings after term. *Rex v. Middlesex (Sheriff)*, 8 D. & R. 137.

If the plaintiff has incurred the costs of instructing counsel to move for an attachment, before the defendant gives notice of his surrender, though he surrenders before the attachment is actually obtained, the court of C. P. will order the costs of those instructions to be paid by the defendant upon setting aside the attachment. *Rex v. Middlesex (Sheriff)*, 1 Taunt. 56.

Where the defendant was rendered in discharge of his bail, and his attorney called to give notice of render that night, but finding no one in the way, saw the plaintiff's attorney the next morning, and then gave notice:—Held, that an attachment against the sheriff moved for on that day, although the instructions to the counsel were given before the notice, was irregular, and the attachment was accordingly set aside. *Rex v. Middlesex (Sheriff)*, 2 Smith, 243.

It is not necessary that an affidavit should be made of the service of the notice of render, in order to complete such render, so as to prevent an attachment against the sheriff, and, therefore, an attachment issued after notice of render, but before affidavit thereof, is irregular. *Rex v. Middlesex (Sheriff)*, 1 Chit. 359.

#### (h) Right of Bail to take Principal.

Special bail in the superior courts have a right to take their principal into custody at any time, and render him in discharge of themselves. *Rex v. Hughes*, 3 C. & P. 373—Tenterden.

But bail in inferior courts have no such right. *Id.*

A person may assist bail in taking, and may lawfully detain the principal, although the bail do not continue present. *Pyeowell v. Stow*, 3 Taunt. 425.

Bail cannot take their principal on a Sunday in order to render him. *Brookes v. Warren*, 2 W. Black. 1273.

A bankrupt may be taken by his bail for the purpose of rendering him, notwithstanding his privilege from arrest, and if they neglect to take him they may be fixed. *Payne v. Spencer*, 6 M. & S. 237.

Bail above may justify the breaking and entering the house of A., (the outer door being open,) in which the principal resides, in order to seek for him, for the purpose of rendering him: such a justification is good without averring that the

principal was in the house at the time. *Sheers v. Brooks*, 2 H. Black. 120.

And in such a plea an averment that the defendants "duly became bail, and entered into a recognizance," is sufficient, without stating that the principal was delivered to their custody. *Id.*

#### 2. By Bankruptcy of Principal.

*Generally.*—Bail are discharged by the principal having obtained his certificate under a commission of bankruptcy. *Anon. Lofft*, 651.

Therefore, where a defendant obtained his certificate under a commission before the trial, but did not plead it puis darrein continuance, the court ordered an exoneretur to be entered on the bail-piece. *Todd v. Maxfield*, 5 D. & R. 258; 3 B. & C. 222.

Where the defendant obtained his certificate as a bankrupt after issue joined, and before trial, but did not plead it puis darrein continuance, and the plaintiff proceeded to trial, and obtained judgment; the court refused to order an exoneretur to be entered on the bail-piece, although the plaintiff's attorney knew before the trial that the defendant had got his certificate, because the bail were still in a condition to render the defendant. *Humphries v. Knight*, 4 M. & P. 370; 6 Bing. 569.

Where the defendant becomes bankrupt and obtains his certificate, but omits to plead it, and his bail become fixed, the court of C. P. will not set aside the proceedings on motion. *Clarke v. Hoppe*, 1 Rose, 353; 3 Taunt. 36.

After the bankruptcy of defendant, plaintiff may sue out a ca. sa., and proceed under it to fix the bail; therefore where ca. sa. issued 1st of May, 1816, returned non est inventus on the 19th; on the 22d, sci. fa. against the bail, and nihil returned; on the 14th June alias sci. fa. returnable 30th, and nihil returned; on the 3d July rule given for bail to appear; and on 9th judgment for default of appearance; on 23d of February, 1816, commission of bankrupt issued against defendant, declared bankrupt on the 11th of March, who surrendered to commission 29th and 29th March, and on the 27th April had further time allowed to finish his examination till 28th May:—Held, that the proceedings against the bail were regular, notwithstanding the bankruptcy of defendant, and proceedings under it; for the issuing of the ca. sa. was good notice to the bail, who are not restrained by the 5 Geo. 2, c. 30, s. 5, which frees the bankrupt from arrest by any of his creditors during the time of his examination. *Payne v. Spencer*, 6 M. & S. 231.

To sci. fa. against bail upon their recognizance, it is competent to the defendant to plead in bar against the issuing of execution, that, before the issuing of the alias writ of sci. fa. the plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c., assigned to the provisional assignee, who before plea pleaded assigned to the assignee under the commission, who was entitled to sue

the defendants, &c. *Kinnear v. Tarrant*, 15 East, 632; 1 Rose, 350.

Bail being fixed with the debt, and having paid it, sue the principal and obtain judgment, after a commission of bankruptcy has issued against him, but before he has obtained his certificate: after he obtains it, the bail in the second action apply to be exonerated, on the ground that the plaintiff, the bail in the original action, might prove their debt under the commission, by virtue of stat. 49 Geo. 3, c. 121, s. 8. The court refused to interfere summarily, but left the bail to their writ of *audita querela*. *Hewes v. Mott*, and *Dalby v. Mott*, 2 Marsh. 37; 6 Taunt. 329; 2 Rose, 455.

If a plaintiff, after judgment obtained, prove his debt, under a commission of bankrupt, sued out against the defendant, and also proceed against the bail, the bail are thereby entitled to their discharge, under 49 Geo. 3, c. 121, s. 14; and the court will discharge them on motion. *Liagins v. Comyn*, 2 Taunt. 246; 1 Rose, 116.

*At what time Certificate obtained.*—Bail for a bankrupt, who obtains his certificate pending the action, shall be discharged, if the certificate be prior to their being fixed; otherwise they remain liable. *Welley v. Cobbe*, 1 Burr. 244; 1 Ld. Ken. 504.

The bail are entitled to be discharged, upon their bankrupt principal's obtaining his certificate, before the time allowed to them by the indulgence of the court for rendering their principal, is out; i. e. before the appearance day of the last *scire facias*. *Mannin v. Partridge*, 14 East, 599; *S. P. Thackrey v. Turner*, 1 Moore, 457; 8 Taunt. 28.

Bail may apply to enter an exoneretur, if the principal has become bankrupt at any time before they are actually fixed; and where the first *scire facias* did not issue until six days after the bankruptcy of the bail, the court set aside the proceedings which had issued against them, but with costs to be paid by them. *Maorby v. Gadge*, 2 Chit. 104.

Where the principal became bankrupt, and on the same day that he obtained his certificate, but before the rising of the court, the bail were fixed on *scire facias*:—Held, that the bail had till the rising of the court on that day, before they could be actually fixed; and on payment of costs the court ordered an exoneretur to be entered on the bail-piece. *Johnson v. Linsey*, 2 D. & R. 385; 1 R. & C. 247.

Proceedings stayed in an action against bail, who had neglected to render their principal, a certificated bankrupt; and an exoneretur ordered to be entered on the bail-piece, on payment of the costs of the action and of the application; although the recognizance had been entered into for his discharge out of custody after final judgment, and the certificate had not been allowed by the Lord Chancellor till after the time conditioned for making the render. *Bottomley v. Medhurst*, M'Clel. 399; 13 Price, 709. *And see* M'Clel. 310; 13 Price, 589.

If an action be commenced against a bank-

rupt after the commission, for work done before the bankruptcy, and the bankrupt afterwards obtain his certificate, the court will enter an exoneretur on the bail-piece. *Willett v. Pringle*, 2 N. R. 190.

The court of C. P. will not relieve the bail of a bankrupt, who are fixed between the signature of the bankrupt's certificate by his creditors and the commissioners, and the time of the allowance of the certificate by the Lord Chancellor. *Stapleton v. Macbar*, 7 Taunt. 589; *S. P. Walker v. Giblet*, 2 W. Black. 811.

*Issue to try validity.*—The court of C. P. will not exonerate the bail, upon the defendant having become bankrupt and obtained his certificate, without giving the plaintiff an opportunity of trying, by an issue, whether the certificate were fairly obtained. *Woolcot v. Leicester*, 6 Taunt. 75.

The court of C. P. will not order an exoneretur to be obtained on the bail-piece, on the ground of the defendant's having obtained his certificate in Ireland; but will direct an issue, in order to ascertain the circumstances under which the original debt was contracted. *Bamfield v. Anderson*, 5 Moore, 331.

The court will not order an exoneretur to be entered on the bail-piece, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he may have obtained his certificate there. *Pedder v. Macmaster*, 8 T. R. 609.

Where the defendant in an action has become bankrupt, and obtained his certificate, after which proceedings are taken against the bail; the court will, on motion, relieve them, and will not direct an issue to try the fact of the bankrupt's being a trader; the certificate by the 5 Geo. 2, c. 30, ss. 7 & 13, being made sufficient evidence of the trading, &c. But no exoneretur having been entered on the bail-piece, such relief was granted only on payment of costs. *Harmer v. Hagger*, 1 B. & A. 332.

An execution levied against bail, after a certificate granted to principal, set aside with costs. *Anon. Lofft*, 651.

Where bail apply to enter an exoneretur on the bail-piece, if fraud is imputed to the bankrupt in obtaining the commission and certificate, and the trading be disputed, the court will direct an issue to try whether the commission duly issued. *Willison v. Smith*, 3 Dougl. 96.

*Application.*—An exoneretur was allowed by K. B. to be entered on motion of the bail of a bankrupt, where the certificate was not obtained till after the return-day of the ca. sa. *Cleveland v. Dickenson*, 1 Tidd's Prac. 290.

So, where a bankrupt is clearly entitled to his discharge, he need not be surrendered by his bail, as the court will, in the first instance, order an exoneretur to be entered on the bail-piece. *Martin v. O'Hara*, Cowp. 823.

It is not necessary in the court of Exchequer,

for the purpose of a motion to stay proceedings in an action against bail on the recognizance, on the ground of discharge by bankruptcy of the principal, that the party should be actually rendered into custody, before it can be entertained by the court. *Bottomley v. Madhurst*, 13 Price, 709; *McClell*, 399.

### 3. By Insolvency and Lunacy of Principal.

If a defendant be discharged under an insolvent debtor's act, the court will order an exoneretur to be entered on the bail-piece. — *v. Bruce*, 2 Chit. 105.

But bail are not discharged by a commission of lunacy having issued against the principal. *Anon. Loft*, 617.

So, in another case, the court refused to enter an exoneretur on the bail-piece, on the ground that the principal was a lunatic, and that the marshal had refused to receive him into his custody. *Anderson's bail*, 2 Chit. 104.

Even where the defendant became a lunatic after the commencement of the action. *Ibbotson v. Galway (Lord)*, 6 T. R. 133.

### 4. By Principal becoming privileged.

Bail are discharged by the defendant becoming a member of the House of Commons. *Lan- gridge v. Flood*, 1 Tidd's Prac. 293.

So, by his succeeding to a peerage. *Trinder v. Shirley*, 1 Dougl. 45.

An unprivileged person in custody in execution, elected a member of parliament, is entitled to his discharge on motion; and, therefore, bail may have an exoneretur entered on the bail-piece, if the privileged person be elected between perfecting bail and final judgment. *Phillips v. Wellesley*, 1 Dowl. P. C. 9.

And this was allowed, although a cognovit had been given with the express consent of the bail; and the plaintiff, had he not taken the cognovit, might have compelled a render before the defendant acquired privilege. *Id.*

### 5. By Death of Principal.

If the principal die after the return of the ca. sa. and before the return is filed, the bail are fixed, and the court will not stay the filing of the return in favour of the bail. *Raushon v. Gunston*, 6 T. R. 284; *S. P. Field v. Lodge*, 3 Dougl. 410.

If a principal die after the return of the ca. sa., although his death happen before suing forth the first sci. fa., the bail are fixed in point of law, the sci. fa. being only an indulgence of the court. *Filewood v. Popplewell*, 2 Wils. 61, 65.

### 6. By Course of Proceeding.

#### (a) Delay.

Bail are discharged if the plaintiff do not declare in time, or obtain a rule for time to declare. *Anon.* 1 Chit. 261, n.

One of two defendants having been holden to

bail in Trinity Term, the plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of Easter Term, not having obtained a rule for time to declare; the court of C. P. held, that the cause was out of court, and the bail entitled to an exoneretur. *Sykes v. Bauwens*, 2 N. R. 404.

A plaintiff may proceed against the bail, although the original action is out of court, when it does not appear whether the bail-bond had been assigned. *Collett v. Bland*, 4 Taunt. 715.

#### (b) Taking Cognovit.

A cognovit by the principal, without notice to the bail, does not of itself discharge the bail. *Hodgson v. Nugent*, 5 T. R. 277.

Bail are not discharged by the plaintiff's taking a cognovit from the principal, unless time be thereby given. *Stevenson v. Roche*, 9 B. & C. 707; *S. C. nom. Stevenson v. Crease*, 4 M. & R. 561.

Where no part of the debt and costs is made payable at a time subsequent to the earliest day on which the execution might have been obtained. *Id.*

But if a plaintiff accept from the principal defendant a cognovit, whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement. *Bowfield v. Twor*, 4 Taunt. 456.

And if a plaintiff take a cognovit, payable by instalments, and postponing the payment of any instalment to a later date than the time when the plaintiff could, with diligence, have obtained judgment and execution, the bail are discharged. *Croft v. Johnson*, 5 Taunt. 319; 1 Marsh. 53.

Where a plaintiff, with the consent of the bail to the sheriff, took a cognovit with a stay of execution for a month:—Held, that although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the cognovit was unsatisfied. *Clift v. Gye*, 9 B. & C. 422.

The bail consented to the defendant's giving a cognovit on such terms as he could obtain from the plaintiff. A cognovit was then given in February to pay in May; default having been made in May, the defendant negotiated, but in vain, till June 13th. The bail having been proceeded against without any notice of this negotiation, the proceedings were set aside. *Charleton v. Morris*, 6 Bing. 427; 4 M. & P. 114.

Where the plaintiff had taken a cognovit from the defendant, with an agreement to receive the debt by long instalments, of which no notice was given to the bail; the court set aside an execution against the bail, sued out above a year after the judgment, without a scire facias to revive it; even though the agreement by the plaintiff, to take the debt by instalments, without the consent of the bail, would not have discharged them, as they could not, after that, have rendered their principal. *Thomas v. Young*, 15 East, 617.

The bail are discharged by the defendant's

giving a cognovit for the payment of debt and costs. *Farmer v. Thorley*, 4 B. & A. 91. And see *Res v. Surrey (Sheriff)*, 1 Taunt. 159.

A warrant of attorney to pay by instalments discharges the sheriff. *Brown v. Neave*, Wightw. 131.

So, a cognovit conditioned for payment by instalments discharges the sheriff. *Res v. Surrey (Sheriff)*, 1 Taunt. 159.

### (c) Part Levy in Execution.

A plaintiff may sue out a fi. fa. against the principal, and levy part of the debt, and afterwards sue out a ca. sa. as to the residue, and charge the bail. *Stevenson v. Roche*, 9 B. & C. 707; & C. nom. *Stevenson v. Crease*, 4 M. & R. 561.

It is no ground for setting aside an execution which has been issued against bail, that the plaintiff has accepted a composition from the defendant, and suspended the execution of a ca. sa. which had been issued against him, though it were without the knowledge or consent of the bail. *Brickwood v. Annis*, 1 Marsh. 250; 5 Taunt. 614.

The plaintiffs sued out a ca. sa. against a principal, who having put in bail, became bankrupt, and obtained his certificate; they afterwards agreed to accept a composition, provided all his creditors would accept the same, of which the bail had no notice;—Held, that the ca. sa. against the principal must be set aside, and that as the bail had not applied to enter an exoneretur on the bail-piece, until after execution had been levied on them, they could only be relieved on payment of costs. *Thackrey v. Turner*, 1 Moore, 457; 8 Taunt. 28; *S.P. Mannin v. Partridge*, 14 East, 599.

### (d) Arrangement with Principal.

Where a plaintiff receives bills of exchange from a defendant with an agreement that he shall not be precluded from proceeding while the bills are running, the bail are not thereby discharged. *Melville v. Glendinning*, 7 Taunt. 126.

Where the plaintiff, after final judgment, took bills, payable at a future day, in satisfaction of the debt, the court of C. P. discharged the bail, on payment of costs, though the application was not made till the fourth term after judgment signed. *Willison v. Whitaker*, 2 Marsh. 383; 7 Taunt. 53.

Where the principal offered to render in discharge of his bail, and an agreement was afterwards entered into between his attorneys and the plaintiff's agent, that the render should be dispensed with for six weeks, on the terms of the bail continuing liable, which agreement they were ignorant of at the time, as well as that their principal had offered to render; but they afterwards consented to their liability continuing, on the terms mentioned in the agreement; and the principal in the mean time became bankrupt, and obtained his certificate; and the plaintiff afterwards proceeded against the bail without notice:

—Held, that they were discharged, on the ground that their liability under their recognizance, ceased by time having been given to their principal to render without their consent or authority in the first instance, and that it could not be revived by their subsequent ratification of such agreement to continue liable, as they had not been informed that their principal had previously offered to render himself in their discharge. *West v. Ashdown*, 7 Moore 566; 1 Bing. 164. And see *Brickwood v. Annis*, 1 Marsh. 250; 5 Taunt. 614.

A mere honorary obligation on the part of a plaintiff not to press a defendant for payment of debt and costs, is not such an indulgence to him as will relieve his bail. *Ladbrook v. Hewett*, 1 Dowl. P. C. 488.

If a plaintiff by an agreement with a defendant expedites his remedy against him, the bail are not thereby released. *Id.*

Where, in the course of a cause, an order was made for taxing the bill on which the action was brought, and which by mistake was drawn up as a stay of proceedings:—Held, that the bail could not avail themselves of that order, as a giving of time, so as to discharge them. *Wooman v. Wood*, 1 Dowl. P. C. 681.

### 7. By other Means.

A plaintiff having obtained bail to his action, sued in equity for the same cause, and being put to his election by the court of equity, elected to proceed there, and a perpetual injunction went not to proceed at law:—Held, that this was no ground for discharging the bail. *Horsley v. Walstab*, 7 Taunt. 235; 2 Marsh. 548.

The court permitted an exoneretur to be entered on the bail-piece, the defendant being under sentence of transportation for a felony. *Wood v. Mitchell*, 6 T. R. 247.

The defendant, a seaman, being out upon bail, on process for a debt under 20*l.* was impressed into the king's service, and as he would have been entitled to his discharge, if in custody, by virtue of the stat. 32 Geo. 3, c. 33, s. 22, the court, on application of the bail, ordered an exoneretur to be entered on the bail-piece in the first instance. *Robertson v. Patterson*, 7 East, 405; 3 Smith, 556.

The defendant being in custody of a messenger, under an order of the secretary of state, for the purpose of being sent out of the kingdom by virtue of the Alien Act, 43 Geo. 3, c. 155, the court refused, while he was still in the kingdom, and might possibly be set at large again, to enter an exoneretur on the bail-piece. *Folkein v. Critico*, 13 East, 457.

If a defendant, an alien, be sent out of the kingdom under the Alien Act, 33 Geo. 3, c. 4, the court will permit the bail to enter an exoneretur on the bail-piece, unless they are indemnified, or have money in their hands belonging to the defendant, sufficient to answer the plaintiff's demand. *Merrick v. Vaucher*, 6 T. R. 50; *S.P. Coles v. De Hayne*, 6 T. R. 246.

Where one of the king's yeomen of the guard had been arrested in the Palace Court, and was there refused to be discharged on filing common bail, and he afterwards removed the cause into the court of K. B. by a writ of habeas corpus cum causa, and put in and perfected bail upon the habeas:—Held, that the bail could not be exonerated, although the defendant might be privileged from arrest. *Sard v. Forrest*, 2 D. & R. 250; 1 B. & C. 139.

Where the court, on motion, allowed the plaintiff to amend the roll, by inserting a continuance to take the case out of the statute of limitations, it was held that such proceeding did not entitle the bail to be exonerated, although they had become bail, and had omitted to render the plaintiffs, in reliance on the defence under the statute. *Taylor v. Gregory*, 2 B. & Adol. 257.

### 8. Application for Discharge.

Bail excepted to, but not struck off the bail-piece, may apply for an exoneretur. *Humphry v. Leite*, 4 Burr. 2107.

In order to exonerate bail excepted to, his name must be struck out of the bail-piece. *Fulke v. Bourke*, 1 W. Black. 462.

After bail put in and justified, and demand of plea with time allowed for pleading, it is too late to move to enter an exoneretur on the bail-piece, on the ground that the plaintiff has not declared on the cause of action which he swore to in his affidavit. *Knight v. Dorey*, 1 B. & C. 48. And see *Sard v. Forrest*, 2 D. & R. 250; 1 B. and C. 139.

## XX. PROCEEDINGS AGAINST BAIL.

### 1. Ca. Sa. against Principal.

*Ca. Sa. lodged.*—A ca. sa. to fix bail must, in London and Middlesex, be entered four clear days in the public book at the sheriff's office. *Reg. Gen. K. B., C. P., and Excheq.*, H. T. 2 Will. 4, 1 Dowl. P. C. 193; 8 Bing. 299; 1 M. & Scott, 426; 3 B. & Adol. 385; 2 C. & J. 189; 2 Tyr. 347; 4 Bligh, N. S. 602.

Before the rule, it was necessary in K. B. that the ca. sa. must be entered in the public book at the sheriff's office, kept there for that purpose. *Hutton v. Reuben*, 5 M. and S. 323; 5 C. 2 Chit. 102.

But the entry was not necessary in the Exchequer: where a ca. sa. was properly indorsed and lodged, and remained the full time on the file of the sheriff of Middlesex's office, but there was no entry in the public book, except of the day of its return, the court of Exchequer refused to set aside the proceedings against the bail, no inquiry having been made at the office on their part during the four days preceding the return, and it being sworn (although not by any person in the office) that, if inquiry had been made, verbal information would have been given that the writ was lodged. *Smith v. Parker*, M'Clel. & Y. 483.

In order to charge the bail, a ca. sa. against

the original defendant must be in the sheriff's office four days before the return-day, exclusive of the day when it is lodged, and of the return day; and an intervening Sunday is not to be reckoned one of the four days. *Furnell v. Smith*, 7 B. & C. 693; *S. P. Howard v. Smith*, 1 B. & A. 528.

*Scire facias* on recognizance of bail. Plea, no ca. sa. duly issued, lodged, and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the ca. sa. did not lie in the sheriff's office four days exclusive of the day it was lodged, the return-day, and an intervening Sunday:—Held, on demurrer, that the rejoinder was bad. *Sandon v. Proctor*, 7 B. and C. 800; *S. P. Elliot v. Lane*, 1 Wils. 334.

Where bail, sued in debt upon a recognizance, pleaded that no ca. sa. was duly sued, returned, and filed against the principal, according to the custom and practice of the court, which required that the writ should lie in the sheriff's office four days before its return:—Held, on demurrer, that this was a bad plea. *Cherry v. Powell*, 1 D. & R. 50.

The want of a ca. sa. is not an irregularity, but matter of substance, of which the bail can only take advantage by plea. *Philpot v. Manuel*, 5 D. & R. 615.

The defendant having put in and perfected bail, a ca. sa. was lodged and returned non est inventus, and proceedings being had against the bail, they rendered the principal in time: the defendant was then bailed again and discharged:—Held, that proceedings could not be had against the last bail without taking out a fresh ca. sa. *Thackray v. Harris*, 1 B. and A. 212.

A plaintiff will not be permitted, on motion in the court of Exchequer, to quash a writ of ca. sa. sued out by him and lodged with the sheriff for the purpose of fixing the defendant's bail in the usual course, on the return of non est inventus, where the defendant has voluntarily surrendered in discharge of his bail, before the return of the ca. sa., and afterwards become bankrupt; although the plaintiff undertook to enter an exoneretur on the bail-piece, and make an affidavit that it was never intended to take the defendant in execution upon the ca. sa. *Stott v. Smith*, 8 Price, 512.

Quære, how far the practice of making such formal return of non est inventus is sustainable; or whether it is not an abuse of process? *Id.*

*Teste and return of Ca. Sa.*—Before the Uniformity of Process Act, in actions commenced by bill, a ca. sa. to fix bail must have had eight days between the teste and return; and in actions commenced by original, fifteen. *Reg. Gen. K. B. C. P. and Excheq.*, H. T. 2 Will. 4.

The court of C. P. would set aside proceedings against bail, if the ca. sa. were tested of a term prior to that in which judgment was signed against the principal. *Gawler v. Jolley*, 1 H. Black. 74.

A *capias ad respondendum* against the bail



was tested of a day prior to the return of the ca. sa. against the principal, but was not sued out till afterwards:—Held, regular. *Pisero v. Wright*, 2 B. & P. 235.

If a defendant consents that a plaintiff shall have judgment as of a term previous to the trial, in proceeding against bail, the ca. sa. may be tested as of that previous term. *Hovenden v. Crowther*, 1 Dowl. P. C. 170.

If the principal be actually in the custody of the sheriff, at the time when the latter, at the instance of the plaintiff, returns non est inventus to a ca. sa., the court of C. P. will set aside such return, together with all subsequent proceedings, against the bail, and order the money levied under an execution to be returned to them. *Forstyth v. Marriott*, 1 N. R. 251.

A return of non est inventus, procured by the plaintiff against the principal, in order to found proceedings against the bail, is irregular, if the principal were at the same time in custody of the same sheriff who made the return, though at the suit of another person; and the subsequent proceedings against the bail will be set aside. *Burks v. Mease*, 16 East, 2.

So where the principal was in the custody of the sheriff upon a criminal charge, and the plaintiff knew that he was in such custody at the time of the return. *Ward v. Brumfit*, 2 M. & S. 238.

Where judgment was signed against the principal without a rule for judgment, and the plaintiff proceeded to execution against the bail, after procuring a return of non est inventus to a ca. sa. against the principal, and a return of two nighs to two writs of sci. fa. against the bail; the court, upon application of the bail, together with the principal, held, that they were entitled to be relieved from such judgment against the principal, and its consequences against them, upon an affidavit by them, that they had no notice of such judgment till the writ of ca. sa. issued against the bail, when they applied to vacate the proceedings. But the court held, that they could not set aside the writ of ca. sa. against the bail, on account of such irregularity of the judgment against the principal, while such judgment remained in force. *Hayward v. Ribbans*, 4 East, 310.

A return of non est inventus to a ca. sa. for the purpose of proceeding against the bail will be good, although the plaintiff knew where to find the defendant, unless he be already in the custody of the sheriff, on either civil process or a criminal charge. *Sillitoe v. Wallace*, 2 Tidd's Prac. 1147.

## 2. By Action.

Where a recognizance of bail in C. P. is put in suit in the Exchequer, the plaintiff cannot have any advantage which he would not have had by the rules of C. P. *Vincent v. Brady*, 1 Anst. 47.

A declaration in debt on a recognizance against bail, must set out for whom the defendant was

bail, and in what sum. *Park v. Yestary*, 1 Wils. 284.

In an action on a recognizance of bail taken at Durham, the venue was laid in Middlesex, and it was averred in the record, that the defendant, of Durham, came before G. L., then and there being a commissioner, duly appointed to take recognizances for the county of Durham, and then and there became bail before the said commissioner:—Held, that this was a sufficient averment, that the commissioner was duly appointed to take the recognizance in the county of Durham, and that the venue was properly laid in Middlesex, because the recognizance was filed and must ultimately be returned there. *Harley v. Hodson*, 2 Moore, 66; 8 Taunt. 171. And see 1 Moore, 514, 430.

A plea to an action on a recognizance of bail, that after, &c. the plaintiff entered into an agreement with the principal in the bail-bond, without the privity of the bail, to take from the principal goods to secure the payment of part of the money recovered, and that such goods were consigned to them accordingly:—Held, bad on special demurrer, because such agreement, by parol, with a person not a party to the cause, cannot be pleaded in bar of such an action, arising on matter of record. *Bulleit v. Jarrold*, 8 Price, 467.

Bail cannot be taken in execution in the court of C. P. on a judgment on their recognizance: therefore, where the sheriff, having taken them on a ca. sa. and discharged them, was sued for an escape, the court set aside the ca. sa. *Wooden v. Moxon*, 2 Marsh. 186; 6 Taunt. 490.

Bail cannot be taken on a ca. sa. in C. P.; secus in K. B. *Anon.* 1 Chit. 191.

In C. P. no ca. sa. lies on a judgment on a sci. fa. against bail; but it is otherwise in the court of K. B. *Troughton v. Clarke*, 2 Taunt. 113. And see *Bayly v. Timmass*, 2 Taunt. 114, n.

## 3. By Scire Facias.

### (a) Sci. Fa. lodged.

A sci. fa. should lie four clear juridical days in the sheriff's office. *Fraser v. Miller*, 1 Dowl. P. C. 141.

As well where scire feci is returned as nihil. *Williams v. Mason*, 1 East. 69, n.

In all proceedings by sci. fa. Sunday is not to be reckoned. *Anon.* 1 Dowl. P. C. 142.

A second writ of sci. fa. against bail not having lain in the sheriff's office four whole days, exclusive of the day on which it was lodged, the return-day, and an intervening Sunday, it was held to be irregular. *Dicas v. Perry*, 2 D. & R. 869.

Holy Thursday is not a juridical day, although the office be open upon paying an extra fee. *Scott v. Larkins*, 7 Bing. 109; 4 M. & P. 748; 1 Dowl. P. C. 201.

The days must be exclusive of the day on which it was lodged and the return-day of the ca. sa. *Dicas v. Perry*, 2 D. & R. 869; *S. P. Howard v. Smith*, 1 B. & A. 528.

So must an alias sci. fa. *Wilson v. Farr* 4 B. & A. 537. And see *Combe v. Cuttill*, 3 Bing. 162; 10 Moore, 534.

A sci. fa. must lie in the sheriff's office the last four days before the return. *Forty v. Hermer*, 4 T. R. 583.

For the purpose of fixing the bail on sci. fa., the ca. sa. against the principal must lie the four last days in the office before the return; and the bail having once been prepared to render their principal in time, which they then omitted to do, in consequence of a rule nisi taken out by them on the suggestion of the court, with a view to an arrangement out of court between the parties (the principal being a lunatic), which rule was afterwards discharged without providing for the bail to be placed in the same situation that they were in before; the court, in a subsequent term, permitted the bail to take the same objection to the regularity of the proceedings, though they had before in the same term, before they were aware of this objection, brought forward another objection, which was over-ruled. *Cock v. Brockhurst*, 13 East, 588.

If the second writ of sci. fa. be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the sci. fa. book in the sheriff's office, which is merely a private book for his own convenience. *Heyward v. Rennard*, 3 East, 570.

#### (b) Form of Sci. Fa.

There must be fifteen days between the return of the first sci. fa. and the return of the second. *Peale v. Watson*, 2 W. Black. 932.

In C. P. provided there be fifteen days between the teste of the first and the return of the second, a second writ of sci. fa. may be tested and issued before the quarto die post of the return of the first. *Combe v. Cuttill*, 3 Bing. 162; 10 Moore, 534.

Sunday may be reckoned as a day in one of the four days which must elapse between the return of the second writ and signing judgment. *Id.*

Unless it be the last. *Id.*

Where there is only one sci. fa. against bail, and the proceedings are by bill, there need be only four days exclusive, between the teste and return of it. *Bell v. Jackson*, 4 T. R. 663.

A sci. fa. against bail may be sued out after a ca. sa. is returned, though not regularly filed; and the shortness of notice to the bail is immaterial. *Hunt v. Cox*, 1 W. Black. 393; 3 Burr. 1360.

The plaintiff may sue out a sci. fa. against the bail, on the return-day of the ca. sa. against the principal. *Shivers v. Brooks*, 8 T. R. 628.

A sci. fa. against bail upon a writ of error on a judgment in the C. P. for damages, must be to shew cause why the plaintiff should not have execution of "the debt aforesaid," and not of the "damages aforesaid." *Barlow v. Evans*, 1 Wils. 99.

#### (c) Necessity for Summons.

No judgment shall be signed for non-appearance, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one sci. fa. *Reg. Gen. K. B. C. P.*, and *Exch. H. T.*, 2 Wil. 4; 1 Dowl. P. C. 193; 8 Bing. 300; 1 M. & Scott, 426; 3 B. & Adol. 385; 2 C. & J. 190; 2 Tyr. 348; 4 Bligh, N. S. 602.

The rule applies to the case of both principal and bail. *Jackson v. Elam*, 1 Dowl. P. C. 515.

Though two writs of sci. fa. on a judgment had been issued previously to the rule of Hil. 2 Will. 4, which requires notice to be given to the bail, still judgment cannot be signed on such writs of sci. fa. without complying with that rule, and giving a rule for appearance is not sufficient. *Kennedy v. Oxford (Lord)*, 1 Dowl. P. C. 613.

The court will not allow judgment to be signed for non-appearance to a sci. fa. against bail, unless it be shewn that the bail have been summoned, or that efforts, and what efforts, have been made to summon them. *Higgins v. Wilkes*, 1 Dowl. P. C. 447.

The plaintiff's attorney left two writs of sci. fa. at the sheriff's office, and directed that they should be returned nihil, at the same time expressing apprehension lest the proceedings should come to the knowledge of the bail; the court, at the instance of the bail, ordered the proceedings to be set aside. *Wilson v. Biden*, 4 M. & P. 537.

Some notice must previously have been given of suing out a sci. fa. against bail. *Wright v. Page*, 2 W. Black. 837; 2 Tidd's Prac. 1178.

It was not necessary to give direct notice of a sci. fa. to the bail, it being their duty to watch the sheriff's office where it is lodged. *Id.*

The court set aside proceedings in scire facis against bail, because they were summoned only an hour after the court rose on the return-day; the sheriff's return of scire facis does not estop the bail from shewing that they were summoned so late on the return-day that they could not bring in their principal before the rising of the court. *Webb v. Harvey*, 2 T. R. 757; *S. P. Peel v. Wills*, 2 T. R. 758, n.

But it was sufficient to fix the bail if they were summoned before the rising of the court on the return-day. *Clarke v. Bradshaw*, 1 East, 86.

Where an action was commenced in June, 1822, and after the defendant became bankrupt, the plaintiff proceeded and signed interlocutory judgment, and issued a ca. sa. in Michaelmas term, 1823, to which non est inventus was returned, on which the plaintiff proceeded by sci. fa. against the bail, and signed judgment thereon on the 26th February, 1824: the court refused to set aside the proceedings against the bail, even upon payment of costs, although it was sworn that they knew nothing of the proceedings after the declaration against the principal, or against themselves, until they received notice on the 27th February that they were fixed. *Smyrne v. Bland*, 4 D. & R. 373.

Where two writs of sci. fa. had been sued out

against the defendant on a recognizance of bail, and to which two nihilis were returned, on which judgment was signed and execution issued, the court refused to set aside such judgment and execution, on the ground that the bail had no notice of the sci. fa. having issued, although they lived in the county of Middlesex; as by their entering into a recognizance they made themselves personally liable; and it was their duty to watch the proceedings in the sheriff's office. *Smith v. Crane*, 8 Moore, 8.

(d) Appearance.

A notice in writing to the plaintiff, his attorney, or agent, is a sufficient appearance by bail on a sci. fa. *Reg. Gen. K. B., C. P., and Exch., H. T.*, 2 Will. 4; 1 Dowl. P. C. 193; 8 Bing. 300; 1 M. & Scott, 426; 3 B. & Adol. 385; 2 C. & J. 190; 2 Tyr. 348; 4 Bligh, N. S. 602.

On a four-day rule, for bail in sci. fa. to appear and plead in term, Sunday, though an intermediate day, is not to be reckoned. *Wathen v. Beaumont*, 11 East, 271.

Where a rule to plead to an alias sci. fa. was given for the 3d instead of the 8th February, but judgment was not signed against the bail until the 9th, the court of Exchequer, considering it as a clerical error, refused to set aside the proceedings. *Diss. Hullock. Smith v. Parker, McClell. & Y.* 483.

(e) Pleadings.

*Venue.*—A scire facias, upon a recognizance taken in Serjeant's Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only; and the form of the recognizance shall not express where it was taken. *Reg. Gen. K. B., C. P., and Exch., H. T.*, 2 Will. 4; 1 Dowl. P. C. 193; 8 Bing. 300; 1 M. & Scott, 426; 3 B. & Adol. 385; 2 C. & J. 190; 2 Tyr. 348; 4 Bligh, N. S. 602.

A scire facias upon a recognizance of bail taken in open court in K. B., is properly suable in Middlesex, where the record is, though all the previous proceedings, which commenced by original, were in London. And semble, that it could not be sued elsewhere than in Middlesex. *Cazeter v. Burke*, 5 East, 461.

A sci. fa. on a recognizance of bail in London may be there sued, though the bail be inrolled in Middlesex. *Kenny v. Thornton*, 2 W. Black. 768.

Where the defendant was sued by original in London, the sci. fa. against the bail must be sued there also; and it does not help the plaintiff who sued out the sci. fa. in Middlesex, that the bail had by mistake been put in there. *Harris v. Calvert*, 1 East, 603. And see *Smith v. Miller*, 7 T. R. 96.

*Declaration.*—Where a plaintiff issued a joint sci. fa. against A. and B., bail of C. and D., upon which A. only was summoned, B. not being found, and A. entered an appearance for himself only:—Held, that a declaration against him alone was irregular. *Seinsbury v. Pringle*, 10 B. & C. 751.

In declaring in sci. fa. on a recognizance of

bail, taken in an action by original, there is no incongruity in stating that the recognizance was taken in an action "then lately commenced and depending in the court of K. B.;" for the action may be said to commence in that court when its jurisdiction attaches upon the original writ sued out of Chancery. *Mayo v. Rogers*, 14 East, 539.

Sci. fa. to have execution for damages and costs recovered against J. B. upon a recognizance of bail, conditioned in case the said J. B. and G. K. should be condemned that J. B. and G. K. should pay, &c. or render themselves, the plaintiffs allege that J. B. and G. K. have not paid, &c. or rendered themselves, according to the form and effect of the recognizance:—Held, on special demurrer, that the breach was ill assigned for non constat, but that J. B. who was condemned, has paid or rendered. *William v. Thorley*, 4 M. & S. 33.

*Pleas, &c.*—The bail cannot take advantage of a mere irregularity in the scire facias by pleading. *Powell v. Taylor*, 2 Tidd's Prac. 1162.

The practice of the court is pleadable where the very merits of the case depend upon it: therefore, where bail sued in scire facias upon their recognizance, pleaded that no ca. sa. was duly sued, returned, and filed against the principal, according to the custom and practice of the court; to which the plaintiff in reply shewed a writ of ca. sa. issued into Middlesex: it is no departure for the defendants to rejoin, that the venue in the action against the principal was in London, for that sustains the plea. *Dudlow v. Watchorn*, 16 East, 39.

It is a departure where in sci. fa. against bail who pleaded that there was no ca. sa. against the principal, they rejoined to a replication that there was, that it did not lie four days in the sheriff's office. *Elliott v. Lane*, 1 Wils. 334.

And such a rejoinder is bad, for attempting to put in issue mere practice. *Sandon v. Proctor*, 7 B. & C. 600. And see *Cherry v. Powell*, 1 D. & R. 50.

A writ of error allowed, though not returned, is in itself a supersedeas; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the ca. sa. against the principal, so as to avoid proceedings against them in scire facias upon the recognizance of bail, prosecuted after a return by the sheriff of non est inventus made pending such writ of error. *Sampson v. Brown*, 2 East, 439.

A plea of the bankruptcy and certificate of the principal is bad, to a sci. fa. on a recognizance. *Beddome v. Holbrooke*, 1 B. & P. 450, n.: *S. P. Donnelly v. Dunn*, 2 B. & P. 45.

If they can plead it at all, the plea must state the special circumstances, or it will be bad on special demurrer. *Donnelly v. Dunn*, 1 B. & P. 448.

To scire facias against bail upon their recognizance, the defendant may plead in bar against the execution, that, before the issuing of the alias writ of scire facias, the plaintiff became a bankrupt, and a commission issued against him, on

which he was declared a bankrupt before the return of the writ, and his effects, debts, &c., assigned to the provisional assignee, who before plea pleaded, assigned to the assignee under the commission, who was entitled to sue the defendants. *Kinnear v. Tarrant*, 15 East, 622; 1 Rose, 350.

To a plea of scire facies against bail, that the principal died before the return of any ca. sa., a replication stating a particular ca. sa., and that the principal was alive at the return of that ca. sa., must conclude with an averment. *Henderson v. Withy*, 2 T. R. 576.

In a former case, held, that it ought to conclude to the court. *Chandler v. Roberts*, 1 Dougl. 58.

A replication to a plea of the death of the principal before the issuing of the first sci. fa., and before the return of any ca. sa., in a recognizance of bail which sets out a ca. sa. and return, must aver that the principal was then living, and conclude with a prayer of judgment, and not traverse the death and conclude to the country. *Filwood v. Popplewell*, 2 Wils. 65.

In an action on a recognizance of bail, where the defendant pleads no ca. sa. issued, a replication setting out the ca. sa., and concluding with a verification by the record, and a prayer that the record may be inspected by the court, is good, though no formal issue be joined. *Jackson v. Wickes*, 2 Marsh. 354; 7 Taunt. 30.

Though the original action was for damages, it is not demurrable in a replication in sci. fa. against bail, to pray judgment of debt and damages. *Roe v. Roe*, 2 Chit. 322.

#### 4. Staying Proceedings.

##### (a) On ground of Writ of Error.

To entitle bail to a stay of proceedings pending a writ of error; the application must be made before the time to surrender is out. *Reg. Gen. K. B. & Excheq.*, H. T. 2 W. 4; 1 Dowl. P. C. 194; 8 Bing. 300; 1 M. & Scott, 427; 3 B. & Adol. 386; 2 C. & J. 196; 2 Tyr. 348; 4 Bligh, N. S. 602.

A writ of error allowed is a supersedeas in law to all further proceedings in the court below; and, therefore, proceedings were set aside, with costs, for irregularity, where the ca. sa. (being returnable on a day after the allowance of the writ of error) was returned, after notice of such allowance, on the same day; and sci. fa. afterwards taken out against the bail. *Miller v. Newbald*, 1 East, 652; *S. P. Sampson v. Brown*, 2 Esp. 439.

Where a ca. sa. is returnable against the principal on a particular day, before which a writ of error is allowed and served; that operates as a supersedeas to any proceedings against the bail, though the ca. sa. has lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*, 3 T. R. 390.

A writ of error is allowed two days after the return of the ca. sa., the bail may be sued pending the writ of error, which is no supersedeas. *French v. Casenove*, 1 Anst. 176.

Where a writ of error is allowed before the expiration of the time permitted to the bail to ren-

der their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Sprang v. Monpriatt*, 11 East, 316.

The court will stay proceedings against bail, until a writ of error brought in the original action be determined, though the application be not made within the four days allowed to the bail to surrender the principal. *Edwards v. Jameson*, and *Edwards v. McCabe*, Forrest, 25.

Upon a writ of error, sued out by the principal after the bail are fixed, and proceedings against them in scire facies, the court will only stay proceedings against the bail pending the writ of error, on the terms of the bail undertaking to pay the condemnation money, and the costs of the scire facies, and (if it be a case in which there is no bail in error) to pay the costs also of the writ of error, if judgment should be affirmed. *Buchanan v. Alders*, 3 East, 546; *S. P. Capoue v. Blyton*, 1 N. R. 67.

If proceedings against bail are stayed, upon undertaking to pay debt and costs within four days after affirmance of judgment, it means the final affirmance of it. *Kershaw v. Cartwright*, 5 Burr. 2819.

The court will not stay proceedings against the bail, pending a writ of error on the judgment against the principal, if the principal has confessed that the writ of error is brought purely for delay. *Pool v. Charnock*, 3 T. R. 79.

##### (b) Other Cases.

The judgment in an original action, and the judgments in the actions against the bail, may be set aside upon one motion, and one affidavit intitled in the original action. *Winder v. Wood*, 3 B. & P. 118.

When a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time is obtained, the proceedings are suspended for all purposes till the rule is discharged. *Seayne v. Crammond*, 4 T. R. 176.

Where bail is put in above, an injunction to stay proceedings against the principal extends to proceedings against the bail. *Carte v. Carte*, Amb. 32.

#### XXI. BAIL UPON REMOVAL FROM INFERIOR COURTS.

Upon removal of a cause by certiorari, out of the court of the honour of Gloucester, the pledges below are discharged by putting in and perfecting bail above. *Taylor v. Shapland*, 3 M. & S. 322.

Where one of several defendants removes a cause by certiorari from the Mayor's Court into K. B., he must put in bail for the other defendants as well as for himself. *Keat v. Goldstein*, 7 B. & C. 525; 1 M. & R. 305.

Or, a procedendo will be awarded. *Id.*

The cause cannot be removed into the King's

Bench, without bail being put in by both of the defendants. *Jameson v. Schenewer*, 1 Dowl. P. C. 175.

By the statute 43 Geo. 3, c. 46, s. 6, a defendant taken or charged in custody at the suit of any person or means process, issuing out of the courts at Westminster, and detained after the return of process, may be bailed in vacation before one of the judges; but the act does not extend to a person in custody upon a habeas corpus removing the cause from the Mayor's Court into the K. B. *Steer v. Smith*, 1 Chit. 44.

Where a pone has issued for the purpose of removing a plaint out of the county court, and the sheriff has notwithstanding proceeded with the plaint, the defendant in order to obtain an attachment against the sheriff, must shew that the recognizance required by the 19 Geo. 3, c. 70, s. 6, has been entered into. *Grimshaw v. Emerson*, 1 Dowl. P. C. 337.

Where the plaintiff in an inferior court of record, brought an action for goods sold and delivered to the amount of 8*l.* 17*s.* 3*d.*, but laid his damages in the declaration at 20*l.*; and the defendant, after interlocutory judgment signed against him, removed the cause into the court of K. B. by habeas corpus cum causa, without entering into recognizance to pay the debt and costs, as required by the statute 19 Geo. 3, c. 70, s. 6, the court refused a procedendo. *Attenborough v. Hardy*, 4 D. & R. 362; 2 B. & C. 802.

Where a defendant, in an action brought in an inferior court for defamation, after entering a common appearance, and suffering judgment by default, removed the proceedings, by certiorari, into the court of K. B., without entering into any recognizance:—Held, to be within stat. 51 Geo. 3, c. 124, s. 3; and the latter court awarded a procedendo for the defendant's default in not entering into the recognizance, as required by that statute, the damages in the declaration being laid only at 13*l.* *Lee v. Goodlad*, 4 D. & R. 350.

Procedendo awarded where an action of trover had been removed by certiorari from an inferior court and the return filed, the defendant not having entered into a recognizance to pay debt and costs as required by the statute 7 & 8 Geo. 4, c. 71, s. 6. *Furnish v. Suann*, 10 B. & C. 458.

Plaintiff in an inferior court, from which a cause is removed by habeas corpus, and a rule for better bail given, is not entitled to a procedendo after render of the defendant, and notice of such render, although such render be made after the day on which the rule for better bail expires. *Farquharson v. Fouchecour*, 16 East, 387.

The plaintiff in an inferior court, from which a cause was removed by habeas corpus, and a rule for better bail given, was held not entitled to a procedendo after the render of the defendant, and notice thereof, although it was not made until after the day on which the rule for better bail had expired. *Johnson v. Walker*, 4 B. & A. 535.

Where the rule for better bail was served on the 14th of January, and the bail did not justify till the 19th of the same month:—Held, that the

plaintiff's procedendo was regular. *Davis v. Tuddenham*, 1 Chit. 130.

If, after a procedendo to carry back a cause to an inferior court, the plaintiff recover, and then sue out a scire facias against the bail below, and they remove the proceeding against them into the court of K. B. by habeas corpus, this court will award a procedendo in the suit against the bail. *Dixon v. Heslop*, 6 T. R. 365.

Where the plaintiff intends to object to bail put in on a habeas corpus, he should obtain a rule or order for better bail, which will entitle him to a procedendo, unless bail are perfected in four days after the service of the rule, and thereupon the same or different bail must justify as in other cases within four days if in term, or if in vacation on the first day of the ensuing term. *Anon.* 1 Chit. 130, (s).

In a cause removed by habeas corpus from the Mayor's court, bail having been put in, the plaintiff served a rule for better bail, wrongly entitled A. v. B. instead of A. v. B. and C.; the defendant thereupon gave notice of justification of the same bail, and afterwards that he should add one and justify:—Held, this was a waiver of the irregularity, for it is not usual to give notice of justification without an exception, though it may be done, and therefore the notice of justification refers to and adopts the rule for better bail. *Aldridge v. Schroder*, 2 Smith, 75.

The time allowed for excepting to bail put in upon a habeas corpus shall be twenty days. *Reg. Gen. K. B., C. P. and Excheq.*, H. T. 2 W. 4; 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 175; 2 Tyr. 343; 4 Bligh, N. S. 595.

A procedendo cannot issue after service of the rule for the allowance of bail, on the ground, that the plaintiff was called by a wrong name in the notice of bail; but the rule for such allowance should be first set aside. *Rice v. Chambers*, 1 Chit. 575.

A plaintiff declared in the City Court in debt, or a concessit solvere, and the cause being removed by habeas corpus into K. B. declared de novo in case:—Held, that he did not lose his bail, as it was the same cause of action. *Gunn v. McHenry*, 1 Wils. 277.

## XXII. BAIL IN ERROR.

### 1. Statutes.

By 3 Jac. 1, c. 8, no execution shall be stayed or delayed upon or by any writ of error or super-seedeas thereupon to be issued, for the reversing of any judgment in any action of debt upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action of debt for rent, or upon any contract, unless the person in whose name the writ of error shall be brought, with two sufficient securities such as the court shall allow of, shall become bound to the party for whom the judgment shall be given, by recognizance in double the sum adjudged to be recovered, to prosecute the writ of error with effect; and also to satisfy and pay (if

judgment shall be affirmed) all and singular the debts, damages, and costs adjudged upon the judgment, and all costs to be awarded for the delaying of execution.

The 13 Car. 2, stat. 2, c. 2, extends this to actions on the statute of Ed. 6, for not setting out tithes, of assumpsit for payment of money, of trover, covenant, detinue, and trespass.

The 16 & 17 Car. 2, c. 8, extends it to any action personal whatsoever, after verdict and judgment; and directs that, in ejectment and writs of dower, no execution shall be delayed by writ of error, unless the plaintiff shall be bound in such reasonable sum as the court to which the writ of error shall be directed shall think fit, with condition that if the judgment shall be affirmed, or the writ of error discontinued, or the plaintiff be nonsuit, he shall pay such costs and damages as shall be awarded.

The 1 Geo. 4, c. 87, s. 3, requires two bail in error.

The 6 Geo. 4, c. 96, enacts that upon any judgment in any personal action, execution shall not be stayed or delayed by writ of error, or supersedeas thereon, without the special order of the court or some judge thereof, unless a recognizance with condition, according to 16 & 17 Car. 2, be first acknowledged in the same court—which extends also to judgments by default as well as on verdict.

## 2. When necessary.

Since 6 Geo. 4, c. 96.]—Bail in error, under the latter statute, are not dispensed with where the error, though real, is only of form. *Wadsworth v. Gibson*, 4 Bing. 572; 1 M. & P. 501.

A person, who is plaintiff both below and above, need not give bail in error. *Divergier v. Fellowes*, 1 Dowl. P. C. 224; 5 M. & P. 403; 7 Bing. 463.

S. P. on 3 Jac. 1. *Freeman v. Garden*, 1 D. & R. 184.

Where, therefore, upon demurrer to a plea, judgment was given in C. P. for the defendant below, and the plaintiff brought a writ of error in the court of King's Bench, and the judgment of the court of C. P. was affirmed; after which he brought a writ of error to the House of Lords, upon which a recognizance of bail in error was entered into. The court ordered it to be cancelled, on an application by the bail, although it was sworn that the plaintiff was a foreigner and insolvent. *Id.*

In ejectment, where the defendant has given an undertaking to give the plaintiff judgment of the term preceding the trial, in case he shall obtain a verdict, and has also entered into the recognizance, with two sureties, to pay costs and damages, both of which are required by the 1 Geo. 4, c. 87, s. 1, he cannot afterwards sue out a writ of error upon the judgment, so as to operate as a stay of proceedings, without entering into a further recognizance with two sureties, with condition pursuant to the provisions of the 16 & 17 Car. 2, c. 8, s. 3. *Roe d. Durant v. Moore*, 4 M. & P. 761; 7 Bing. 124.

Previously to 6 Geo. 4, c. 96.]—Under 3 Jac. 1, c. 1, no bail was necessary in error on a judgment in debt upon a prior judgment. *Biddleston v. Whitel*, 3 Burr. 1545; 1 W. Black. 507.

Nor on a judgment in debt for goods sold and delivered, and on an account stated. *Alexander v. Biss*, 7 T. R. 449.

Nor on a judgment by default in debt, on a count for a promissory note. *Trier v. Bridgman*, 2 East, 359.

Nor generally, unless it appeared that the action was brought on a specific contract. *Ablett v. Ellis*, 1 B. & P. 249.

Nor in debt, upon a judgment recovered (by verdict) in Ireland, upon a judgment by default. *Parkins v. Stewart* (in error), 9 Price, 1.

A writ of error upon a judgment in debt on a recognizance of bail, was a stay of execution, without bail. *Dell v. Wild*, 8 East, 240.

But not in debt on bond, conditioned for the payment of money, and also for performing all covenants in a mortgage deed. *Butler v. Brushfield*, 10 East, 407.

Nor in debt on a bond conditioned for re-investing stock, and paying the dividends in the mean time. *Gillingham v. Myers*, McClell. & Y. 147.

But it was a debt on a bond given by a third person for payment of a sum certain by instalments. *Chauvert v. Alfrey*, 2 Burr. 746; S. C. nom. *Chauvet v. Alfred*, 2 Ld. Ken. 437.

And an indemnity bond was not a money bond for payment of money only, within the statute requiring bail. *Planagan v. Watkins*, 2 D. & R. 549; 1 B. & C. 316. But see *Thrale v. Vaughan*, 1 Wils. 19; 2 Stra. 1190.

A mortgage deed containing a covenant for the re-payment of the money was within the statute, a contract upon which bail in error was necessary. *Buckney v. Metham*, 3 Taunt. 383.

Where a writ of error was brought upon a judgment on demurrer, in the case of a sci. fa. sued out pursuant to the statute 8 & 9 Will. 3, c. 12, s. 8, bail in error was not required. *Sparks v. O'Kelly*, 1 Taunt. 168.

But in error on a judgment, after verdict upon a sci. fa. against bail, bail in error was required, the sci. fa. being a personal action. *Palfrey v. Thomson*, 2 W. Black. 1227.

It was doubtful whether special bail was requisite, upon error returnable in parliament, upon judgment in K. B. in debt upon recognizance in error. *Trinder v. Watson*, 3 Burr. 1566. And see *Martin v. Justice*, 8 T. R. 639.

Where there was one count on which judgment was entered up, for which bail in error was not required, it seemed sufficient to excuse the plaintiff in error from further bail. *Trier v. Bridgman*, 2 East, 359; S. P. *Webb v. Geddes*, 1 Taunt. 540.

Special bail was required upon reversing an outlawry. *Sercoale v. Hanson*, 1 Wils. 3; 2 Stra. 1178. S. P. *Crascraft v. Gledose*, 3 Burr. 1482.

But only where special bail was originally re-

quired. *Campbell v. Daley*, 3 Burr. 1920. And see *Summervell v. Watkins*, 14 East, 536.

The bail put in by defendant upon reversing an outlawry were bail in the original suit. *Hesse v. Wood*, 4 Taunt. 691.

Though a writ of error has been allowed, yet, if bail in error be not afterwards put in, it will be of no avail, though the defendant in error has treated the writ as a nullity. — *v. Nicholls (Gent.)*, 2 Chit. 106.

Where writ of error is amended in K. B., new bail must be given to the amended writ in C. P., and the plaintiff below shall not take out execution for want of bail. *Rafael v. Verelst*, 2 W. Black. 1067.

### 3. Putting in.

#### (a) When.

A defendant has four clear days after final judgment to put in bail in error. *Bennet v. Nichols*, 4 T. R. 121.

The bail are to be put in within the four days, without reference to the time of the allowance, or serving the copy of it. *Jacques v. Nison*, 1 T. R. 279.

The four days are to be reckoned from the time when the taxation of costs is completed by the insertion of the sum. *Blackburn v. Kymer*, 1 Marsh. 278; 5 Taunt. 672.

If the writ of error be allowed before judgment, the time for putting in bail (which is four days) runs from the judgment; if after judgment, from the time of the allowance. *Gravall v. Stimpson*, 1 B. & P. 478.

#### (b) What Amount.

*Generally.*—A recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and, in case of a penalty, in double the sum really due, and double the costs. *Reg. Gen. K. B., C. P., & Exchequer*, H. T. 2 W. 4; 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 175; 2 Tyr. 343; 4 Bligh, N. S. 595.

Bail in error must justify in double the sum for which judgment was entered up. *Phillipson v. Browne*, 2 Chit. 105.

But bail in error on a judgment in debt on a bond, need only justify in the sum recovered. *Moore v. Lynch (in error)*, 1 Wils. 213.

If, on a bond debt, double the sum secured by the bond be the sum for which the bail bind themselves in the recognizance in error, it is sufficient; though a further sum be due for interest and costs, and nominal damages have been recovered. *Dizon v. Dizon*, 2 B. & P. 433.

A recognizance of bail in error for a less sum than double the sum recovered by the judgment, does not stay the execution. *Reed v. Cooper*, 5 Taunt. 320.

*In Ejectment.*—In ejectment, the recognizance of bail in error shall be taken in double the yearly value, and double the costs. *Reg. Gen. K. B.*, VOL. I.

C. P., & Exchequer, H. T. 2 W. 4; 1 Dowl. P. C. 186; 8 Bing. 291; 1 M. & Scott, 418; 3 B. & Adol. 377; 2 C. & J. 175; 2 Tyr. 343; 4 Bligh, N. S. 596.

Though the stat. 16 & 17 Car. 2, provides that no execution in ejectment shall be stayed unless the plaintiff in the writ of error shall be bound for the costs in case judgment be affirmed, &c., yet by reasonable construction it is sufficient if he procure proper sureties to enter into the recognizance of bail; but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be. The practice was to take the recognizance in double the improved rent, and the single costs of the ejectment. *Keene d. Byron (Lord) v. Deardon*, and *Stott v. Lomax*, 8 East, 298.

Bail in error on a judgment in ejectment justify in double the sum. *Thomas v. Goodtitle*, 4 Burr. 2501.

When the plaintiff sued out execution in ejectment, after error brought by the defendant, on the ground that although the latter had entered into a recognizance in compliance with the stat. 16 & 17 Car. 2, c. 8, he had not given notice of the terms of such recognizance:—Held, that as those terms were such as had been invariably used, no notice was necessary, and the execution was set aside with costs. *Doe d. Webb v. Goundry*, 1 Moore, 118; 7 Taunt. 427. And see *Highgate Archway Comp. v. Nash*, 1 B. & A. 597; 2 Chit. 325.

The plaintiff in error in ejectment is not required to find bail to join in his recognizance to pay costs on affirmance. *Id.*

In ejectment it is sufficient if the plaintiff in error enter into a recognizance by himself without any bail. *Assn. 2 Tidd's Prac.* 1211.

#### (c) Character of Bail.

The same persons who were bail in the court of K. B. may justify again as bail upon a writ of error returnable in parliament. *Martin v. Justice*, 8 T. R. 639.

Where the plaintiff in error, within four days after being ruled to put in better bail, viz. on the day after Hilary Term, gave notice that he should justify the same bail on the first day of the ensuing term, and two days before the first day of that term gave notice of fresh bail:—Held, that the latter bail were not entitled to justify, there being no reason assigned for the non-attendance of the former bail. *Lunn v. Leonard*, 1 M. & S. 366.

If hired bail be put in on a writ of error, the plaintiff may issue execution. *Broune v. Brown*, 12 Moore, 172; 4 Bing. 38.

Sham bail in error may be treated as a nullity, and execution may issue. *Bradley v. Comperts*, 1 M. & R. 567.

Where sham or hired bail, who are insolvent, and of whom notice has been given, and to whom no exception is entered, become bail in error, the plaintiff may treat the writ of error and the bail as nullities, and take out execution. *Ward, v. Levi*, 2 D. & R. 421; 1 B. & C. 268.

As execution after added bail is regular, and the court will discharge a rule for setting it aside with costs. *Cram v. Kitchen*, 1 B. & C. 269, n.

#### (d) Recognizance and Proceedings.

As to the form of the recognizance in error, see *Nease v. Wood*, 4 Taunt. 691; *Havelock v. Geddes*, 13 East, 623; *Mattheus v. Gibson*, 8 East, 527; and *Graham v. Grill*, 1 M. & S. 409.

A recognizance entered into by the bail in error without the principal is good. *Dixon v. Dixon*, 2 B. & P. 443.

The names of the plaintiff and defendant in the original action must be retained in the case of bail in error, until the transcript of the record is carried over to the court of error. *Smith's bail*, 3 M. & P. 242.

Money cannot be paid into court in lieu of bail in error, unless by consent. *Collins v. Gwynne*, 2 M. & Scott, 775.

#### 4. Justification and Notice.

Where bail in error were regularly put in, and properly described in the notice, and were described as the bail "already put in" in the notice of justification:—Held sufficient, although it was objected that their names and additions should have been inserted in the notice of justification, as well as in the notice of their being put in. *Richardson v. Mellish*, 9 Moore, 579.

Bail in error were put in in the vacation, and excepted to, and the plaintiffs in error gave notice that they would justify on the first day of the next term; they did not so justify:—Held, that the bail were not entitled to have an exoneretur entered on the bail-piece. *Adnam v. Wilks*, 6 B. & C. 287; 9 D. & R. 397.

If bail in error are excepted to in vacation, and the notice of exception require them to justify before a judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term. *Reg. Gen. K. B., C. P., and Exch.*, H. T. 2 Will. 4; 1 Dowl. P. C. 185; 8 Bing. 299; 1 M. & Scott, 417; 3 B. & Adol. 376; 2 C. & J. 172; 2 Tyr. 342; 4 Bligh, N. S. 595.

Where bail in error was put in in vacation, and excepted to, and the plaintiff in error gave notice that they would justify on the first day of next term, and before that day nonprossed his own writ of error, and the bail did not justify:—Held, that the bail were not entitled to stay proceedings in an action against them upon the recognizance, nor to have an exoneretur entered on the bail-piece. *Dickenson v. Heseltine*, 2 M. & S. 210.

Bail in error, who refuses to justify, may have his name struck out of the bail-piece at any time. *Jones v. Tubb (in error)*, 1 Wils. 337.

Where, on opposing bail in error, one of them acknowledged that he did not know the plaintiff in error, and that he had become bail at the request of his attorney, who had told his son that if his father became bail, he should come to no harm; the court of C. P. ordered him to be rejected, and refused to allow further time for an-

other to justify in his stead. *Capon v. Dillmore*, 8 Moore, 516; 1 Bing. 423.

#### 5. Changing, adding, and giving Time.

Bail in error cannot be changed. *Anon.* 2 Chit. 84.

Although it is a general rule not to grant time for adding and justifying bail in error, in lieu of those of whom notice of justification has already been given, yet, if the bail are prevented from coming up by any misconduct of the opposite party, time will be given to put in other bail. *Dyott v. Dunn*, 1 D. & R. 9.

Time was refused to perfect bail in error, where no real error could be suggested, as the court thought it brought merely for delay. *Handasyde v. Morgan*, 2 Wils. 144.

Where the plaintiff in error was ruled in vacation to put in better bail, and took no notice of it until four days before the next term, when he gave notice of added bail for the first day of the term, the court would not permit the bail to justify. *Ostreich v. Wilson*, 1 M. & S. 367, n.

Where, in error, the original bail had been alarmed by the defendant in error, and therefore would not become bail; further time was refused to put in bail in error, unless some error on the record was shown, and the amount of the judgment deposited with the master. *Anon.* 1 Dowl. P. C. 32.

#### 6. Liability of Bail in Error.

Bail in error cannot surrender the principal, but must pay the money if judgment be affirmed. *Anon.* Loft, 237.

As bail in error cannot surrender the principal, they are not entitled to relief though the principal become a bankrupt pending the writ of error. *Southgate v. Braithwaite*, 1 T. R. 624.

They are not liable for interest, although the original action was on a promissory note. *Anon.* 6 Price, 338.

Nor are they chargeable in an action upon their recognizance with *meame profita*, where they have not been ascertained by writ of inquiry, pursuant to 16 & 17 Car. 2, c. 8. *Dee v. Reynolds, (in error)*, 1 M. & S. 247.

If a defendant (the plaintiff in the action), upon judgment being affirmed, take in execution the body of the plaintiff in error, for the debt, damages, and costs in error, he does not thereby discharge the bail in error, but may sue them on their recognizance. *Perkins v. Pettit*, 2 B. & P. 440.

Bail in error, who were excepted to and did not justify, were relieved from proceedings against them, though no other bail had been put in; but they were made to pay the costs up to that time, the plaintiff having been induced by former cases to proceed against them. *Gould v. Holmstrom*, 7 East, 580; 3 Smith, 575.



BAILIFF—*See* SHERIFF.

## BAILMENT.

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## I. WAREHOUSEMEN.

A warehouseman is only bound to take reasonable and common care of any commodity entrusted to his charge. *Catiff v. Danvers, Peake*, 114—Kenyon.

His liability commences from the time the crane is applied to raise them into the warehouse; and it is no defence that they were injured by falling into the street, from the breaking of tackle, the carman who brought the goods having refused the offer of slings for further security. *Thomas v. Day*, 4 Esp. 262—Ellenb.

A warehouseman receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another. *Ogle v. Atkinson*, 5 Taunt. 759; 1 Marsh. 323.

Where an order is given previously to the delivery of goods to a bailee, carrier, or other person, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly; a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. *Streeter v. Horlock*, 1 Bing. 34.

Where A. hired a room in the house of B. at 2s. per week, for the purpose of depositing goods for safety, and kept the key of a padlock by which the room door was fastened, and the goods were stolen by one of B.'s family:—Held, that B. could not be sued as bailee for the value of the goods stolen. *Peers v. Sampson*, 4 D. & R. 636.

A warehouseman, who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is remeasured, and that before the malt in question was remeasured the seller became bankrupt. *Stonard v. Dunkin*, 2 Camp. 244—Ellenborough.

## II. HIRERS OF PROPERTY.

## 1. Generally.

The hirer of goods—as in the case of musical instruments hired to be used at the Opera House—is not answerable for a loss by fire. *Langman v. Calini, Abb. Ship*, 270, n.—Kenyon.

The hirer of a carriage by the year, under a written agreement, binding the carriage-maker "to keep the same in perfect repair without any further charges whatever," is not liable for repairs made necessary by accident, and not by the wilful default of the hirer. *Reading v. Menham*, 1 M. & Rob. 234—Denman.

Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sell it within the time, he cannot recover his charge for the hire. *Wright v. Melville*, 3 C. & P. 542—Best.

## III. OTHER BAILERS.

## 1. Generally.

The bailee of goods to be kept for hire is bound to take the same care of them as he would of his own; but if they are stolen by his servants he is not liable, without gross negligence on his part. *Finucane v. Small*, 1 Esp. 315—Kenyon.

A watchmaker is bound so to secure property placed in his hands in the way of his trade, as to protect it against depredations that may be committed by the persons in his employ. Therefore, where A. entrusted B. (who was a chronometer maker) with a chronometer to be repaired, and B. suffered his servant to sleep in the shop in which the chronometer was deposited; B. was held liable to A. for its value, B.'s servant having stolen it, and B. at the time, when the theft was committed, having deposited his watches in a more secure place than that in which the chronometer was left. *Clarks v. Barnshaws, Gow*, 30 —Dallas.

A workman for hire is not only bound to guard the thing bailed to him against ordinary hazards, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed. *Leck v. Maestaer*, 1 Camp. 138—Ellenborough.

A. lent a picture to B. who wished to shew it to C.; B. without any previous communication and unknown to C. sends the picture to his house, where it was accidentally injured:—Held, that C. was not responsible for not keeping the picture safely. *Lethbridge v. Phillips (Knt.)*, 2 Stark. 544—Abbott.

A., a general merchant, undertakes, voluntarily and without reward, to enter a parcel of goods the property of B., together with a parcel of his own of the same sort, at the Custom-house, for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A., having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or employment

which necessarily implied skill in what he had undertaken, is not liable to an action for the loss occasioned to B. *Sheills v. Blackburne*, 1 H. Black. 158.

If a thing be deposited by one with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. *May v. Harvey*, 13 East, 197.

## BANK OF ENGLAND. See PUBLIC COMPANY.

### BANKERS.

- I. STATUTES, 260.
- II. AUTHORITY AND DUTY, 260.
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- IV. LIEN OF BANKERS, 262.
- V. PAYMENTS. TO—See DEBTOR AND CREDITOR.
- VI. WHEN ALLOWED INTEREST—See INTEREST.

#### I. STATUTES.

The statutes relative to bankers are,

- 6 Anne, c. 22, s. 9.
- 7 Anne, c. 7, s. 61.
- 15 Geo. 2, c. 13, s. 5.
- 21 Geo. 3, c. 60, s. 12.
- 39 & 40 Geo. 3, c. 28, s. 15.
- 55 Geo. 3, c. 184, as to stamps.
- 7 Geo. 4, c. 46.
- 9 Geo. 4, c. 23.

By 7 Geo. 4, c. 46, empowering certain corporations or co-partnerships to carry on the business of banking, it is enacted, that before any such corporation, &c., shall issue bills or notes, or take up money on such bills, &c., an account shall be made out by the secretary or other person, being one of the public officers next mentioned, containing, among other things, the names and places of abode of two or more members of such corporation, &c., who shall have been appointed public officers thereof, and in whose names the corporation shall sue and be sued; such account to be annually returned to the Stamp Office between certain days, and a copy thereof to be evidence of the appointment of such officers.

In an action brought by such officer on behalf of a banking company, the return to the Stamp Office is not the only admissible evidence of his being one of the public officers, but it may be proved aliunde. *Edwards v. Buchanan*, 3 B. & Adol. 788.

#### II. AUTHORITY AND DUTY.

*Respecting Securities.*—Bankers may pledge bills deposited with them by a customer, though such customer be a creditor, when the parties receiving the bills are unacquainted with that circumstance. *Collins v. Martin*, 1 B. & P. 648; 2 Esp. 250.

So, they may negotiate them to such an extent as the necessary demands of the customer require, without his express authority. *Thompson v. Giles*, 3 D. & R. 733: S. C. not S. P. 2 B. & C. 422.

Where indorsed bills of exchange are deposited by a customer with a banker, the latter has the absolute power of disposing of them. Such absolute power, however, may be qualified by circumstances: as where the banker is agent for his country correspondent, to receive and pay bills for him, with an allowance for so doing; or, where, in an annual account stated between them, the banker has entered the bills as the property of the correspondent in the one case, considering him as a factor, and the bills as remitted for a particular purpose, viz. to be received and carried to account as cash when due, and his power over them limited to that object: in the second case, raising an express declaration of trust. Nor will it extend the power so restricted to agency, nor defeat such declaration of trust that the banker entered in his books the bills as cash, or that he so considered them, his own books not being evidence for him, though they might be against him. *Ex parte Pearce*, 1 Rose, 232; 19 Ves. jun. 25.

When a banker's acceptances exceed the cash balance in his hands, he holds collateral securities for value. *Bosanquet v. Dudman*, 1 Stark. 1—Ellenborough.

And he may recover against the acceptor of an accommodation bill (deposited with him as a collateral security before it became due), although the party who deposited the bill had it in his hands when it became due, and had received satisfaction from the drawer. *Id.*

*Payment of Checks.*—A banker in London, receiving bills from his correspondents in the country to whom they had been indorsed, to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a check upon a banker for the amount, although it turn out that such check is dishonoured. *Russell v. Hankey*, 6 T. R. 12.

A banker is bound by law to pay a check drawn by a customer within a reasonable time after the banker has received sufficient funds belonging to the customer; and the latter may maintain an action of tort against the banker for refusing payment of a check under such circumstances, although he has not thereby sustained any actual damage. *Marzatti v. Williams*, 1 B. & Adol. 415.

A. and B. severally kept cash at the same banking house. On the 13th of November, A. paid in a draft for 250*l.* drawn by B. in favour of the former, upon the bankers, to whom the latter was considerably indebted. The draft was received by the bankers' clerk without any thing being said respecting it, or any entry made of it in their books. In the course of the same day, the bankers discounted bills for B. to the amount of 1600*l.*, the produce of which they expressly appropriated to the charges of the day, consisting

of bills accepted by him for 1349l.; two drafts for 50l. each, given to other persons; and the draft for 250l. in favour of A., which was presented before the latter drafts. The bills and the two 50l. drafts, were paid by the bankers on the same day, leaving a balance only of 137l. in their hands. On the morning of the 14th they wrote a letter to A., stating that they had not carried the draft for 250l. to his credit, but that they would "retain it by them in the hope of its being provided for;" and they promised B. that they would pay it when they had funds. On that day the bankers discounted other bills for B. to the amount of 699l., the produce of which they specifically appropriated to claims upon him, amounting to 599l.; after which an unappropriated balance of 98l. remained in the banker's hands:—Held, that they were liable to A. for the whole amount of the 250l. draft in an action for money had and received, though they had not at any moment an unappropriated sum in their hands sufficient to cover the draft. *Kilsby v. Williams*, 1 D. & R. 476; 5 B. & A. 815.

Two several banking firms, carrying on business respectively in the same country town, were in the habit of exchanging notes and securities with each other, and settling their balance by a prescribed mode. One of the firms became bankrupt, and, at the time of the act of bankruptcy, each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprized of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly from their agents in London, who did not know the situation of the parties:—Held, that the solvent firm might recover the amount of the notes, in an action for money had and received against such assignee. *Edmeads v. Newman*, 2 D. and R. 568; 1 B. & C. 418. See 7 D. & R. 523.

But where money was paid into a banking-house for the purpose of taking up a particular bill, which was then lying there for payment; and the banker's clerk said at the time, that he could not give up the bill till he had seen his master:—Held, that it was money had and received to the use of the owner and holder of the bill, and could not be applied by the bankers to the general account of the acceptor who had paid in the money. *De Bernales v. Fuller*, 14 East, 590, n.; 2 Camp. 426.

If bankers pay a cancelled check drawn by a customer under circumstances which ought to have excited their suspicion, and induced them to make inquiries before payment, they cannot take credit for the amount. *Scholey v. Ramsbottom*, 2 Camp. 485—Ellenborough.

**Appropriation of Money.**—Where bankers had discounted a bill for one of their customers, and on the morning of the day on which it became due wrote it off in his account, having no notice that he was then dead:—Held, that they might reimburse themselves out of funds belonging to him in their hands. *Rogerson v. Ladbroke*, 1 King. 93; 7 Moore, 412.

The plaintiff and defendant each kept an account with a banker at M. In October the plaintiff desired the defendant to pay in to his account a sum due to him for rent. The defendant wrote to the plaintiff, stating that he had caused the amount to be transferred to his account, and the plaintiff sent him a receipt by return of post; the sum, however, was not actually transferred until the 8th of December. On the 9th, notice of the transfer was sent to the plaintiff by post, which did not reach him till the 11th. On the 10th the banker stopped payment:—Held, that the transfer was equivalent to payment. *Eyles v. Ellis*, 12 Moore, 306.

C. draws a check on his bankers, payable to A. and B., assignees of D., or bearer, and writes the name of their bankers across it. B. who has another private account with the bankers, pays the check into that account:—Held, that the bankers are justified in applying it to that account; the drawers writing the names of the bankers of the payees of the check across it not being, according to the custom of trade, information to the bankers that the money is that of the payees. *Stewart v. Lee*, M. & M. 158—Tenterden.

Where bankers employed to receive dividends in the funds, had in their own books credited their employers with the dividends as received, and had allowed them to draw without having any other funds in their hands:—Held, that the bankers were bound by the entries so acted on, though not communicated, and that they could not set up as a defence, that the entries had been fraudulently made by one of the partners, the money never having been received by the house. *Hume v. Bolland*, R. & M. 371—Best.

Certain stock was vested in trustees, upon trust, amongst other things, to pay the dividends to A. during his life, and, after his death, upon trust for his wife and children. M. & Co. were the bankers of the trustees, and employed by them to receive the dividends. During the life of A. the amount of the dividends on the stock was regularly carried to the account of A. in the books of the firm, and drawn for and received by him. A. died on the 23d of January, 1824, and on his death a new account was opened with the trustees in the books of M. & Co.; and in that account credit was given to the trustees for dividends, amounting to 1403l. as received in April and July, 1824, and the trustees were debited with several sums, amounting to 225l., paid by checks drawn upon the house, on the presumption that the dividends had been actually received. In point of fact, the above dividends had not been received by M. & Co.; F., a partner in that house, having, in the lifetime of A., sold and transferred the stock in question, by means of forged powers of attorney. F. continued, after this transfer, to enter in the day-book of M. & Co. the amounts of the half-yearly dividends, on the days when they would have become due, as if he had duly received the same at the Bank of England, which amounts were in the ordinary course of business regularly posted from such day-book to the credit of the trustees by the clerks of M. & Co. Commissions of bankrupt issued against the members

of the firm of M. & Co. in September and October, 1834:—Held, that at the date of those commissions the bankrupts were not indebted to the trustees for the balance of the dividends appearing by the books to have been received. *Hume v. Bolland*, 1 C. & M. 130; 2 Tyr. 575.

Held, also, that although the entries in the books, coupled with the payments on account of the supposed dividends, were prima facie evidence against the banking firm that they had had and received the amount of the dividends to the use of the trustees; yet, that inasmuch as the transfer under the forged power was absolutely void, the property in the stock and dividends due thereon remained in the trustees; and that, as they were entitled to receive the dividends at the Bank of England, they could not treat the amount of those dividends as money had and received to their use by the bankers, although the bankers might be liable to an action on the case for deceit, in which damages might be recovered in proportion to the injury arising from their untrue representation that they had received the dividends for the use of the trustees. *Id.*

*Other Things.*—Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons, without the authority of the other. *Innes v. Stephenson*, 1 M. & Rob. 145—Tenterden.

A member of a banking-house applied to for a loan may lend the money of the firm, and doing so the company may sue. *Alaxander v. Barker*, 1 Price's P. C. 157; 2 C. & J. 133; 2 Tyr. 140.

H. F., who was trustee with some other persons of some property, was also partner in a banking-house. He forged a power of attorney from the trustees, authorizing the banking-house to sell stock in the funds, which was done, some of the partners doing some act towards the completion of the sale. The brokers paid the proceeds of the sale to the banker's account generally at their agents, and it was drawn out by H. F., who had the whole management of the banking-house intrusted to him by his partners. H. F. was afterwards executed for a similar forgery:—Held, that the money received by the banking-house constituted a debt due from them to the trustees. Note: the circumstances of H. F. being a partner, and also a trustee, were not taken into consideration. *Stone v. Marsh*, 6 B. & C. 551; 9 D. & R. 643; R. & M. 364; S. C. not S. P. 8 D. and R. 71.

The term "acceptance" in a banker's deposit note, means "demand;" and as the maker has no option to exercise, the note need not be left with him for acceptance. *Sutton v. Toomer*, 1 M. & R. 125; 7 B. & C. 416.

### III. FAILURE OF BANKERS.

Payment of money into a banking-house, to be placed to the credit of another, upon a condition, the money in the meantime to stand in the

bankers' books in the name of the party paying it in: it is at his risk, and the loss is his, if the bankers fail before the condition is complied with, though the other party had written to desire it to be paid in generally. *Calley v. Short*, Coop. C. C. 148.

Where goods were paid for by country bank notes in the afternoon of a day, in the morning of which the bankers had stopped payment, without the knowledge of the vendor or vendee, and the former offered to return the notes to the latter, demanding payment of them:—Held, that the vendor should have promptly presented the notes to the insolvent bankers, and given notice of non-payment to the vendee according to the law-merchant, and by his neglecting to do so, he had made the notes his own. *Camidge v. Allenby*, 9 D. & R. 391.

### IV. LIEN OF BANKERS.

Bankers have a lien upon bills or notes paid into their houses for the balance of a general account. *Jourdaine v. Lefevre*, 1 Esp. 66—Ken.

A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect: this does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them, in order to secure the payment of his general balance. *Davis v. Bousher*, 5 T. R. 488.

A banker has a lien for the amount of his balance upon money securities paid in by a customer on his running account; and the banker's assignees, after his bankruptcy, may sue the drawer of one of those securities, made payable to bearer, who defended the action on behalf of the customer, and may recover against such drawer the amount of the balance; and this, notwithstanding an offer made to the assignees on the part of the customer before the action brought, that though he was not aware of the exact balance, if any were due, he was ready to pay it, on receiving back the security; for this was no tender of the balance to defeat the action. *Scott v. Franklin*, 15 East, 428.

A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer, which may come to his hands, and may put the same in suit. And even where, taking into account the bills on both sides, the customer has a balance in his favour of a sum not equal to the amount of any one of them, this surplus cannot be appropriated to any one of the bills, in reduction of the claim of the banker suing any of the parties to the bill. *Bolland v. Bygrave*, R. & M. 271—Abbott.

The assignees of a banker, who, having fraudulently sold out stock belonging to a customer, and appropriated the proceeds, deposited the securities amongst those belonging to other per-

sons, retain a lien upon such securities, notwithstanding they had been given up to the customer by the banker in contemplation of bankruptcy. *Wilson v. Balfour*, 2 Camp. 579—Ellenborough.

But a banker has no lien on munniments casually left in his shop, after he has refused to advance money on them as a security. *Lucas v. Dorrien*, 7 Taunt. 278; 1 Moore, 29.

## BANKRUPT.

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## I. STATUTES IN BANKRUPTCY.

*Generally.*—The statutes by which the law and practice of bankruptcy are now regulated are the 6 Geo. 4, c. 16, the 1 & 2 Will. 4, c. 56, and the 3 & 4 Will. 4, c. 47.

The bankrupt statutes do not bind the crown. *Ex parte Russell*, 19 Ves. jun. 165.

The general bankrupt act, 6 Geo. 4, c. 16, which repealed all former bankrupt acts, came into operation 1st September, 1825. A commission having been sued out September 8, 1825, against F., upon an act of bankruptcy committed by him in the July preceding.—Held, that it could not be supported. *Maggs v. Hunt*, 4 Bing. 212.

The 5 Geo. 4, c. 98, which repealed the former bankrupt acts, enacted, that after June, 1824, a bankrupt's certificate should not be received in evidence unless entered of record. The 6 Geo. 4, c. 16, repealed the 5 Geo. 4, c. 98, from May 2, 1825, and the old statutes from September, 1825: it provided also, that its enactments respecting certificates should take effect from May 2, 1825, and that certificates on commissions issued after the act took effect, should be entered of record, "the present practice in bankruptcy" was, by s. 135, to be continued, unless when alterations were expressly declared. Where a commission was issued in January, 1825, and the certificate obtained in November, 1825:—Held, that it need not be entered of record. *Tuttle v. Grimwood*, 3 Bing. 493; 11 Moore, 432.

Stat. 6 Geo. 4, c. 16, s. 81, is no repeal of statute 3 Geo. 4, c. 39, s. 2, by which executions on warrants of attorney, which are not filed within a certain time after execution, are declared void as against assignees of a bankrupt under a commission afterwards issued. *Wilson v. Whittaker*, M. & M. 8—Abbott.

The act of the 47 Geo. 3, sess. 2, c. 74, applies only to persons who were traders at the time of their decease, and not to persons who have left off trade before they died. *Hitchon v. Bennett*, 4 Madd. 181.

*Retrospective Clauses.*—In the 6 Geo. 4, c. 16, the following clauses have been held to be retrospective:

54 } *Bell v. Bilton*, 4 Bing. 615; 1 M. & P.  
55 } 574.

56 *Ex parte Grundy*, 1 Mont. & Mac. 393.

82 } *Churchill v. Crease*, 5 Bing. 180; 2 M. & P. 415;  
83 } *Terrington v. Hargreaves*, 5 Bing. 489; 3 M. & P. 137.

87 } *Terrington v. Hargreaves*, 5 Bing. 489; 3 M. & P. 137.

108 } *Cumming v. Welleford*, 6 Bing. 503; S. C. nom. *Cumming v. Heale*, 4 M. & P. 238.

*Not retrospective.*—The following clauses have been considered not to be retrospective:

73 *Wombell v. Lever*, 2 Sim. 361.

92 } *Key v. Cook*, 2 M. & P. 790; S. C. nom. *Key v. Goodwin*, 6 Bing. 576.

132 *Ex parte Sumner*, 1 Mont. 253.

## II. JURISDICTION IN BANKRUPTCY.

## 1. Court of Bankruptcy.

By 1 & 2 Will. 4, c. 56, s. 1, a court of bankruptcy consisting of a chief judge, three other judges, and six commissioners, was established as a court of law and equity in all matters of bankruptcy: the court to consist of a court of Review, formed by the four judges, or any three of them: two subdivision courts, consisting of three commissioners, and the several courts of each of the commissioners. And see 6 Geo. 4, c. 16, s. 135.

All existing commissions, transferred to the court of bankruptcy, to be duly registered in the registrar's office, in books to be kept for that purpose, and prosecuted before such commissioner as the court of Review should appoint. *Reg. Gen.* H. T. 2 Will. 4, 1 Deac. & Chit. xxiv.

By 3 & 4 Will. 4, c. 47, His Majesty may direct the judges of the bankrupt court, other than the chief judge, to act in the insolvent debtors' court; and the insolvent court are empowered to order prisoners to be brought before one of the commissioners or a judge of the court of bankruptcy. By the same act, his Majesty may authorize any one or more of the judges of the court of bankruptcy to exercise the same jurisdiction and power in all respects as by the 1 & 2 Will. 4, c. 56, is given to three judges.

By section 8, the court of Review has the power of taxing costs.

## 2. Court of Review.

The court of Review has no jurisdiction to hear or rehear petitions which have been heard, or to make orders altering or affecting orders pronounced by the Lord Chancellor or Vice-Chancellor before the bankruptcy act, 1 & 2 W. 4, c. 56; but in cases pending, and not heard and disposed of at the date of the act, and upon new matters arising out of the petitions, and orders made by the Lord Chancellor and Vice-Chancellor, the court of Review has sole jurisdiction. *Ex parte Langston*, 1 Mont. & Bigh. 142.

The court of Review has no jurisdiction to hear petitions addressed to the Lord Chancellor. *In re Appleby*, 1 Deac. & Chit. 1. But see Orders of 16 & 17 January, 1832.

The court of Review has no jurisdiction to hear a petition of appeal to the Lord Chancellor from an order of the Vice-Chancellor; nor a petition for a rehearing of a petition of appeal already heard by the Lord Chancellor; nor a cross petition of appeal to the Lord Chancellor, complaining of a particular part of the order of the Vice-Chancellor. *Ex parte Benson*, 1 Deac. & Chit. 324.

But it has jurisdiction to hear a petition to the Lord Chancellor for confirming a master's re-

port, where the Lord Chancellor had made an order on a previous petition, referring the matters therein to the master; or a supplemental petition of appeal to the Lord Chancellor from an order of the Vice-Chancellor, where such petition is upon new grounds, which were not brought forward by the original petition, or by the petition of appeal; or a petition to the Lord Chancellor, praying only consequential directions on one part of an order made by the Vice-Chancellor, against which no petition of appeal had been presented. *Ex parte Benson*, 1 Deac. & Chit. 324.

A creditor, resting upon a common law lien, without proving under the commission previous to the bankruptcy court act, appeared as a respondent, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the commissioners, to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the commissioners, but did not draw up the order of the Vice-Chancellor:—Held, that this was not enough to bring him within the jurisdiction of the court of Review:—Held, also, that filing an affidavit is not a waiver of any objection to the jurisdiction. *Ex parte Reid*, 1 Deac. & Chit. 250.

The court of Review has no direct power over the secretary of bankruptcy, who is an officer of the Lord Chancellor, and not of that court. *Anon.* 1 Deac. & Chit. 359: *S. P. In re Fly*, 1 Deac. & Chit. 249.

### 3. Lord Chancellor.

The Lord Chancellor has no jurisdiction to hear an original petition in bankruptcy since the 1 & 2 Will. 4, c. 56. *Ex parte Lowe*, 1 Deac. & Chit. 30.

The jurisdiction of the Lord Chancellor in bankruptcy is distinct from that of the court of Chancery. *Ex parte Lund*, 6 Ves. jun. 782.

Proceedings in bankruptcy are not proceedings in equity. *Crowder v. Davies*, 3 Y. & J. 439.

On a motion for a prohibition to the Lord Chancellor sitting in bankruptcy, it appeared that the assignees had seized, as the property of the bankrupt, a farm belonging to J. S., and kept it a long time and mismanaged it; and that the Chancellor had referred it to the master, to take an account between J. S. and the assignees, in respect of such farm and mismanagement; and afterwards, upon his report, had ordered a certain sum to be paid to J. S. by the assignees, the commission having been previously superseded:—Held, first, that the jurisdiction of the Chancellor, sitting in bankruptcy, was not confined to the period during which the commission subsisted: secondly, that the Chancellor having power to order restitution pending the litigation, he had not exceeded his jurisdiction, in ordering the master to take an account as to the management of the farm, nor in making the assignees personally liable, beyond the funds in their hands, for such mismanagement: thirdly, that the Chancellor had jurisdiction over all effects taken under the commission, as well those of strangers as of a bank-

rupt, and over the assignees, for all acts done by them in their character as such under the commission: fourthly, that in cases where the Chancellor had jurisdiction generally, the court of King's Bench had no authority to revise his order: and fifthly, that no prohibition could be granted after the final order of the Chancellor, unless there were an original want of jurisdiction apparent on the face of the proceedings: but the court of King's Bench did not decide whether they had an authority to direct a prohibition to the Chancellor, sitting in bankruptcy. *Ex parte Cowan*, 3 B. & A. 123.

The court had no jurisdiction to appoint a receiver upon petition in bankruptcy. *Ex parte Tupper*, 1 Rose, 179.

There was no appeal from the Lord Chancellor in bankruptcy. *Ex parte Bryant*, 1 Ves. & B. 211; 1 Rose, 288.

But there was no settled rule of the court to prevent the Lord Chancellor from re-hearing an appeal in bankruptcy. *Ex parte Baker*, 1 Mont. & Mac. 279.

The filing of an affidavit in bankruptcy was the swearing and carrying of it into the bankrupt office, it was then within the reach of the Lord Chancellor, should the purposes of justice at any time require the production of it. *Ex parte Newton*, 2 Rose, 19.

Where a stranger to the commission seeks relief under the Chancellor's jurisdiction in bankruptcy, he submits himself to it in all respects, and the Chancellor will enforce his orders against him. A point arising out of the question of proofs is within the jurisdiction. *Ex parte Pearce*, 1 Rose, 232; 19 Ves. jun. 25.

A stranger to this commission applying for and obtaining an order in bankruptcy, brought himself within the jurisdiction. *Ex parte Bezzant*, 1 Rose, 181.

## III. WHO MAY BE BANKRUPTS.

### 1. Statute.

The following description of persons are mentioned in the statute as those who are subject to the bankrupt laws: agents, who make their living by buying and selling; bankers, bleachers, brokers, builders, calenderers, carpenters, cattle-salesmen, coffee-housekeepers; commodities, persons who make their living by the workmanship of—companies, members of, or subscribers to any incorporated commercial or trading company established by charter or act of parliament, as such not liable—dyers, factors, farmers, as such not liable—fullers, graziers, as such not liable;—goods, buyers and sellers of, those persons who seek their living by buying and letting for hire; hotel-keepers, innkeepers, insurers of ships' freight or other matters against perils of the sea—common labourers, and workmen for hire, as such not liable—merchandise, using the trade of, by way of bargaining, bartering, commission, consignment, exchange, or otherwise, in gross or by retail; packers; parliament, persons having privilege of parliament, if

traders within any of the other descriptions, are liable—printers, receivers of other mens' monies or estates into their trust or custody, salesmen of cattle or sheep, scriveners, shipwrights, tavern-keepers—taxes, receivers general of, as such not liable—victuallars, warehousemen, wharfingers, and workmen of goods, unless for hire. 6 Geo. 4, c. 16, s. 2.

The statute extends to aliens, denizens, and women, both to make them subject thereto, and to entitle them to all the benefits given thereby. 6 Geo. 4, c. 16, s. 135.

Quere, whether a commission cannot issue against a person attainted, as he may be sued in a civil action even when attainted of treason? *Ramsay v. McDonald*, 1 W. Black. 30; S. C. nom. *Ramsden v. Macdonald*, 1 Wils. 217.

The Lord Chancellor would stop the progress of a commission against one who was not properly the object of it. *In re Letois*, 2 Rose, 59.

Trespass lies against the assignees under a commission of bankruptcy, sued out against a person not liable to be a bankrupt, for entering a house. *Perkin v. Procter*, 2 Wils. 383.

## 2. Particular Persons.

### (a) Executors.

An executor, who carries on the business for the benefit of the testator's children, may be a bankrupt. *Viner v. Cadell*, 3 Esp. 88—Eldon.

Under the bankruptcy of an executor and trustee, directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable. *Ex parte Garland*, 10 Ves. jun. 110.

Where a testator disposed of his property, and directed a trade, in which he was concerned, to be carried on after his death:—Held, that only the testator's capital in the trade was liable to the creditors of the trade who became such after the testator's death, and that they had no further claims upon his assets. *Ex parte Richardson*, 3 Madd. 138.

### (b) Infants.

A commission of bankruptcy cannot be supported against a person under age. *O'Brien v. Currie*, 3 C. & P. 253—Burrough. S. P. *Ex parte Adam*, 1 Ves. & B. 494.

Such a commission is void, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365; 2 M. & Scott, 496.

It was long since held that a person could not be a bankrupt by reason of a trading by him during his infancy. *Stevens v. Jackson*, 4 Camp. 164; 1 Marsh. 469; 6 Taunt. 106; S. P. *Ex parte Moule*, 14 Ves. jun. 603.

But it was considered that an infant might be a bankrupt where he had held himself out as an adult and traded as such: therefore a bankrupt praying to supersede his commission on the ground of infancy was left to his action, where he had traded two years as an adult. *Ex parte Watson*, 16 Ves. jun. 265.

A partnership of three becoming insolvent, and one being an infant, a joint commission of bankruptcy against the other two was superseded, as separate commissions ought to have been taken out. *Ex parte Henderson*, 4 Ves. jun. 163; S. P. *Ex parte Layton*, 6 Ves. jun. 440.

A joint commission of bankruptcy, superseded on the ground of the infancy of one partner, on the petition of the assignees under a separate commission. *Ex parte Barwise*, 6 Ves. jun. 601.

### (c) Married Women.

A wife being a sole trader in London is liable to a commission of bankruptcy, and her assignees shall come in paramount the assignees of the husband, though his was the prior bankruptcy. *La Vie v. Philips*, 1 W. Black. 570; 3 Burr. 1776.

The wife of a convict sentenced to transportation may be a trader and a bankrupt, although the husband is only on board the hulks, and she has occasional intercourse with him. *Ex parte Franks*, 7 Bing. 762; 1 M. & Scott, 1.

A commission having issued against a married woman, on a trading before marriage, it was superseded. *Ex parte Mear*, 2 Bro. C. C. 266.

### (d) Lunatics.

A lunatic may be a bankrupt, if the act of bankruptcy be committed during a lucid interval. *Anon.* 13 Ves. jun. 590.

## 3. Requisites of Trading.

*Trading in England.*—One who has traded to England, whether native, denizen, or alien, though never a resident trader in England, but comes over here occasionally, and commits an act of bankruptcy, is an object of the bankrupt laws. *Alexander v. Vaughan*, Cowp. 398. And see *Ex parte Smith*, Cowp. 402.

A person residing in the Isle of Man, but coming from time to time to this country, and buying goods here, which were afterwards sold in that island, is a trader against whom a commission of bankrupt may issue in this country, although he only bought but never sold any goods here. *Allen v. Cannon*, 4 B. & A. 418.

A person residing in India, and trading there, and in the course of that trading drawing bills upon England for the value of other bills sent thither, upon which he got a profit by the exchange, and in the course of that sort of dealing contracting debts in England, is a trader within the meaning of the bankrupt laws. *Ingliss v. Grant*, 5 T. R. 530.

A trader in London purchases goods to be sold by A. and B., partners in trade in Dublin, and charges them to A. and B. at prime cost; this creates a debt due from B. in England, and makes him a trader here. *Williams v. Nunn*, 1 Taunt. 270; 1 Camp. 152.

A joint commission against two partners in England, another partner residing abroad, was superseded. *Ex parte Layton*, 6 Ves. jun. 434.

*During Operation of Statute.*—A trading, which

ceased before the 6 Geo. 4, c. 16, took effect, will not support a commission issued after that time. *Surtees v. Ellison*, 9 B. & C. 750; 2 M. & R. 586.

A commission issued under that statute was ordered to be superseded, on the ground that there was no proof of any trading subsequently to the 1st September, 1825, when it came into operation. *Ex parte Batten*, 1 Mont. & Mac. 287.

A farmer and grazier had frequently, before September, 1825, and in some few instances after, purchased cattle with a view to resale, and not for the purpose of his farm. A commission having issued against him after September, 1825, it was held, in an action brought to try the validity of the commission, that the acts of buying before that period were evidence to explain the quality of the subsequent acts. *Worth v. Budd*, 2 B. & Adol. 172.

*When Time presumed.*—Where a trader has been proved to have traded in the usual course once, he will be presumed to have continued to carry on his business in the same manner until the time of his bankruptcy. *Heaney v. Birch*, 1 Rose, 356; 3 Camp. 233.

*Party ceased to trade.*—A man who has retired from business may become a bankrupt in respect of debts contracted during the period of his trading. *Willoughby v. Thornton*, 1 Selw. N. P. 175; *S. P. Doe d. Barnard v. Lawrence*, 2 C. & P. 134; *Dave v. Holdsworth*, Peake, 64; *Ex parte Dewdney*, 15 Ves. jun. 495.

So, if a trader cease to manufacture, but still continue to solicit orders and to execute them, and hold himself out to the world as capable of executing them. *Wharam v. Routledge*, 5 Esp. 235—Ellenborough.

A person who had formerly taken in goods on pledge, and had ceased to do so, but continued to sell the unredeemed pledges, is still a trader as a pawnbroker, and subject to the bankrupt laws. *Rawlinson v. Pearson*, 5 B. & A. 124.

Whether or not a trader has ceased his trading does not depend upon the mere discontinuance of it, or the absence of any specific act of trading, but whether there be an intention to exercise or resume it, and that is a question for a jury. *Ex parte Patterson*, 1 Rose, 402; *S. P. Ex parte Cundy*, 2 Rose, 357.

Where a party having manufactured goods for sale discontinues the sale almost entirely, and uses all his produce himself, but occasionally allows parties applying to have small quantities on payment, it is a question for the jury whether these sales are with the intention of continuing trade, or for the accommodation of the applicants; and in the latter case he ceases to be a trader. *Paul v. Dowling*, M. & M. 263; 3 C. & P. 500—Tenterden.

Where a lime-burner commenced the building a large mansion-house on his estate, and employed nearly all the bricks and lime made at the kiln, and considerable quantities of lime besides for that purpose, and from the time of commencing the building he continued to purchase chalk,

but very nearly discontinued any sale of lime, except in some few instances, and generally under particular circumstances, as to be spread on the lands of tenants or neighbours, or to be used in the repairs of houses in the parish on some reason of urgent haste, and there were some instances in which no such explanation was given; but in every case the lime was paid for, and the whole quantity sold did not exceed five quarters, during a period in which the kiln had produced not less than three hundred quarters of lime, of which the rest was employed about the building; the question, whether this was a continuance of the trading, was held to depend upon its having been with intent to keep the trade in existence after the house was finished, or merely to accommodate the purchasers. *Id.*

The question, when a trader ceases to trade, is, in all cases, purely for the consideration of the jury. *Dance v. Wyatt*, 4 M. & P. 201.

*Profit on Act of Trading.*—The smallness of the profit is no consideration, and one act of buying and selling is sufficient to constitute a trader within the bankrupt laws. *Newland v. Bell*, Holt, 221—Gibbs.

*Number of Acts of Trading.*—Whether or not a person is a trader, does not depend upon his occasionally doing acts of trading, but upon the intention generally so to get his living. *Ex parte Patterson*, 1 Rose, 402; *S. P. Ex parte Maginnis*, 1 Rose, 84; *Patman v. Vaughan*, 1 T. R. 572.

Generally, the trifling amount of trading is immaterial, if there be an intention to continue the trading. *Ex parte Moore*, 14 Ves. jun. 603.

Therefore, the purchase of one lot of timber, with intent to sell again, will make a man a trader. *Holroyd v. Gwynne*, 2 Taunt. 176; 1 Rose, 113.

Even if the timber be standing at the time of the purchase. *Id.*

Where a person engaged in the Greenland whale fishery made three purchases of oil, one of which he sold again:—Held, that it was a question for the judge to determine, whether these dealings constituted a trading within the meaning of the statute 1 Jac. 1, c. 15, s. 2. *Gale v. Halfknight*, 3 Stark. 56—Abbott.

So, trading, in the instance of an attorney buying and selling books, may be sufficient; the nature of the dealing, though small, being such as to manifest an intention to deal generally. *Ex parte Bryant*, 1 Ves. & B. 211; 1 Rose, 288.

*Illegal Trading.*—A smuggler, dealing in contraband goods, by buying and selling, is a trader within the meaning of the statute 1 Jac. 1, c. 15, s. 2, and therefore liable to a commission, although such buying and selling is illegal. *Cobb v. Symonds*, 1 D. & R. 111; 5 B. & A. 516.

A trader may be a bankrupt, although he has not taken out a licence necessary to legalize his trade. *Saunderson v. Bowles*, 4 Barr. 2064.

But a buying in connection with others, to

carry on a system of fraud, is not a trading.  
*Miliken v. Brandon*, 1 C. & P. 380—Abbott.

#### 4. Agents, Brokers, and Factors.

If one procure orders for goods—i. e. coals—having no stock, but buying from those who have, he making out bills to his customers in his own name, and being himself debited by the person he buys of, this is a trading within the bankrupt laws; but if he procure orders for another, and is by that other person paid a commission, the other person sending the goods to the customers, this was not a trading within the bankrupt laws, antecedent to the stat. 6 Geo. 4, c. 16. *Doe d. Bernard v. Lawrence*, 2 C. & P. 134—Abbott.

The word "brokers" includes not only brokers who buy and sell goods, but stock-brokers. *Anon. Callen*, Bkt. Laws, 18.

And pawn-brokers. *Rawlinson v. Pearson*, 5 B. & A. 124.

And ship-brokers. *Pott v. Turner*, 6 Bing. 702; 4 M. & P. 551.

It was doubted whether an insurance-broker could be made a bankrupt. *Ex parte Stevens*, 4 Madd. 256.

#### 5. Builders.

By the statute, builders are expressly made liable to be bankrupts. 6 Geo. 4, c. 16, s. 2. But before that statute it was held, that

A builder who buys timber, which he works into the houses which he builds, and sells them when built, is not an object of the bankrupt laws. *Clark v. Wisdom*, 5 Esp. 147—Ellenborough.

Nor a person who builds a public theatre, to be held in shares, for which he was to be paid according to the measure and value, he being himself a proprietor of several shares, or by erecting public baths on the ground of which he was joint tenant in fee. *Williams v. Stevens*, 2 Camp. 300—Ellenborough.

#### 6. Companies, Members of.

All members of public companies are, however, liable to the bankrupt laws, except members of or subscribers to any incorporated commercial or trading companies, established by charter or act of parliament. 6 Geo. 4, c. 16, s. 92.

Before the statute it was held, that holders of stock in public companies were not liable to the bankrupt laws, in that character merely. *Ex parte Bull*, 15 Ves. jun. 357.

And several statutes had exempted the proprietors of stock in particular companies.

*East-India stock*, 9 & 10 Will. 3, c. 44, s. 74.

*Bank stock*, 7 & 8 Will. 3, c. 31, s. 42; 8 & 9 Will. 2, c. 20, s. 47; 8 Geo. 1, c. 8, s. 43.

#### 7. Farmers.

Farmers, as such, are expressly excepted from being traders within the bankrupt law by 6 Geo. 4, c. 16, s. 2.

A farmer buying and selling horses to an ex-

tent unauthorised by his character of farmer may be a bankrupt as a horse-dealer, although he may have so bought and sold without a licence to deal in horses. *Ex parte Gibbs*, 2 Rose, 38.

A person who buys any article for the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously than his own produce could be sold unmixed, does not thereby become a trader. *Patten v. Browne*, 7 Taunt. 409.

Thus, a person who buys pigs or other stock with a view to a resale of them, as ancillary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader. *Id.*

A farmer bought rye-grass seed, mixed it with seed of his own growth, and sold the mixture; he bought pigs, put them on his farm, fed them on the stubbles, and resold them, some after a week, some after longer periods:—Held, that neither of these was an act of trading. *Id.*

Nor does a farmer, who occasionally buys hay, corn, horses, &c., with a view to sell again for profit, thereby become a trader. *Stewart v. Ball*, 2 N. R. 78. But see *Bartholomew v. Sherwood*, 1 T. R. 573, n.

A farmer and grazier, exercising also the business of a drover, by buying and selling cattle from time to time, beyond the occasions of his farms, was exempted from the operation of the bankrupt laws by stat. 5 Geo. 2, c. 30, s. 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader. *Bolton v. Swoerby*, 11 East, 274.

One who bought cattle at one fair, kept them three or four days on his own ground, and drove them to another fair to sell, was held to be a drover within the meaning of stat. 5 Geo. 2. *Mills v. Hughes*, Bull. N. F. 39.

A., an officer in the army, retires to the country, where he rents a dwelling-house and three acres of land, buys pigs, and consumes part in his family, and sells the rest at a neighbouring market; he makes no show as a dealer, and is proved not to have bought more than fourteen pigs in one year:—Held, that he was a trader within the bankrupt laws. *Newland v. Bell*, Holt, 221—Gibbs.

Quære, whether a farmer who deals largely in sheep, and sells some at fairs from his own farm, and makes purchases and sells at the same fair at a profit and loss, and buys and sells others that had never been at any fair, be a trader within the 5 Geo. 2, c. 30, s. 40? *Hale v. Small*, 3 Moore, 58; 8 Taunt. 730. And see *S. C.* 4 Moore, 415; 2 B. & B. 25.

A cowkeeper whose transactions of buying and selling are incidental to the occupation of farmer, grazier or drover, was exempted from the operation of the bankrupt laws, by stat. 5 Geo. 2, c. 30, s. 40. *Carter v. Dean*, 1 Swanst. 64.

Buying standing crops of grass, cutting them

down, and making them into hay, is a trading within the bankrupt law. *Bloxham v. Graham*, Peake's Add. Cas. 3—Kenyon.

#### 8. Horse Dealers.

Buying and selling horses with an avowed intention to take out a licence, and become a dealer, is sufficient to constitute a trading within the bankrupt laws, however limited the trading, and though no licence has been actually taken out. *Wright v. Bird*, 1 Price, 20.

But a person who purchases dead horses for his dogs, and sells the skins and bones, does not thereby become a trader, although he might sell such skins at a profit. *Summersett v. Jarvis*, 6 Moore, 56; 3 B. & B. 2.

A. was a horse dealer and livcry stable keeper: after his death, his widow carried on the business of the livery stable, but without any licence, and bought horses to let, which she occasionally sold to customers:—Held, a sufficient trading to support a commission of bankrupt against the widow. *Martin v. Nightingale*, 3 Bing. 421; 11 Moore, 305.

#### 9. Inn, Hotel, Coffee-house, and Tavern-keepers.

By statute, all keepers of inns, taverns, hotels, or coffee-houses, and victuallers, are traders within the bankrupt laws. 6 Geo. 4, c. 16, s. 2.

Under the statute it has been held, that the keeper of a private lodging-house, who also seeks a profit by furnishing her guests with provisions, is subject to the bankrupt laws as an hotel-keeper, although the provisions are set apart as the separate property of each guest. *Smith v. Scott*, 9 Bing. 14; 2 M. & Scott, 35.

Before the statute, an inn-keeper, or victualler, merely as such, was not a trader within the bankrupt laws. *Saunderson v. Bowles*, 4 Burr. 2064.

Neither was an innkeeper, selling wine and brandy, and other liquors, by the dozen, to customers out of his inn, necessarily a trader. *Willett v. Thomas*, 2 Chit. 651: *S. P. Anon. Loft*, 218.

But a publican who sold liquors out of his house in large quantities, to all persons who applied for them, was held to be a trader. *Holme v. Bough*, 1 Selw. N. P. 181—Ellenborough.

However inconsiderable the extent of such dealing, and the profits arising from it might be. *Patman v. Vaughan*, 1 T. R. 572.

#### 10. Manufacturers.

By the statute, all persons, who either for themselves, or as agents, or factors for others, seek their living by the workmanship of goods or commodities, are traders. 6 Geo. 4, c. 16, s. 2.

If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he shall not be considered as a trader, though he buy necessary ingredients to fit it for the market; but where the produce of the land is merely the raw ma-

terial of the manufacture, and the manufacture not the necessary mode of enjoying the land, there he is a trader. *Wells v. Parker* (in error), 1 T. R. 34; 1 Bro. P. C. 545; 1 Bro. C. C. 178. And see *S. C.* 1 T. R. 783.

A person who rented a brick-ground, and made bricks thereon for public sale, was held subject to the bankrupt laws. *Id.*

But afterwards held, that a man, whether tenant or freeholder, who sells bricks made from the produce of his soil, is not a trader within the bankrupt laws; but he is if he purchases the materials of his manufacture. *Ex parte Gallimore*, 2 Rose, 424.

And in another case it was held, that a devisee for life of an estate, part of which was a brick-ground, making bricks there for sale generally, with a view to profit, was not a trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks, and had occupied the same ground as a brick-maker for general sale before the estate came to him by devise: for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state; and it is not a buying of any commodity, to sell it again; nor does it fall within the principle of the bankrupt laws, which were levelled against those, who getting other men's goods into their hands obtain credit upon and consume the same. *Sutton v. Weeley*, 7 East, 442; 3 Smith, 445; *S. P. Ex parte Burgess*, 2 Glyn & J. 183.

If a person manufacture bricks from his own estate, and, according to the usual mode of burning the clay into bricks, he buys chalk and burns it with the clay, not for the purpose of carrying on lime-burning as a business, but as the most convenient mode of burning the clay into bricks; it is not a trading, although the use of the chalk was not necessary for the manufacture of the bricks, and he subsequently sell the lime produced in the process. *Paul v. Downing*, M. & M. 263; 3 C. & P. 500—Tenterden.

A person purchasing land for the purpose of making bricks from it, and selling them, and agreeing to pay 4s. per thousand bricks in part of the purchase money, and making and selling bricks accordingly, is not a trader. *Hearne v. Rogers*, 4 M. & R. 486; 9 B. & C. 577.

A brick-maker taking the earth off the waste, for which he afterwards paid a consideration, and selling the bricks, is a trader. *Ex parte Harrison*, 1 Bro. C. C. 173.

*Other Persons.*—One who buys a coal mine, and works it, and sells the coals, is not a trader within the statutes of bankruptcy. *Port v. Tutton*, 2 Wils. 189: *S. P. Wells v. Parker* (in error), 1 T. R. 38.

Whether the owner of a colliery, borrowing a particular species of coal to render his own marketable, be a trader, is a question for a jury upon the intention. *Ex parte Gallimore*, 2 Rose, 424.

A person selling stone delivered from his own quarry, is not a trader. *Ex parte Gardener*, 1 Rose, 377; 1 M. & B. 45.

But a man may sell such timber as he cuts down on his own land, without subjecting himself to the bankrupt laws. *Holroyd v. Gwynne*, 2 Taunt. 176.

If a person burn chalk, not the produce of his own land, and sell the lime, it is a trading. *Paul v. Dowling*, M. & M. 263; 3 C. & P. 500—Tent.

But a person who burns chalk, the produce of his own land, and sells the lime, is not, it seems, a trader. *Id.*

A farmer, making lime from a lime pit, opened and worked before the commencement of his term, and selling the surplus beyond what he required for manure, is not a trader within the bankrupt laws. *Ex parte Ridge*, 1 Ves. & B. 360.

#### 11. Merchants.

All persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise in gross or by retail, and all persons who either for themselves, or as agents, or factors for others, seek their living by buying and selling, are traders. 6 Geo. 4, c. 16, s. 2.

#### 12. Parliament, Members of.

If any trader, having privilege of parliament, shall commit any of the acts of bankruptcy mentioned in the statute, he may be a bankrupt like other persons; but is not subjected to arrest or imprisonment during the term of such privilege, except in cases made felony by the statute 6 Geo. 4, c. 16, s. 9.

#### 13. Scriveners.

A scrivener within the bankrupt laws is one who, with an intention thereby to get a living, receives into his custody other men's money to be laid out on their account, according to the purpose for which it is deposited. The mode of his remuneration, whether by procuration fees, by a charge for commission, or otherwise, is a circumstance immaterial; the actual deposit of, and complete control over, the money of others till invested, and the intention thereby to get a living, being the essence of this species of trading. *Ex parte Malkin*, 2 Rose, 27; 2 Ves. & B. 31.

Again, a scrivener has been held to be a person intrusted with the money of his employer, and who, for commission, finds a borrower. *Ex parte Bath*, 1 Mont. 82; *S. P. Yeo v. Allen*, 3 Dougl. 214.

The strong probability is, that no person can now be the object of a commission as a scrivener. *In re Lewis*, 2 Rose, 59.

An attorney is not necessarily a scrivener. *Ex parte Malkin*, 2 Ves. & B. 175.

One who in the common course of his profession purchases and sells estates, negotiates loans, &c., is not a scrivener. *Id.*

Unless he has been in the habit of having money deposited with him for the purpose of laying it out on securities. *Adams v. Malkin*, 3 Camp. 534—Gibbs.

But an attorney whose principal business is in

the transaction of annuities, for which he charges a commission, and who, in the course of obtaining them for those who employ him, receives large deposits of money, which he pays into a banker's hands in his own name, is not. *Hurd v. Brydges*, Holt, 654—Dallas.

An attorney, however, who becomes a general depository of the money of his clients, and of other persons, which he invests on securities, charging, in addition to his fees for preparing the securities, a compensation (no matter by what name), and who unites this occupation with the business of a conveyancer, &c., is a scrivener. *Hutchinson v. Gascoigne*, Holt, 507—Wood.

A clerk in the custom-house, who receives debentures or securities for merchants, for which he receives the money, and has a commission on such receipts, and employs the money so received in discounting bills or notes for his own benefit, is not a scrivener within the meaning of the bankrupt laws. *Hanson v. Harrison*, 2 Esp. 555—Kenyon.

#### 14. Ship-owners and Underwriters.

The owner of a share in a ship is not in that character subject to the bankrupt laws. *Ex parte Bowes*, 4 Ves. jun. 168.

Shareholders of a steam packet are not traders. *Ex parte Wiswold*, 1 Mont. 263.

Before the statute, an underwriter, merely in that character, could not be a bankrupt. *Ex parte Bull*, 15 Ves. jun. 355.

But now they are expressly made liable to the bankrupt laws by the description of persons insuring ships, or their freight, or other matters, against perils of the sea. 6 Geo. 4, c. 16, s. 2.

#### 15. Other Persons.

A schoolmaster buying books and shoes, and selling them at an advanced price to his scholars, is not a trader. *Valentine v. Vaughan*, Peake, 76—Kenyon.

The publisher of a newspaper, buying the whole daily impression from the proprietors, reselling it at a profit, and bearing the loss of such as remained unsold, is a trader within the bankrupt laws. *Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.

A butcher is within the bankrupt laws. *Dalby v. Smith*, 4 Burr. 2148.

Quere, whether a scavenger, contracting with a parish for a valuable consideration for liberty to take the mud, dust, &c. is a trader? *Ex parte Bryant*, 1 Ves. & B. 217.

Seemle, that a scavenger is not a trader. *Ex parte Collins*, 1 Rose, 373.

The owner of a colliery, buying articles and selling them to his own pitmen, is not a trader: nor a fisherman who buys occasionally fish to make up for market a cargo otherwise deficient. *Ex parte Gallimore*, 2 Rose, 424.

A fisherman buying fish of other boats at sea, and selling it on shore, is a trader; and if such be the usual practice of a particular class of fisher-

men, one of them who is proved to have done so once, will be presumed to have continued to carry on his business in the same manner till the time of his bankruptcy. *Heaney v. Birch*, 1 Rose, 356; 3 Camp. 233—Ellenborough.

Merely drawing bills on a person's own account, at the expense of paying a quarter per cent. commission, besides interest at 5 per cent. for their being discounted, and borrowing accommodation notes in exchange for his own to the same amount, will not make a man an object of the bankrupt laws. *Hankey v. Jones*, Cowp. 745.

#### 16. *Proof of Trading.*

The declarations of a bankrupt to a party with whom he is dealing, respecting his transactions in trade, are not evidence to prove the trading of such bankrupt. *Brinley v. King*, 1 C. & P. 646; *S. C. nom. Bromley v. King*, R. & M. 228—Best.

But declarations made by a party, of his object in buying a particular article, are admissible in evidence to prove his intention, and whether he thereby became a trader. *Gale v. Halfknight*, 3 Stark. 56—Abbott.

An acknowledgment by a person that he was in partnership with another as a trader, who afterwards became bankrupt, is sufficient to constitute a trading, although no acts of buying or selling were proved to have taken place during the partnership. *Parker v. Barker*, 3 Moore, 226; 1 B. & B. 9.

#### 17. *Decision of Question of Trading.*

Whether a man is a trader within the bankrupt laws is a question of law, and not of fact. *Hankey v. Jones*, Cowp. 752.

A trading to support a commission depends not upon the quantity, but upon the intention; and it is a question for a jury whether there is evidence to evidence that intention. *Ex parte Maginnis*, 1 Rose, 84; *S. P. Patman v. Vaughan*, 1 T. R. 572.

If a man buys, and represents himself as a dealer, and offers goods in exchange, it has been held, that it should be left to the jury to say whether he did not buy to sell again. *Milliken v. Brandon*, 1 C. & P. 380—Abbott.

### IV. ACT OF BANKRUPTCY.

#### 1. *Nature and Requisites generally.*

*Acts of Bankruptcy.*—The following acts are specified in the statute as those which amount to acts of bankruptcy:—Any trader with intent to defeat, or delay his creditors, who shall depart this realm; or, being out of the realm, remain abroad; depart from his dwelling-house, or otherwise absent himself; begin to keep house; suffer himself to be arrested for a debt not due; yield himself to prison; suffer himself to be outlawed; procure himself to be arrested; procure his goods, money, or chattels to be attached, sequestered, or taken in execution; make, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his

lands, tenements, goods or chattels, or surrender of his copyholds; or gift, delivery, or transfer of his goods or chattels, shall be deemed to have committed an act of bankruptcy. 6 Geo. 4, c. 16, s. 3.

The opinion that an act of bankruptcy is a crime no longer prevails. *Cumming v. Bailey*, 6 Bing. 371; 4 M. & P. 36—Tindal.

A man cannot commit an act of bankruptcy by the conduct of his agent, without his knowledge. *Cotton v. James*, M. & M. 273; 3 C. & P. 505—Tenterden.

Though a commission of bankruptcy is a matter of right, yet, where it has been taken out under circumstances of oppression, the court will examine into it strictly, and, if there should be no sufficient act of bankruptcy on the proceedings, will not sustain it by directing an inquiry as to any other acts. *Ex parte Smith*, 1 Rose, 147.

*Must be before Commission issued.*—A trader must be so before the act of bankruptcy; therefore a commission cannot be supported by an act of bankruptcy by lying in prison, unless the trading were before the imprisonment. *Ex parte Lynch*, 1 Mont. 453.

There must be a valid, subsisting, and complete act of bankruptcy, when the commission is sued out; it cannot be supported by relation to a preceding act of bankruptcy, but which was not complete when the commission was sued out. *Glasington v. Rawlins*, 4 Esp. 224; 3 East, 407. *And see Oliver v. Johnson*, 1 D. & R. 560; 5 B. & A. 908.

An act subsequent to the striking of the docket, but previous to the sealing of the commission, is sufficient. *Ex parte Dufrene*, 1 Rose, 333; 1 Ves. & B. 51; *S. P. Simpson v. Sikes*, 6 M. & S. 312.

And for this purpose a fraction of a day is admitted, by allowing evidence that the act, though on the same day, was previous to the issuing, i. e. the awarding and sealing the commission. *Wydown's case*, 14 Ves. jun. 80.

The act having been committed so recently before the commission sued out, and at such a distance from London that no knowledge of it could possibly have reached London at the time of suing, will not invalidate the commission. *Hopper v. Richmond*, 1 Stark. 507—Ellenb.

A docket struck without an act of bankruptcy, upon the belief by the creditor that one had been committed, will support a commission upon a subsequent act. *Ex parte Webster*, 2 Glyn & J. 252.

On an application to supersede a commission and issue another, the act of bankruptcy being subsequent to the date of the commission, the solicitor was required to state by affidavit why he took out a commission, which he could not support; pending that, the time having expired, another creditor obtained a supersedeas and a commission, under the apprehension of immediate extents; the bankruptcy was afterwards declared under the first commission, upon acts of bankruptcy found previously to its date, but the latter commission was preferred. *Ex parte Mavor*, 19 Ves. jun. 539.

A commission may be sustained by any act



that can be proved antecedent to the commission. *Ex parte Dufrene*, 1 Rose, 333; 1 Ves. & B. 51.

A bankrupt cannot set up a prior secret act of bankruptcy to invalidate his commission, either at law or in equity. *Rez v. Bullock*, 2 Leach, C. C. 996; 1 Taunt. 71.

An act of bankruptcy prior to the one on which the commission is grounded, will not invalidate the commission, even though it be shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donovan v. Duff*, 9 East, 21; S. C. nom. *Kennett v. Duff*, 2 Smith, 44. But see *Doe d. Hunter v. Boulcot*, 2 Esp. 595; *Parker v. Manning*, 2 Esp. 597; *Miles v. Rawlins*, 4 Esp. 194.

It is not to be presumed that a petitioning creditor had notice of an act of bankruptcy prior to the debt, although the fact appear on the face of the depositions. *Thackrah v. Wood*, 3 Stark. 141—Abbott.

*After Party has ceased to trade.*—The act of bankruptcy may be committed after the trading has ceased. *Doe d. Barnard v. Lawrence*, 2 C. & P. 134—Abbott. *S. P. Ex parte Bamford*, 15 Ves. jun. 449.

So that it is during the existence of a petitioning creditor's debt, contracted while in trade. *Ex parte Dewdney*, 15 Ves. jun. 495; *S. P. Ex parte Bourne*, 16 Ves. jun. 145.

A, not a trader, was indebted to B. to the amount of 100*l.*, and afterwards became a trader. After A. had ceased to be a trader (the debt to B. still existing), he committed an act of bankruptcy:—Held, that a commission might be supported upon B.'s debt. *Baillie v. Grant*, 2 M. & Scott, 193; 9 Bing. 121.

*Operation of Statute.*—A commission issued after the 1st September, 1825, when the 6 Geo. 4, c. 16, took effect, will not be supported by proof of an act of bankruptcy committed before the passing of that act. *Hewson v. Heard*, 9 B. & C. 734, n.; 2 M. & R. 586; *S. P. Palmer v. Moore*, 9 B. & C. 754, n.; *Maggs v. Hunt*, 12 Moore, 357. And see *Surtees v. Ellison*, 9 B. & C. 750; 2 M. & R. 586; *Ex parte Batten*, 1 Mont. & Mac. 287; *Worth v. Budd*, 2 B. & Adol. 172; S. C. not S. P. 1 Dowl. P. C. 328.

Where a trader committed an act of bankruptcy, upon which a commission might have issued under the statutes then in force, but which were repealed, and the repealing statute was repealed, it was held sufficient to support a commission issued after the repeal of the repealing statute. *Phillips v. Hopwood*, 10 B. & C. 38.

*Where committed.*—The act of bankruptcy must be committed within England or Wales. *Ex parte Smith*, Cowp. 402. And see *Inglis v. Grant*, 5 T. R. 530.

Though the act must be committed in this country, yet a letter from a trader who has gone abroad in the course of his trade, connected with

circumstances here, may be sufficient evidence of such act. *Ex parte Hague*, 1 Rose, 150.

## 2. Departing the Realm.

If a trader, whose house of trade is in Ireland, comes to England on business, and again quits this country to avoid an arrest, it is a departing the realm with intent to delay his creditors, sufficient to constitute an act of bankruptcy. *Williams v. Nunn*, 1 Taunt. 270; 1 Camp. 152.

A trader who leaves England, and proceeds to Ireland, where he carries on trade with an honest intention, compatible with trade, does not thereby commit an act of bankruptcy. *Windham v. Paterson*, 2 Rose, 466; 1 Stark. 144.

If the necessary consequence of a trader's departing the realm is that his creditors must be delayed, he thereby commits an act of bankruptcy. *Ramsbottom v. Lewis*, 1 Camp. 279—Ellenb.

But a trader has a right to go abroad to look after his concerns, though his creditors may be thereby delayed, and it is no act of bankruptcy. *Warner v. Barber*, Holt, 175—Gibbs. *S. P. Ex parte Mutrie*, 5 Ves. jun. 574.

A commission cannot be sustained by residence abroad, where the departure was for a fair and proper purpose, and not with a view of defrauding creditors. *Id.*

But otherwise, if an apprehension of arrest be coupled with a justifiable motive. *Id.*

Departure from the realm, with a consequential delay of a creditor, is not an act of bankruptcy, without proof or necessary inference of an intention to delay at the instant of departure. *Ex parte Osborne*, 2 Ves. & B. 177; 1 Rose, 387.

Pressure of debts, though strong, is not conclusive evidence of an intention to delay creditors. *Id.*

Where a trader appointed to meet A. respecting some accounts in which B. was interested, and failed to do so, but left this country for France, leaving a letter for B., in which he stated that he should be back in ten days, and in the mean time would make proposals to the creditors; and on the following day he wrote another letter to B. from Calais, stating that the account current between them might be speedily settled; and a month afterwards he wrote another letter from Paris, stating that he was under the necessity of remaining in France:—Held, that the departing the realm and absence abroad, being a continuous act, these letters were admissible in evidence, and sufficient to establish an act of bankruptcy, by shewing the intent with which such trader departed. *Rawson v. Haigh*, 9 Moore, 217; 2 Bing. 99; 1 C. & P. 77. And see *Bateman v. Bailey*, 5 T. R. 512.

## 3. Departing from Dwelling-house.

*What a Departure.*—A departure with an intent to delay is an act of bankruptcy, though no creditor be thereby in fact delayed. *Robertson v. Liddell*, 9 East, 487; 3 Smith, 347; *S. P. Williams v. Nunn*, 1 Taunt. 270; 1 Camp. 152.

It is not alone sufficient that a creditor should be thereby delayed, but the departure must also

have been with that intent. *Fowler v. Padget*, 7 T. R. 509; *S. P. Aldridge v. Ireland*, 1 Taunt. 273, n.; 3 Dougl. 397; *Ex parte Osborne*, 1 Rose, 387; 1 Ves. & B. 177.

It is not sufficient that a sheriff's officer who comes to levy a fi. fa. on the trader's effects is refused admittance after the trader has left his house. *Barnard v. Vaughan*, 8 T. R. 149. And see *Schooling v. Lee*, 3 Stark. 149.

A collusively assigns his house in town, stock, &c. to B., and retires to Paddington. B. takes possession, and carries on the business, concealing A.'s residence from his creditors. Three months afterwards a commission issues against A., under which the assignees take possession of the house, &c. as being still the property of A. In an action of trespass by B. against the assignees, held, that there was evidence to go to the jury of A.'s having committed an act of bankruptcy, by departing from his dwelling-house, or otherwise absenting himself. *Young v. Wright*, 2 Marsh. 233; 6 Taunt. 540.

The act of bankruptcy, by leaving his house to avoid a creditor, without collusion, is complete the instant of his departure; and therefore not affected by a subsequent residence with the petitioning creditor. *Ex parte Gardner*, 1 Ves. & B. 45; 1 Rose, 377.

*Cause of Departure.*—Leaving his house to avoid his creditors is a sufficient act of bankruptcy, though no creditor called in his absence. *Hammond v. Hicks*, 5 Esp. 139—*Mansfield*: *S. P. Wydown's case*, 14 Ves. jun. 86.

Rule for setting aside the verdict discharged.

A departure to avoid an arrest is an act of bankruptcy. *Warner v. Barber*, Holt, 175—*Gibbs*.

Though under the impression of a groundless apprehension. *Ex parte Bamford*, 15 Ves. jun. 447; *S. P. Newman v. Stretch*, M. & M. 338.

It is an act of bankruptcy where the trader absented himself from his house, where his creditors were, to avoid irritation and harsh language. *Vincent v. Prater*, 4 Taunt. 603; 2 Rose, 275.

And where a trader departs from his dwelling-house on account of domestic dissensions, if he makes no arrangements for carrying on his business in his absence, and he foresees that, as a necessary consequence, his establishment must be broken up, and his creditors must be delayed, which events accordingly happen, he thereby commits an act of bankruptcy. *Holroyd v. Whitehead*, 3 Camp. 530; 2 Rose, 145; *S. C.* not *S. P.* 1 Marsh. 128; 5 Taunt. 444.

Seemle, that in order to constitute an act of bankruptcy by departing from the dwelling-house, the departure must be with an absolute intent to delay creditors. If it be only with intent to delay creditors in case a particular event occurs, and that event does not occur, it is not an act of bankruptcy. *Fisher v. Boucher*, 10 B. & C. 705.

*Time of Absence.*—The length of absence is immaterial, as the act of bankruptcy is complete at the time of departure. *Holroyd v. Gwynne*, 2 Taunt. 176; 1 Rose, 113.

A trader, having a counting-house in town, and a dwelling-house in the country, left the former, (to which he never returned), taking his books with him, and slept at his dwelling-house a few nights, when he finally left that also:—Held, that having quitted his counting-house without the animus revertendi, he began to absent himself from that day, within the meaning of the 13 Eliz.-c. 7, s. 1, and thereby committed an act of bankruptcy. *Judine v. De Cossen*, 1 N. R. 234.

*What Dwelling-house.*—A trader who has no settled house or counting-house, but takes up a temporary abode at a public-house in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors. *Holroyd v. Gwynne*, 2 Taunt. 176; 1 Rose, 113.

Where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his own home without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them left the house of business there to avoid an arrest, at the same time carrying their books of account along with them:—Held, that they both thereby committed an act of bankruptcy. *Spencer v. Billing*, 3 Camp. 314; 1 Rose, 362—*Ellenb.*

*Proof of Intention.*—A declaration by a bankrupt of his motives for absenting himself from his home, made at the time, is evidence in an action by the assignees against a creditor of the bankrupt in order to prove the act of bankruptcy. *Bateman v. Bailey*, 5 T. R. 512.

But the declarations of a trader, made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Lee v. Marton*, 1 M. & Rob. 210—*Parke*.

The declaration of a bankrupt on his return, that he had absented himself to avoid a writ against him, is sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt on which it was founded, or of the creditor of the bankrupt. *Newman v. Stretch*, M. & M. 338—*Parke*.

Where the act of bankruptcy is the absconding to avoid being arrested, general proof of his so absconding is sufficient, without shewing any writs to have actually issued. *Wilson v. Norman*, 1 Esp. 334—*Kenyon*.

Quære, whether a letter written by a bankrupt, within a few days after the supposed act of bankruptcy, is admissible in evidence? *Sunderman v. Laforest*, 1 C. & P. 46—*Burrough*.

But it seems that a letter, written by a bankrupt shortly after his absenting himself from his home, is evidence to shew his motive in going, but not to prove the fact of his absence. *Kasson v. Haigh*, 9 Moore, 217; 2 Bing. 99; 1 C. & P. 77.

Letters bearing post-marks before the act of bankruptcy, and found in the alleged bankrupt's possession after it, containing statements of matters material to the act of bankruptcy, are admissible, without calling the writer as evidence against

the alleged bankrupt, to shew that he received intimation of these facts, though not to prove their truth. *Cotton v. James, M. & M. 273; 3 C. & P. 505*—Tenterden.

Where a trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt; the attorney having advised him to remain at the office, until it was ascertained whether the creditors would engage to give him a safe conduct; the trader remained at the office accordingly, for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting:—Held, that what passed between the attorney and the trader was admissible in evidence, upon an issue whether the latter had committed an act of bankruptcy on that occasion. *Bramwell v. Lucas, 4 D. & R. 367; 2 B. & C. 745.*

Depositions taken before commissioners of bankrupt, stating that a trader promised to meet one of his creditors at the office of his solicitors, in order to give him security for a debt, but that he did not attend the appointment, but altogether absented himself, are not of themselves sufficient evidence of the commission of an act of bankruptcy under the statute 49 Geo. 3, c. 121, s. 10, as it was not stated that he absented himself with an intent to delay such creditor. *Toleman v. Jones, 9 Moore, 24; S. C. nom. Tucker v. Jones, 2 Bing. 2.*

The deposition of the witness should state an intention, or circumstances from which the court will necessarily infer it: the departure of a man under embarrassed circumstances is strong, but not conclusive evidence of intention. *Ex parte Osborne, 2 Ves. & B. 177; 1 Rose, 387.*

Whether a departing the dwelling-house be accompanied with an intent to delay a creditor, is a question of fact for a jury to decide upon all the circumstances. *Aldridge v. Ireland, 1 Taunt. 273, n.; S. C. not S. P. 3 Dougl. 397.*

#### 4. Otherwise absenting himself.

##### (a) From what Place.

The words in stat. 6 Geo. 4, c. 16, s. 3, are, "or otherwise to absent himself," which are the same as were used in the previous statutes, 13 Eliz. c. 7, and 1 Jac. 1, c. 15; which, it has been held, are not confined to an absenting from the dwelling-house, or any particular place.

Therefore, a trader's absenting himself from any place, with intent to delay a creditor, is an act of bankruptcy; and it is immaterial whether a creditor be actually delayed or not. *Hallen v. Homer, 1 C. & P. 108*—Park: *S. P. Cambridge v. Alderson, 1 C. & P. 213; Curteis v. Willes, 6 D. & R. 224; R. & M. 58; 1 C. & P. 211.*

Absenting, unless from the place of abode or of business, or to avoid a creditor, is not an act of bankruptcy. *Bernasconi v. Farebrother, 10 B. & C. 543.*

Where a man in the habit of frequenting the Exchange to collect news, left it at the sight of a creditor, desiring a friend to say he was not there, it was held an act of bankruptcy. *Gimingham v. Laing, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.*

If a trader, fearful that he may receive an unpleasant letter from a creditor, quit his house, and desire the letter to be forwarded to him at a turnpike; and if the letter was unfavourable, it was not his intention to return; but, if favourable, it was his intention to proceed on his regular business; and the letter which is favourable is forwarded, and he proceed on his regular business, it is not an act of bankruptcy. *Fisher v. Boucher, 10 B. & C. 705.*

##### (b) What an Absenting.

A trader, who is not denied to his creditors calling for money, but who sees them, and pretends to go out to get money, and does not return, nor endeavour to get the money, making it only a pretext, commits an act of bankruptcy. *Bigg v. Spooner, 2 Esp. 651*—Kenyon.

A creditor called upon a bankrupt by appointment. The bankrupt left the room and did not return, and his wife told the creditor he had gone out:—Held, that this was sufficient evidence to warrant the jury in inferring that the bankrupt left the house for the purpose of avoiding his creditor. *Charrington v. Brown, 11 Moore, 341.*

A trader left a message at his house for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and stay till dinner time:—Held, that it was for the jury to consider, whether he absented himself to delay the creditor; and this evidence warranted their conclusion that he did not. *Vincent v. Prater, 4 Taunt. 603; 2 Rose, 275.*

Where a trader went to his neighbour, and told him that he expected to be arrested, and, while he remained there, was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch; and when told that the officer had gone past his house, and had left the street, immediately returned home:—Held, that this was an act of bankruptcy, within the words, "otherwise absenting himself, to the intent to delay creditors," although it appeared not only that no creditor was delayed, but that none could possibly be delayed. *Chenoweth v. Hay, 1 M. & S. 676; S. C. nom. Chenoweth v. Hayley, 2 Rose, 137. And see Young v. Wright, 2 Marsh. 233; 6 Taunt. 540.*

A trader being informed by the attorney of the petitioning creditor, that he had delivered a warrant to arrest him to a sheriff's officer, who was seeking him for the purpose of executing it, was advised by the same attorney to repair to his office, to avoid the publicity of being arrested in the street, which he did, and remained there a considerable time:—Held, that he had not committed an act of bankruptcy within the meaning of the statute. *Mills v. Eton, 3 Price, 142.*

Where a trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him, whether he could safely attend the meeting without being arrested for debt; the attorney having advised him to remain at the office, until it was ascertained whether the creditors would engage to give him a safe conduct; the trader remained at the office accordingly for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting:—Held, that he had committed an act of bankruptcy on that occasion. *Bramwell v. Lucas*, 4 D. & R. 367; 2 B. & C. 745.

Where a trader, on being arrested, was liberated on his undertaking to execute a bail-bond:—Held, that the omission to attend to execute the bail-bond did not amount to an act of bankruptcy. *Schooling v. Lee*, 3 Stark. 149—Abbott.

Where a trader, upon being arrested, escaped from the officer, and fled into the house of another, and was pursued by the officer, and inquired for at the house, but was denied, and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and when it was dark, returned home to his own house, and gave directions to deny him to any one who called, and continued nearly a month in his bed-chamber:—Held, that this constituted an act of bankruptcy, under the words "otherwise absconding himself" *Bayly v. Schofield*, 1 M. & S. 338; 2 Rose, 100.

A trader abstaining from going to a particular place through the apprehension of process (whether such apprehension be well-founded or not), thereby "absents himself with intent to delay his creditors," and commits an act of bankruptcy. *Robson v. Rolle*, 2 M. & Scott, 786; 9 Bing. 648.

If bankers close the doors and windows of the bank, it seems to be an act of bankruptcy by absention: *Cumming v. Bailey*, 6 Bing. 363; 4 M. & P. 36.

One of three partners, bankers, left his house at Bath, and went to London to raise funds; and having failed in his efforts to do so, he remained there three days:—Held, that the jury were warranted in finding that he absented himself with an intent to delay his creditors. *Id.*

Where a trader at B. left her dwelling-house and went to London, for the purpose of persuading a creditor to withdraw his execution, and left word of the place to which she had gone, but, failing to procure the withdrawing of the execution, did not return to her dwelling-house:—Held, that this was no act of bankruptcy. *Aldridge v. Ireland*, 3 Dougl. 397; 1 Taunt. 273, n.

The mere failure to keep an appointment made with a creditor is not an act of bankruptcy. *Key v. Shaw*, 1 M. & Scott, 463; 8 Bing. 320; *S. P. Toleman v. Jones*, 9 Moore, 24; *S. C. nom. Tucker v. Jones*, 2 Bing. 2.

So, it would seem that a breach of an appointment by a trader to call at his creditor's house to

pay a debt, is not an act of bankruptcy. *Lees v. Marton*, 1 M. & Rob. 210—Parke.

A debtor appointing a time and place where he might meet and pay his creditors, and failing to keep the appointment, must be presumed, in the absence of evidence to the contrary, to have absented himself with the intent to delay his creditors, and thereby commits an act of bankruptcy; and, in an action by a bankrupt against his assignees to try the validity of the commission, the plaintiff must give evidence to rebut the presumption, or he cannot maintain his action. *Widger v. Browning*, 9 D. & R. 306; *S. C. not S. P. 2 C. & P. 523*; *M. & M. 27*.

Where a man, in the habit of attending the Royal Exchange, broke an appointment he had made with a creditor to meet him there; or, (being the proprietor of a theatre), retired behind the scenes to avoid a sheriff's officer, at the same time giving orders to be denied to him:—Held, that each of these was an act of bankruptcy. *Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.

### 5. Beginning to keep House.

#### (a) What a Denial.

*Order to deny and Denial.*—A general order to be denied to all comers, and a denial accordingly to some one in particular, is sufficient to constitute an act of bankruptcy. *Lloyd v. Heathcote*, 5 Moore, 129; 2 B. & B. 388; *S. P. Macklow v. May*, 1 Taunt. 479.

But an order to deny, without an actual denial, is not sufficient. *Fisher v. Beucher*, 10 B. & C. 705; *S. P. Wydown's case*, 14 Ves. jun. 86.

Where a trader, being under apprehension of arrest, gave directions to his servant to deny him in case A., a sheriff's officer, called:—Held, that the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house. *Id.*

A denial, without any previous order to do so, is not an act of bankruptcy, although the trader subsequently approves of it. *Ex parte Foster*, 1 Rose, 50; 17 Ves. jun. 414.

A denial, with subsequent approbation, but the time not ascertained nor connected with the previous direction ten months before the commission, is not a sufficient act of bankruptcy. *Id.*

Where the order to be denied is on one day, and the denial on another, the act of bankruptcy is on the latter day. *Hewkes v. Sands*, 3 Dougl. 429.

If a trader hear himself denied to a creditor by one of his family, and he do not come forward, and his remaining quiescent is from an intention to delay the creditor, it is an act of bankruptcy, though he has given no directions to be denied. *Smith v. Moon*, M. & M. 458—Tindal.

Rule for new trial refused. *Id.*

Two traders in partnership left their shop, and told their shopman that they were going out to endeavour to get some bills of exchange discounted, and directed him to say that they were not in

the way; or to make some excuse for them in case a creditor should call. On that and the following day, a creditor called, when they were both at home, and desired to see either the one or the other of them; when the shopman denied them without being authorized by them so to do:—Held, that the jury were warranted in concluding that they absented themselves with an intent to delay their creditors. *Copper v. Desanges*, 3 Moore, 4; S. C. nom. *Defie v. Desanges*, 8 Taunt. 671.

**Order to deny, and Retirement.]**—An order to deny, with any act done, as retiring to an unusual part of the house, is an act of bankruptcy. *Fisher v. Boucher*, 10 B. & C. 705.

And if a trader withdraws from one part of his house, where he had before usually sat, and where there was free access to him, to a more retired part of it, to avoid personal application for money, by means whereof his creditors are prevented from importuning him; this will be an act of bankruptcy. *Dudley v. Vaughan*, 1 Camp. 271; 9 East, 491 c.—Ellenborough.

A trader, having been denied to a creditor who called for money, was, after a little time, seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward, said he was not at home:—Held, that a jury were properly directed to consider whether the trader "had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely to meet a creditor, to a more retired part." *Key v. Shaw*, 9 Bing. 390; 8 M. & Scott, 462.

Where an aged member of a banking firm was arrested on the 20th May, at his private dwelling, distant several miles from the house of business, for a partnership debt; and after the sheriff's officer was prevailed upon to withdraw, upon a promise of his executing a bail-bond when required, he reproached his servants for letting such persons into his house, and ordered them not to let any person into the house they did not know, stating that he was afraid of being arrested again: on the morning of the 21st, the servants did not open the door without ascertaining from the windows what persons required admission, and the outer gate of the house was kept locked; and it further appeared that on that day he removed from one apartment of the house to another, to avoid being seen by a person who called, whom he supposed to be a creditor:—Held, that he committed an act of bankruptcy on the 21st May, though no creditor was actually denied. *Harvey v. Ramsbottom*, 2 D. & R. 142; 1 B. & C. 55.

**Denial by shutting up Doors.]**—An act of bankruptcy by beginning to keep house, may be by closing the doors, without change of place or denial to creditors. *Cumming v. Bailey*, 6 Bing. 363; 4 M. & P. 36.

If bankers close the doors and windows of the bank, and their customers cannot obtain admis-

sion, and the jury find that they are so closed to exclude the customers, and the bankers remain within, it is an act of bankruptcy by beginning to keep house. *Id.*

Although neither of the partners lived in the banking-house. *Id.*

Overruling a previous case, in which it was held, that shutting up a banker's shop was not an act of bankruptcy by a partner residing in another place. *Ex parte Mayor*, 19 Ves. jun. 543.

Where one of several partners in a bank, who resided at the place of business, and was the only partner who transacted the business, (the others residing at a distance,) shut up the banking-house, and absented himself from it and stopped payment:—Held, that this was not evidence of a joint act of bankruptcy by all three. *Mills v. Bennett*, 2 M. and S. 556; 2 Rose, 269.

**Denial at unseasonable Times.]**—It is not an act of bankruptcy for a debtor to cause himself to be denied to a creditor calling by the debtor's appointment for payment on a Sunday. *Ex parte Preston*, 2 Rose, 21; 2 Ves. & B. 311.

So, a denial at a late hour, after retirement to rest, is not an act of bankruptcy. *Hughes v. Gilman*, 10 Moore, 480; 2 C. & P. 32.

If a trader is denied to a clerk of a creditor, at his shop, it appearing by the evidence that the shop was shut up for the evening, but at an earlier hour than usual; it is proper to be left to the jury to say, whether the bankrupt had himself denied, to delay his creditor, or whether it was because the clerk called at an unseasonable hour. *Id.*

An order given to the servants of a trader to deny him, on the ground of being busy, is sufficient to constitute an act of bankruptcy. *Steford v. Clarke*, 1 C. & P. 27—Burrough.

But if a trader direct his servant, "that if any one should come whilst he was at dinner, or engaged in business, she should deny him:—"Held, that such instructions did not amount to a direction for a general denial; and, therefore, although a creditor called, and was denied, it was no act of bankruptcy. *Shew v. Thomson*, Holt, 159—Gibbs.

Nor, in a similar case, where the trader knew of the coming of a particular creditor. *Smith v. Currie*, 3 Camp. 349; 1 Rose, 364—Ellenb.

Where a trader ordered his servant to say, if any creditors called, that he was not at home, and he was accordingly denied, but was in bed ill at the time:—Held, that it was properly left to the jury, whether this was a beginning to keep house with an intent to commit an act of bankruptcy; and that they were warranted in finding that it was. *Lazarus v. Wailman*, 5 Moore, 313.

**Intent of Denial.]**—It is not essential that a creditor should actually be delayed. *Lloyd v. Heathcote*, 5 Moore, 129; 2 B. & B. 388.

For the words in the statute 1 Jac. 1, c. 15, s. 2, "to the intent, or whereby his creditors shall or may be defeated or delayed," are to be read, "to the intent his creditors shall, or whereby (or that thereby) they may be defeated," &c. *Har-*

port, where the Lord Chancellor had made an order on a previous petition, referring the matters therein to the master; or a supplemental petition of appeal to the Lord Chancellor from an order of the Vice-Chancellor, where such petition is upon new grounds, which were not brought forward by the original petition, or by the petition of appeal; or a petition to the Lord Chancellor, praying only consequential directions on one part of an order made by the Vice-Chancellor, against which no petition of appeal had been presented. *Ex parte Benson*, 1 Deac. & Chit. 324.

A creditor, resting upon a common law lien, without proving under the commission previous to the bankruptcy court act, appeared as a respondent, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the commissioners, to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the commissioners, but did not draw up the order of the Vice-Chancellor:—Held, that this was not enough to bring him within the jurisdiction of the court of Review:—Held, also, that filing an affidavit is not a waiver of any objection to the jurisdiction. *Ex parte Reid*, 1 Deac. & Chit. 250.

The court of Review has no direct power over the secretary of bankruptcy, who is an officer of the Lord Chancellor, and not of that court. *Anon.* 1 Deac. & Chit. 359; *S. P. In re Fly*, 1 Deac. & Chit. 249.

### 3. Lord Chancellor.

The Lord Chancellor has no jurisdiction to hear an original petition in bankruptcy since the 1 & 2 Will. 4, c. 56. *Ex parte Lowe*, 1 Deac. & Chit. 30.

The jurisdiction of the Lord Chancellor in bankruptcy is distinct from that of the court of Chancery. *Ex parte Lund*, 6 Ves. jun. 782.

Proceedings in bankruptcy are not proceedings in equity. *Crowder v. Davies*, 3 Y. & J. 438.

On a motion for a prohibition to the Lord Chancellor sitting in bankruptcy, it appeared that the assignees had seized, as the property of the bankrupt, a farm belonging to J. S., and kept it a long time and mismanaged it; and that the Chancellor had referred it to the master, to take an account between J. S. and the assignees, in respect of such farm and mismanagement; and afterwards, upon his report, had ordered a certain sum to be paid to J. S. by the assignees, the commission having been previously superseded:—Held, first, that the jurisdiction of the Chancellor, sitting in bankruptcy, was not confined to the period during which the commission subsisted: secondly, that the Chancellor having power to order restitution pending the litigation, he had not exceeded his jurisdiction, in ordering the master to take an account as to the management of the farm, nor in making the assignees personally liable, beyond the funds in their hands, for such mismanagement: thirdly, that the Chancellor had jurisdiction over all effects taken under the commission, as well those of strangers as of a bank-

rupt, and over the assignees, for all acts done by them in their character as such under the commission: fourthly, that in cases where the Chancellor had jurisdiction generally, the court of King's Bench had no authority to revise his order: and fifthly, that no prohibition could be granted after the final order of the Chancellor, unless there were an original want of jurisdiction apparent on the face of the proceedings: but the court of King's Bench did not decide whether they had an authority to direct a prohibition to the Chancellor, sitting in bankruptcy. *Ex parte Cowan*, 3 B. & A. 123.

The court had no jurisdiction to appoint a receiver upon petition in bankruptcy. *Ex parte Tupper*, 1 Rose, 179.

There was no appeal from the Lord Chancellor in bankruptcy. *Ex parte Bryant*, 1 Ves. & B. 211; 1 Rose, 288.

But there was no settled rule of the court to prevent the Lord Chancellor from re-hearing an appeal in bankruptcy. *Ex parte Baker*, 1 Mont. & Mac. 279.

The filing of an affidavit in bankruptcy was the swearing and carrying of it into the bankrupt office, it was then within the reach of the Lord Chancellor, should the purposes of justice at any time require the production of it. *Ex parte Newton*, 2 Rose, 19.

Where a stranger to the commission seeks relief under the Chancellor's jurisdiction in bankruptcy, he submits himself to it in all respects, and the Chancellor will enforce his orders against him. A point arising out of the question of proofs is within the jurisdiction. *Ex parte Pearce*, 1 Rose, 232; 19 Ves. jun. 25.

A stranger to this commission applying for and obtaining an order in bankruptcy, brought himself within the jurisdiction. *Ex parte Beszant*, 1 Rose, 181.

## III. WHO MAY BE BANKRUPTS.

### 1. Statute.

The following description of persons are mentioned in the statute as those who are subject to the bankrupt laws: agents, who make their living by buying and selling; bankers, bleachers, brokers, builders, calenderers, carpenters, cattle-salcemen, coffee-housekeepers; commodities, persons who make their living by the workmanship of—companies, members of, or subscribers to any incorporated commercial or trading company established by charter or act of parliament, as such not liable—dyers, factors, farmers, as such not liable—fullers, graziers, as such not liable;—goods, buyers and sellers of, those persons who seek their living by buying and letting for hire; hotel-keepers, innkeepers, insurers of ships' freight or other matters against perils of the sea—common labourers, and workmen for hire, as such not liable—merchandise, using the trade of, by way of bargaining, bartering, commission, consignment, exchange, or otherwise, in gross or by retail; packers; parliament, persons having privilege of parliament, if

traders within any of the other descriptions, are liable—printers, receivers of other mens' monies or estates into their trust or custody, salesmen of cattle or sheep, scriveners, shipwrights, tavern-keepers—taxes, receivers general of, as such not liable—victuallers, warehousemen, wharfingers, and workmen of goods, unless for hire. 6 Geo. 4, c. 16, s. 2.

The statute extends to aliens, denizens, and women, both to make them subject thereto, and to entitle them to all the benefits given thereby. 6 Geo. 4, c. 16, s. 135.

Quere, whether a commission cannot issue against a person attainted, as he may be sued in a civil action even when attainted of treason? *Ramsay v. McDonald*, 1 W. Black. 30; S. C. nom. *Ramsden v. Macdonald*, 1 Wils. 217.

The Lord Chancellor would stop the progress of a commission against one who was not properly the object of it. *In re Lewis*, 2 Rose, 59.

Trespass lies against the assignees under a commission of bankruptcy, sued out against a person not liable to be a bankrupt, for entering a house. *Perkin v. Procter*, 2 Wils. 383.

## 2. Particular Persons.

### (a) Executors.

An executor, who carries on the business for the benefit of the testator's children, may be a bankrupt. *Viner v. Cadell*, 3 Esp. 88—Eldon.

Under the bankruptcy of an executor and trustee, directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable. *Ex parte Garland*, 10 Ves. jun. 110.

Where a testator disposed of his property, and directed a trade, in which he was concerned, to be carried on after his death:—Held, that only the testator's capital in the trade was liable to the creditors of the trade who became such after the testator's death, and that they had no further claim upon his assets. *Ex parte Richardson*, 3 Madd. 138.

### (b) Infants.

A commission of bankruptcy cannot be supported against a person under age. *O'Brien v. Currie*, 3 C. & P. 283—Burrough. S. P. *Ex parte Adam*, 1 Ves. & B. 494.

Such a commission is void, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365; 2 M. & Scott, 496.

It was long since held that a person could not be a bankrupt by reason of a trading by him during his infancy. *Stevens v. Jackson*, 4 Camp. 164; 1 Marsh. 469; 6 Taunt. 106; S. P. *Ex parte Moule*, 14 Ves. jun. 603.

But it was considered that an infant might be a bankrupt where he had held himself out as an adult and traded as such: therefore a bankrupt praying to supersede his commission on the ground of infancy was left to his action, where he had traded two years as an adult. *Ex parte Watson*, 16 Ves. jun. 265.

A partnership of three becoming insolvent, and one being an infant, a joint commission of bankruptcy against the other two was superseded, as separate commissions ought to have been taken out. *Ex parte Henderson*, 4 Ves. jun. 163; S. P. *Ex parte Layton*, 6 Ves. jun. 440.

A joint commission of bankruptcy, superseded on the ground of the infancy of one partner, on the petition of the assignees under a separate commission. *Ex parte Barwis*, 6 Ves. jun. 601.

### (c) Married Women.

A wife being a sole trader in London is liable to a commission of bankruptcy, and her assignees shall come in paramount the assignees of the husband, though his was the prior bankruptcy. *La Vie v. Philips*, 1 W. Black. 570; 3 Burr. 1776.

The wife of a convict sentenced to transportation may be a trader and a bankrupt, although the husband is only on board the hulks, and she has occasional intercourse with him. *Ex parte Franks*, 7 Bing. 762; 1 M. & Scott, 1.

A commission having issued against a married woman, on a trading before marriage, it was superseded. *Ex parte Mear*, 2 Bro. C. C. 266.

### (d) Lunatics.

A lunatic may be a bankrupt, if the act of bankruptcy be committed during a lucid interval. *Anon.* 13 Ves. jun. 590.

## 3. Requisites of Trading.

*Trading in England.*—One who has traded to England, whether native, denizen, or alien, though never a resident trader in England, but comes over here occasionally, and commits an act of bankruptcy, is an object of the bankrupt laws. *Alexander v. Vaughan*, Cowp. 398. And see *Ex parte Smith*, Cowp. 402.

A person residing in the Isle of Man, but coming from time to time to this country, and buying goods here, which were afterwards sold in that island, is a trader against whom a commission of bankruptcy may issue in this country, although he only bought but never sold any goods here. *Allen v. Cannon*, 4 B. & A. 418.

A person residing in India, and trading there, and in the course of that trading drawing bills upon England for the value of other bills sent thither, upon which he got a profit by the exchange, and in the course of that sort of dealing contracting debts in England, is a trader within the meaning of the bankrupt laws. *Ingless v. Grant*, 5 T. R. 530.

A trader in London purchases goods to be sold by A. and B., partners in trade in Dublin, and charges them to A. and B. at prime cost; this creates a debt due from B. in England, and makes him a trader here. *Williams v. Nunn*, 1 Taunt. 270; 1 Camp. 152.

A joint commission against two partners in England, another partner residing abroad, was superseded. *Ex parte Layton*, 6 Ves. jun. 434.

*During Operation of Statute.*—A trading, which

for the remainder of two months:—Held, that this was a legal imprisonment, so as to constitute an act of bankruptcy. *Stevens v. Jackson*, 1 Marsh. 469; 6 Taunt. 106; 4 Camp. 164; 2 Rose, 285.

An act of bankruptcy was considered committed by lying in prison for two months, though the party had the benefit of day rules during that period. *Soames v. Watts*, 2 C. & P. 400—Best.

*For what Debt.*—A penalty due to the crown was held to be a debt within the stat. 1 Jac. 1, c. 15, s. 2; therefore, where a trader lay in prison more than two months, being unable to pay Exchequer penalties for smuggling:—Held, that it was an act of bankruptcy. *Cobb v. Symons*, 5 B. & A. 516; S. C. not S. P. 1 D. & R. 111.

### 8. Escape from Prison.

By 6 Geo. 4, c. 16, s. 5, if any trader having been arrested, committed, or detained for debt, shall escape out of prison or custody, it shall be an act of bankruptcy from the time of the arrest, commitment, or detention.

Carrying a prisoner, by the permission of the sheriff, through another county, for the purpose of calling upon his attorney there, in his way to a judge's chambers, upon an habeas corpus, is not escaping within stat. 21 Jac. 1, c. 19, s. 2, (in which the provision was nearly the same), so as to make the party a bankrupt. *Rose v. Green*, 1 Burr. 437; 3 Ld. Ken. 173.

### 9. Fraudulent Transfer.

#### (a) Statute.

The words of the statute are, "make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels;" "or make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels;" and if done with intent to defeat or delay creditors, it is an act of bankruptcy. 6 Geo. 4, c. 16, s. 3.

A conveyance by deed of all a trader's estate to trustees for the benefit of his creditors, is not an act of bankruptcy, unless a commission issue within six months, provided certain forms be attended to. 6 Geo. 4, c. 16, s. 4.

The words "either within this realm or elsewhere" were inserted, because, under the previous statute 21 Jac. 1, c. 19, it had been held that a person resident in India, and trading there, drawing bills upon England for the value of other bills sent thither, did not commit an act of bankruptcy by assigning, while resident in India, all his effects in trust for creditors, in certain proportions. *Inglis v. Grant*, 5 T. R. 530. And see *Ex parte Smith*, Cowp. 402.

The word "fraudulent" applies to each of the words gift, delivery, and transfer. *Cook v. Caldecott*, 4 C. & P. 315; M. & M. 522—Tenterden.

The word "delivery" is of very general signification; but, being connected with the words "gift or transfer," it seems that, in interpretation,

it must be confined to transactions of the same nature. *Cotton v. James*, M. & M. 273; 3 C. & P. 505—Tenterden.

#### (b) Of all Estate for all Creditors.

A deed, whereby a trader conveys all his property in trust to divide amongst his creditors, is an act of bankruptcy. *Ex parte Bourne*, 16 Ves. jun. 149; S. P. *Ex parte Smith*, 1 Ves. & B. 518.

Though the creditors, with whom such deed was in the first instance concerted, afterwards, and when it was executed, changed their purpose, unknown to the bankrupt, and intended to set it up as an act of bankruptcy. And such deed is operative, though it contain a proviso to be void, if the trustees think fit. *Tuppender v. Burgess*, 4 East, 230; 1 Smith, 33.

So, though there was in an assignment by partners a proviso to be void if all the creditors for above 20l. should not execute, or a commission of bankruptcy should issue within a certain time. *Dutton v. Morrison*, 17 Ves. jun. 193; Rose, 213.

But otherwise, where the deed, being joint and not several, was never executed. *Id.*

So, although there is a proviso that it should be void if all the creditors should not execute it, and that in the meantime the acts of the trustees should be good. *Back v. Gooch*, 4 Camp. 232; Holt, 13—Gibbs. And see *Antrom v. Chase*, 15 East, 212.

So, though not executed by the trustees or the creditors. *Id.*

But otherwise, where not properly stamped. *Whitwell v. Dimesdale*, Peake, 168—Kenyon.

So, although the assignment be made merely for the purpose of making an act of bankruptcy. *Simpson v. Sikes*, 6 M. & S. 295.

The execution by the debtor of a deed of trust, which is an act of bankruptcy, is not in the nature of an escrow before it is executed by the trustees. *Id.*

Proviso in a lease for re-entry, and that the lease should be void if the lessee assigned without licence. The lessee by deed assigned all his property, real and personal, to trustees, for the benefit of his creditors, and was afterwards declared a bankrupt:—Held, that the deed of assignment was an act of bankruptcy and void. *Dee v. Lloyd v. Powell*, 8 D. & R. 35; 5 B. & C. 308.

Where a person conveyed all his property to a canal company, upon their advancing money to pay all his debts, it was held to be no act of bankruptcy. *Manton v. Moore*, 7 T. R. 67.

#### (c) Of all Estate to a particular Creditor.

An assignment of all a trader's stock, though only by way of security, and for valuable consideration, is an act of bankruptcy. *Hassell v. Simpson*, 1 Dougl. 89, n.; 1 Bro. C. C. 99.

A conveyance made by a trader of his whole substance to a particular creditor, under which possession was not taken until it became neces-



sary, to prevent the operation of the statute, was adjudged fraudulent and an act of bankruptcy. *Worseley v. De Mattos*, 1 Burr. 467; 2 Ld. Ken. 218; *S. P. Wilson v. Day*, 2 Burr. 827.

So, though the trader afterwards continued to carry on his trade for three years, at the expiration of which time a commission issued against him. *Pulling v. Tucker*, 4 B. & A. 382. And see *Hartley v. Smith*, Buck, 368.

A bill of sale to a particular creditor, of all the effects of a trader, in trust to satisfy his debt, and to pay over the surplus (if any) to the trader, who then knew himself to be insolvent, is an act of bankruptcy, and of no effect as a conveyance, notwithstanding it was given by the trader when under arrest, at the suit of the particular creditor for a just debt, and followed by an immediate change of possession. *Newton v. Chentler*, 7 East, 137; 3 Smith, 137; *S. P. Butcher v. Easto*, 1 Doug. 295.

(d) Of part of Estate to a particular Creditor.

*Must be voluntary.*—A conveyance of part of a trader's property to a particular creditor, to be an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3, must be voluntary, and given in contemplation of bankruptcy, both of which are necessary to make an act of bankruptcy by fraudulent conveyance. *Gibbons v. Philippe*, 7 B. & C. 529.

If a trader voluntarily give a bill of sale without pressure or demand, but when he is in such a situation that he must be supposed to anticipate that a bankruptcy will in all human probability follow, it is, it seems, an act of bankruptcy. *Id.*

But, if it be made under compulsion, and the party yield to fear, it is not a fraudulent preference. *Reed v. Ayton*, Holt, 503—Gibbs: *S. P. Arbousin v. Hanbury*, Holt, 575.

A transfer of goods in satisfaction of a bona fide debt, made voluntarily and in contemplation of bankruptcy, is an act of bankruptcy, and not protected by the eighty-first section, though made more than two months before a commission issues. *Brown v. Nunn*, 9 Bing. 107; 2 M. & Scott, 122.

*What Transfers are within the Statute.*—It was held under the former statutes, that a pretended sale of part of a trader's goods to a particular creditor, or any other contrivance not in the course of trade, but calculated merely to give a fraudulent preference, and to defeat the equality of the bankrupt laws, was void; though the delivery of the goods to such creditor, and his assent to the transaction, was complete before any act of bankruptcy committed: but that such pretended sale was not in itself an act of bankruptcy, any more than any other fraudulent transaction, which was not by deed. *Rust v. Cooper*, Cowp. 629. And see *Alderson v. Temple*, 4 Burr. 2235; *Harman v. Fisher*, Cowp. 117; *Loft*, 472; *Gayner's case*, 1 Burr. 477; and *Compton v. Bedford*, 1 W. Black. 362.

But it is now held, that the words of the present statute being so much more extensive, a

fraudulent sale is an act of bankruptcy. *Cook v. Caldecott*, M. & M. 522; 4 C. & P. 215—Tenterden.

But it has been said, that, to constitute an act of bankruptcy by a fraudulent sale, the fraud must be known by the buyer. *Id.*

A sale of goods at such a price, and under such circumstances, that the buyer ought to know the trader is selling to raise money in fraud of his creditors, is an act of bankruptcy, and the buyer is liable to the assignees in trover for the value of the goods. *Id.*

Where A. and B., being in embarrassed circumstances, conveyed to C. all the machinery in their mills, and all the machinery to be substituted in lieu thereof, to secure 3029l. 9s. 7d., with interest, defeasible, however, upon the payment of that sum with interest, by instalments of 50l. in each succeeding month, but had other property:—Held, that this was not per se an act of bankruptcy, but that it should have been left to the jury to say whether the conveyance was a fraudulent preference. *Balme v. Hutton*, 2 Y. & J. 101.

A fraudulent delivery of goods is not an act of bankruptcy unless it be in the nature of a gift or transfer; so, when goods are removed with intent to delay a creditor, but the party to whose custody they are given has no claim given to him over them, this is not an act of bankruptcy. *Cotton v. James*, M. & M. 273; 3 C. & P. 505—Tenterden.

A rule for a new trial was obtained, but afterwards discharged. *Id.*

At all events such delivery of goods by his agent carrying on his business without his direction, is no act of bankruptcy. *Id.*

A builder was employed in building on the land of a proprietor; and, upon disagreeing as to the construction of the contract, the proprietor claimed to consider the builder as a debtor, on account of certain advances made to him to an extent which the builder denied, and the builder's son, who principally managed the work, removed goods to the premises of a person for safe custody, and to secure them from being taken by the proprietor, and the builder approved the discontinuance of the works, but did not direct or know of the removal of the goods, it was held not to be an act of bankruptcy. *Id.*

A gift of money is not within sect. 3 of 6 Geo. 4, c. 16. *Abell v. Daniel*, M. & M. 370—Tent.

A bill of exchange is a chattel, and within that statute, and a fraudulent delivery or transfer of such bill by a trader to a creditor constitutes an act of bankruptcy. *Cumming v. Bailey*, 4 M. & P. 36; 6 Bing. 363.

If a trader fraudulently inclose in a letter to a creditor a bill of exchange, it is an act of bankruptcy, without evidence that the bill ever came to the hands of the creditor, or that he would have accepted it. *Id.*

*What Conveyances within former Statutes.*—A deed, whereby a debtor, being pressed, conveys estates in trust, to sell, and to pay the

pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference, in contemplation of bankruptcy, was an act of bankruptcy. *Morgan v. Horseman*, 3 Taunt. 241; 1 Rose, 334. And see *Young v. Wright*, 2 Marsh. 233; 6 Taunt. 540.

But the deed was valid, so far as related to the protection of the urgent creditor. *Id.*

Quere, whether void for the residue? *Id.*

An assignment of a lease, part of a bankrupt's estate, made in contemplation of bankruptcy, to some of the creditors, was an act of bankruptcy. *Devon v. Watts*, 1 Dougl. 86. And see *Lenton v. Bartlett*, 3 Wils. 47; and *Shaw v. Jackman*, 4 East, 210.

So, an assignment of all stock in trade, together with two leasehold houses, to a creditor by way of mortgage, was an act of bankruptcy, and rendered void the mortgage both of the houses and of the goods. *Law v. Skinner*, 2 W. Black. 996.

#### (e) In case of Partnership.

Where partners, by deed, assigned all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner did not assent to it, the assignment was held to be fraudulent and void, and an act of bankruptcy. *Eckhardt v. Wilson*, 8 T. R. 140.

So, an assignment of partners by deed of all their property in trust for their creditors, with a proviso to be void if all the creditors for above 90*l.* should not execute, or a commission of bankrupt should issue within a certain time, was an act of bankruptcy. *Secus* when the deed being a joint and not a several one was never executed. *Dutton v. Morrison*, 1 Rose, 213; 1 Ves. jun. 193.

Where one partner makes a fraudulent grant by deed to another partner, it is an act of bankruptcy in the former, but not in the latter. *Whitwell v. Thompson*, 1 Esp. 68—Kenyon.

And where two partners join in an assignment of property as security for a debt, and one of whom has at the time committed an act of bankruptcy, it is void as to a moiety only. *Id.*

A partnership which existed between A. and B. was dissolved by mutual consent. A., being separately possessed of freehold and leasehold estates, after the dissolution conveyed them to trustees for sale or mortgage, and empowered them to execute such conveyances as they should think fit, for the purpose of converting his said estates into money, in order to enable him to carry on his trade, and to pay his creditors their debts; and it was agreed, that such conveyances might be made and executed by the trustees with or without the concurrence of A., and that they should be seised or interested in the money arising from such sale or mortgage. At the time this deed was executed, A. had stock in trade, and other personal effects to a considerable amount, independently of the partnership assets, which were not sufficient to pay the partnership debts. The trustees were not creditors of either

A. or his partner. A. and his partner afterwards gave C. & Co., who were not creditors of either, a power of attorney to make demands of every description, to examine and settle all the accounts, together with other powers to act for them, they agreeing to ratify whatever should be done under it. A deed was afterwards prepared by A. and his trustees, for the purpose of conveying all his freehold and leasehold estates previously conveyed to D. & Co. to sell or mortgage, with a view to raise 130,000*l.*, and 40,000*l.* in negotiable bills of exchange, and to indemnify the drawers and acceptors from the payment thereof; but these sums were not advanced, nor were the bills drawn, or any other act done under the latter deed:—Held, that neither the execution of the first conveyance to his trustees, nor the power of attorney, under these circumstances, constituted an act of bankruptcy by A. *Berney v. Davison*, 4 Moore, 126; 1 B. & B. 408.

So, where such partners, being in insolvent circumstances, stopped payment on the 15th of February, 1819, and dissolved their partnership on that day: and A. being separately possessed of freehold and leasehold estates, conveyed the whole of them on the same day, by indentures of lease and release, to trustees in trust for sale or mortgage, for the purpose of converting such estates into money, it being convenient to A. to raise money at an early period: and subsequently to this conveyance, A. and B. gave a power of attorney to C. & Co. to recover all debts which should be due to them, together with full powers for them to act:—Held, that these circumstances did not constitute an act of bankruptcy by A. *Berner v. Vyner*, 4 Moore, 322; 1 B. & B. 482.

#### (f) Other Conveyances.

Every grant and conveyance which a court of equity would declare fraudulent, was held to constitute an act of bankruptcy. *Jacob v. Shepherd*, 1 Burr. 417: *S. P. Unwin v. Oliver*, 1 Burr. 481.

To invalidate a deed it is not necessary to shew that the party was insolvent; the question is, whether the deed was made to hinder and delay his creditors, by placing the property out of their reach? *Richards v. Smallwood*, Jacob, 557.

A fraudulent judgment and execution, though void against creditors, is not in itself an act of bankruptcy. *Clavey v. Hayley*, Cowp. 427.

An agreement for a secret execution, after which the debtor was to retain possession of the goods, though void against creditors, is not, of itself, an act of bankruptcy. *Anmer v. Spawwood*, Lofft, 114.

An agreement to accept a composition, where there is no assignment of the trader's effects, is not an act of bankruptcy. *Jelly v. Wallis*, 3 Esp. 228—Kenyon.

Quere, whether a fraudulent assignment of a policy of insurance upon the trader's life be an act of bankruptcy? *Grogan v. Cook*, 2 B. & P. 230.

Whether an assignment by deed of book debts is an act of bankruptcy depends upon what other

affects the trader had. *Ex parte Richardson*, 14 Ves. jun. 186.

A conveyance by deed to a child, though declared to be void under stat. 1 Jac. 1, if made when a trader is insolvent, is fraudulent, and an act of bankruptcy. *Whitwell v. Thompson*, 1 Esp. 68—Kenyon.

An ante-nuptial settlement may be an act of bankruptcy. *Ex parte Mayor*, 1 Mont. 292.

(g) *Who estopped from setting up the Act.*

Parties who were privies, and had assented to a deed of assignment, could not set it up as an act of bankruptcy. *Bamford v. Baron*, 2 T. R. 594.

A. assigns all his estate to trustees for the benefit of his creditors, and B. also makes a like assignment to trustees, two of whom are trustees under A.'s assignment; A., at the instance of his trustees, sues out a commission of bankrupt against B., the act relied upon being B.'s assignment.—Held, that the commission, being that of A.'s trustees, who were privies and parties to B.'s deed of assignment, could not be supported. *Ex parte Kilner*, Buck, 104.

A commission of bankrupt being sued out upon the petition of a creditor, who had not concurred in a deed of conveyance, and who, together with others who had so concurred, was chosen assignee;—Held, that it was no objection to an action brought by them as assignees, for the recovery of part of the bankrupt's estate, that some of them had concurred in such deed. *Tuppen-den v. Burgess*, 4 East, 230; 1 Smith, 33.

For such estoppel applies only to the petitioning creditor, who originates the commission. *Id.*

The assignees of a bankrupt, though neither of them are petitioning creditors, cannot avail themselves of an act of bankruptcy, of which the petitioning creditor would be estopped from availing himself. *Type v. Hockin*, 9 D. & R. 881; 7 B. & C. 101.

If the petitioning creditor knew of and acquiesced under a deed of trust which amounted to an act of bankruptcy, though he did not execute, it will not support the commission. *Ex parte Cawkwell*, 19 Ves. jun. 233; 1 Rose, 315.

10. *Fraudulent Surrender of Copyholds.*

By 6 Geo. 4, c. 16, s. 3, if any trader shall make a fraudulent surrender of any of his copyhold lands or tenements, with intent to defeat or delay his creditors, it is an act of bankruptcy.

This was previously held not to be an act of bankruptcy, because it was said it could not be done with intent to defeat or delay creditors, as they could not have execution of copyhold lands. *Ex parte Cockshott*, 3 Bro. C. C. 502.

11. *Filing Declaration of Insolvency.*

By 6 Geo. 4, c. 16, s. 6, making a declaration of insolvency in writing, signed by the trader, and attested by an attorney, and filed with the secretary of bankrupts, shall be an act of bankruptcy.

And by s. 7, no commission grounded on such an act shall be invalid, by reason of the declaration having been concerted or agreed upon between the bankrupt and any creditor, or other person.

12. *Filing Petition to Insolvent Court.*

By 7 Geo. 4, c. 57, s. 13, filing a petition in the Insolvent Debtor's Court is an act of bankruptcy, provided the trader is declared bankrupt before the time of hearing in the Insolvent Debtor's Court.

According to the practice of the Insolvent Debtor's Court, the petition of the insolvent is signed by him in prison, and there delivered to the provisional assignee of the court:—Held, that the petition is not filed within the meaning of the 13th section of the statute 7 Geo. 4, c. 57, so as to constitute an act of bankruptcy, until it reaches its final destination—the custody of the proper officer in the office. *Garlick v. Sangster*, 2 M. & Scott, 68.

13. *Giving Money or Security to Petitioning Creditor.*

By 6 Geo. 4, c. 16, s. 8, if, after a docket struck, a trader shall pay money to the person who struck it, or give security or satisfaction for his debt, or any part of it, whereby he might receive more in the pound than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy.

This provision is nearly similar to one contained in the previous statute 5 Geo. 2, c. 30, s. 24, under which it has been held, that where a petitioning creditor was holder of a bill accepted by the bankrupt, payment after the commission was an act of bankruptcy. *Ex parte Thompson*, 1 Ves. jun. 157.

And that it was equally an act of bankruptcy, although it was uncertain at the time, whether the person taking the payment would in fact receive more than the other creditors. *Ex parte Paxton*, 15 Ves. jun. 463.

14. *Concerted Act of Bankruptcy.*

By 6 Geo. 4, c. 16, s. 7, no commission granted on an act of bankruptcy, by filing a declaration of insolvency, shall be invalid by reason of such declaration having been concerted or agreed upon between the bankrupt and a creditor, or other person.

By 1 & 2 Will. 4, c. 56, s. 42, no commission shall be superseded or fiat annulled, or adjudication reversed, by reason of concert between the petitioning creditor, his solicitor or agent, and the bankrupt, his solicitor or agent.

Though a concerted commission or fiat is protected by the latter statute, a concerted act of bankruptcy is still a nullity. *Marshall v. Barkworth*, 1 Nev. & M. 279.

Before the statutes it was held, that a concerted act of bankruptcy could not support a commission. *Stewart v. Rickman*, 1 Esp. 108—Kenyon. And see *Bamford v. Baron*, 2 T. R. 594; and *Field v. Bellamy*, Bull. N. P. 39.

Even though it be for the benefit of the cre-

ditors that it should proceed. *Ex parte Brookes*, Buck, 257.

In one case, a commission on a concerted act of bankrupt was superseded with costs, though carried on bona fide and without collusion. *Ex parte Gouthwaite*, 1 Rose, 87. And see *Ex parte Bimmer*, 1 Madd. 250.

But a concerted act of bankruptcy is not objectionable, where the creditor who avails himself of it is not privy to it. *Ex parte Bourne*, 16 Ves. jun. 145.

Therefore, where a trader denied himself for the express purpose of becoming a bankrupt, but such denial was made without the knowledge of, or any previous concert with the petitioning creditor, it was considered unobjectionable. *Roberts v. Teasdale*, Peake, 27—Kenyon.

Where A., B., and C., were traders, and they employed an attorney, who was likewise employed by D. a creditor of their firm, and the attorney advised A., B., and C., to become bankrupts; and in order to procure an act of bankruptcy he took D. with him to the respective houses of A., B., and C., having first concerted with them that they should respectively deny themselves when D. called:—Held, that although D. was not privy to such denial, yet, inasmuch as the attorney was the agent of D. as well as of A., B., and C., and accompanied him for the purpose of procuring such denials, that such denials therefore were fraudulent acts of bankruptcy, and could not support a commission under which D. was the petitioning creditor. *Prosser v. Smith*, Holt, 442—Burrough.

Nor was an assignment of such traders' effects to their foreman, concerted with the same attorney, allowed to be an act of bankruptcy. *Id.*

A concerted commission will be superseded at the costs of the solicitor and petitioning creditor; and if a commission be taken out upon an act, proved at the trial of an issue to have been concerted with the petitioning creditor, and the solicitor, the court will supersede it, and will not direct another issue to try the validity of the commission with liberty to prove other acts. *Ex parte Prosser*, Buck, 77.

Though a commission of bankruptcy cannot stand upon a concerted act of bankruptcy, it may be supported if any other act of bankruptcy, not liable to that objection, has been committed, and the privity of the bankrupt is no objection. *Ex parte Edmonson*, 7 Ves. jun. 303.

Though subsequent to the affidavit of belief. *Ex parte Dufrene*, 1 Ves. & B. 56; 1 Rose, 333.

Affidavits, that merely state hearsay and belief as to a commission being concerted, are not alone sufficient to induce the court to direct an issue; but if they are corroborated by circumstances of suspicion attending the case, an issue will be directed. The jurisdiction in bankruptcy extends to every person fraudulently engaged in issuing a commission. *Ex parte Boyle*, Buck, 247.

#### 15. Members of Parliament.

Traders having privilege of parliament may be

bankrupt upon any of the ordinary acts of bankruptcy. 6 Geo. 4, c. 16, s. 9.

*If traders, having privilege of parliament, do not pay, secure, or compound with a creditor, or enter into a bond, within one month after service of a summons, and not appearing to an action, they commit an act of bankruptcy from the time of the service of the summons.* 6 Geo. 4, c. 16, s. 10.

*So, a trader, having privilege of parliament, disobeying an order of any court of equity, or in bankruptcy or lunacy, for payment of money after service, and a peremptory day fixed, will thereby commit an act of bankruptcy.* 6 Geo. 4, c. 16, s. 11.

There was a similar clause in the statutes 4 Geo. 3, c. 33, and 45 Geo. 3, c. 124; under the former of which it was held, that the act of bankruptcy created by that statute must in some of its circumstances be proved by a creditor; a creditor therefore admitted to prove them; but as the necessity alone justifies this exception from the rule, his testimony could not be received as to facts of which evidence could be obtained from other sources. *Ex parte Harewort*, 2 Rose, 203.

Where a person of a given character, and under certain circumstances, is brought within the bankrupt laws, the adjudication of the commissioners ought to proceed upon the direct evidence before them, that the person is of the character and within the circumstances required, and not upon a deposition incorporating the substance of an affidavit; in which (in another court) those essentials have been attested. *Id.*

Semble, it ought to appear upon the deposition as an ingredient of the act of bankruptcy, that the summons which ought to be served on the trader M. P. was taken out after the affidavit was filed upon record. *Id.*

Under the 45 Geo. 3, c. 124, it was held, that a trader having privilege of parliament, by not paying money under an order of court, committed an act of bankruptcy. *Read v. Phillips*, 16 Ves. jun. 437.

To prove an act of bankruptcy under 6 Geo. 4, c. 16, by a trader, who is a member of parliament, not paying or securing to a creditor a debt of 100*l.* after the suing out of a writ of summons, &c. it is not absolutely necessary to call the creditor. *Burton v. Green*, 3 C. & P. 306—Tenterden.

#### 16. Joint Commissions.

To support a joint commission of bankrupt, there must be separate acts of bankruptcy by each partner. *Allen v. Hartley*, 4 Dougl. 20.

Where one of three partners in a banking concern, who resided at the place where the banking-house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking-house, shut it up and stopped payment:—Held, that this was not evidence of a joint act of bankruptcy by all three. *Mills v. Bennett*, 2 M. & S. 556; 2 Rose, 203.

17. *Proof of Act of Bankruptcy.*(a) *Before Commissioners.*

*Who may prove.*—Semble, that a creditor may prove the act of bankruptcy before the commissioners. *Rex v. Bullock*, 2 Leach, C. C. 996; 1 Taunt. 71.

A creditor has been held in equity not to be a competent witness to prove the act of bankruptcy. *Ex parte Osborne*, 2 Ves. & B. 177; 1 Rose, 387.

In one case the commissioners were permitted, under particular circumstances, to receive an affidavit of the act of bankruptcy made before a master extraordinary. *In re Wood*, 1 Rose, 298.

In another case the act of bankruptcy was not permitted to be proved by affidavit, although the same person had regularly proved the same act of bankruptcy, under a prior separate commission against him and his partners. *Ex parte Rowe*, 2 Rose, 339.

*How Proof Made.*—A bankrupt is bound to disclose to the commissioners all the circumstances relating to his property, notwithstanding such disclosure may tend to establish an act of bankruptcy. *Pratt's case*, 1 Glyn & J. 58.

A petitioning creditor, under a separate commission against A., ordered to exhibit the proceedings under that commission, in order to aid the proof of an act of bankruptcy by A. under a subsequent joint commission against A. and B. *Ex parte Harrison*, 2 Glyn & J. 135.

There is a jurisdiction in bankruptcy to compel witnesses to attend the commissioners to prove the act of bankruptcy, reserving just exceptions. *Ex parte Higgins*, 11 Ves. jun. 8.

A person having a deed in his possession, that in effect amounts to an act of bankruptcy by one of the parties, may be ordered to attend the commissioners with it, without prejudice to any objection being taken before them as to disclosure of confidential communications. *Ex parte Treacher*, Buck, 17: S. P. *Ex parte Cawkwell*, 19 Ves. jun. 233; 1 Rose, 313.

Witnesses to prove the act of bankruptcy not having obeyed the summons of the commissioners, an order was made that they should attend. *Ex parte Lund*, 6 Ves. jun. 781.

A witness to an act of bankruptcy ordered to attend the commissioners, and prove, under penalty of costs for disobedience. *Ex parte Gardner*, 2 Rose, 107; 1 Ves. & B. 74: S. P. *Ex parte Jones*, 17 Ves. jun. 379.

(b) *In Actions.*

*Declarations of Bankrupt.*—The declarations of a bankrupt as to any particular matter or deed which may constitute an act of bankruptcy, if made after the deed done, are not evidence. *Robson v. Kemp*, 4 Esp. 233—Ellenborough.

In order to let in the declaration of the bankrupt, in proving an act of bankruptcy, what the bankrupt says must be connected or contemporaneous with the act. *Ex parte Palmer*, 1 Deac. & Chit. 373.

A trader being pressed for payment of a debt by the attorney of a creditor, promised to give him a security on the following day; instead of which he left his place of residence, and immediately afterwards gave securities to another creditor, a relation. On his return home, at the expiration of nearly a month, the attorney of the former creditor, in the course of conversation, asked him what security he had given his relation; to which he replied, "he did not know."—Held, that the declarations of the debtor in that conversation were admissible in evidence to support an alleged act of bankruptcy in giving the securities to his relation, by way of fraudulent preference, and to shew the conduct of the party giving them; although it was objected that the conversation took place in the absence of the person to whom the securities were given; and at too great a distance of time (a month) from the completion of the transaction—*Gaselee*, J. diss. *Ridley v. Gyde*, 2 M. & Scott, 448; 9 Bing. 349.

In an action by the assignees of a bankrupt, the bankrupt may allow his attorney before the bankruptcy to give in evidence privileged communications, though offered as proof of the act of bankruptcy. *Merle v. Moore*, R. & M. 390; 2 C. and P. 275—Best.

In trespass against the sheriff and an execution creditor for seizing goods of A., which the plaintiffs claimed as assignees under a joint commission against A. and B., the plaintiffs in support of the joint commission gave evidence of acts and declarations of B., for the purpose of shewing that he had become a bankrupt:—Held, that this evidence was inadmissible; and that the court, in granting a new trial on this ground, could not limit the inquiry on such second trial to the question of B.'s bankruptcy. *Bernasconi v. Farebrother*, 2 B. & Adol. 372.

*Who may be Witnesses.*—The bankrupt cannot be called to explain an act upon which the assignees rely as an act of bankruptcy. *Sayer v. Garnet*, 9 Bing. 103; 4 M. and P. 734.

Nor to explain an equivocal act of bankruptcy. *Hoffman v. Pitt*, 5 Esp. 22—Ellenborough.

Though in one case it was held that a bankrupt is an admissible witness to explain a doubtful act, which may be or not an act of bankruptcy; as whether an arrest relied upon as a concerted and fraudulent one was so or not. *Oxlade v. London (Sheriff)*, 1 Esp. 287—Kenyon.

A creditor is a witness to prove an act of bankruptcy, if he releases the assignees. *Koopes v. Chapman*, Peake, 19—Kenyon.

*Depositions.*—The commission and proceedings are inadmissible evidence of an act of bankruptcy for the purpose of defeating a conveyance. *Whitworth v. Graham*, 2 Rose, 364.

Where the proceedings are produced, the act of bankruptcy, found under the proceedings shall be sufficient for the plaintiff, without proof of an actual act of bankruptcy. *Pearson v. Fletcher*, 5 Esp. 90—Ellenborough.

A deposition in which it is stated that the de-

ponent saw the bankrupt execute an assignment of all his effects to a trustee, for the benefit of his creditors, is sufficient evidence of an act of bankruptcy, without producing the deed of assignment itself, such deposition being in evidence amongst the other proceedings under statute 49 Geo. 3, c. 121, s. 10. *Kay v. Stead*, 2 Stark. 200—Wood.

The depositions of the act of bankruptcy, when recorded according to 5 Geo. 2, c. 30, s. 41, are evidence, in an action at law, to prove the precise time when the act of bankruptcy was committed, if specified therein. *Jonson v. Wilson*, 1 Dougl. 257.

An objection to the insufficiency of depositions to establish an act of bankruptcy must be made at the trial. *Jacobs v. Latour*, 2 M. & P. 20; 5 Bing. 131.

If no objection is made at the trial, it is not any ground for a new trial. *Id.*

The defendant, though he has given no notice to dispute, may nevertheless give evidence to disprove the act of bankruptcy. *Mills v. Bennett*, 2 M. & S. 556; 2 Rose, 269.

In an action by assignees, where no notice has been given to dispute, a deposition stating that the bankrupt absented himself, and that the bankrupt had admitted that he absented himself for the purpose of avoiding his creditors, but not specifying the time of such admission, is not prima facie evidence to prove the act of bankruptcy. *Marsh v. Meager*, 1 Stark. 353—Ellenb.

Upon an order to proceed to trial upon two issues, to try the validity of the commission, the plaintiff to give notice in writing to the bankrupt of the acts intended to be relied on at the trial:—Held, that the petitioner in his notice must specify the acts relied on, the times when they were committed, and the witness who will be called to prove them. *Ex parte Bogen*, Buck, 137.

## V. PETITIONING CREDITOR.

### 1. Who may be.

*Agents.*—A factor, who sells goods in his own name, without a del credere commission, is a good petitioning creditor against the purchaser, although he has merely communicated the name of the purchaser to his principal. *Sadler v. Leigh*, 4 Camp. 185; 2 Rose, 286—Ellenborough.

But he ceases to be so, when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from the purchaser. *Id.*

*Aliens and Traders in an Enemy's Country.*—A commission of bankruptcy founded on the petition of a British subject resident here, for a debt due to himself and partners, also British subjects, but resident and carrying on trade in an enemy's country, is bad. *McConnell v. Hector*, 3 B. & P. 113. *And see De Metton v. De Mello*, 12 East, 234; 2 Camp. 420; *Kensington v. Inglis*, East, 275.

Even though he be naturalized in a neutral

state. *O'Mealey v. Wilson*, 1 Camp. 482—Ellenborough.

The residence of a British subject in an enemy's country for the purpose of a trade, licensed by the government of this country, is not a disability to take out a commission. *Ex parte Baghole*, 18 Ves. jun. 525; 1 Rose, 271.

The debt of such a person would be good to support the commission, if the residence be not shewn to be an adhering to the enemy. *Roberts v. Hardy*, 3 M. & S. 533; 2 Rose, 457.

### *Creditors who have signed Composition Deeds.*

—If a trader commit an act of bankruptcy by assigning all his stock in trade to A., who is a party to the deed of assignment, A. cannot be a petitioning creditor grounded on that act of bankruptcy. *Jackson v. Irwin*, 2 Camp. 49—Ellenborough. *And see Bamford v. Baron*, 2 T. R. 594.

Nor a creditor, who, without executing, has assented to the deed, by approving of acts done under it by the trustees. *Back v. Goock*, 4 Camp. 232; Holt, 13—Gibbs: *S. P. Hicks v. Burfitt*, 4 Camp. 235, n. *And see Tappenden v. Burgess*, 4 East, 230; 1 Smith, 33.

So, of an absolute bill of sale. *Ex parte Shaw*, 1 Madd. 599.

If the petitioning creditor has acted under the deed, although he may not have executed it, he cannot avail himself of it as an act of bankruptcy, and will be liable for the costs. *Ex parte Caswell*, 1 Rose, 313; 19 Ves. jun. 233.

Where a creditor, being ignorant that an act of bankruptcy had been committed by his debtor, executed a composition deed for the amount of his debt, and received a dividend under it:—Held, that he might still become a petitioning creditor in respect of the original debt. *Doe d. Pitcher v. Anderson*, 5 M. & S. 161; 1 Stark. 262.

Where a commission was sued out upon the petition of a trustee of an equitable creditor who had signed a composition deed, the court superseded the commission. *Ex parte Bather*, Buck, 426.

If, at a meeting of creditors, one of the creditors dissent from the execution of a deed of assignment—quære, whether he can issue a commission upon it? *Ex parte Bayley*, 1 Mont. & Mac. 438.

If, by a composition deed, an insolvent assigns to four trustees, all his goods, for the benefit of his creditors, provided the trustees and the creditors on or before a given day prove their debts, if required, and execute the deed, and there is a covenant by the trustees and creditors that they will not arrest, implead, or prosecute the debtor, or any of his goods, chattels, lands, or tenements, on account of their debts, and on such suing or prosecution the deed shall be a discharge; and the deed is executed by two only of the trustees; the debt of a trustee who has executed it is extinguished, and he cannot sue out a commission on it. *Small v. Marwood*, 9 B. & C. 300; 4 M. & R. 181.

*Executors.*—One of three executors may by

himself be a good petitioning creditor on a debt due to the testator. *Treasure v. Jones*, 1 Selw. N. P. 265.

A commission may be taken out by an executor before he has obtained probate. *Ex parte Paddy*, 3 Madd. 241; *Buck*, 235.

So, a commission may be supported on a debt due to the petitioning creditor in the character of executor, although he had not obtained a probate on a sufficient stamp at the time when the commission issued, if he afterwards, before adjudication, obtain a valid probate, for that has relation back to the testator's death. *Rogers v. James*, 7 Taunt. 147; 2 Marsh. 425.

**Husband and Wife.**—A husband alone cannot be the petitioning creditor to support a commission, in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife dum sola. *Ramsey v. George*, 1 M. & S. 176; 1 Rose, 108.

But the husband alone may sue out a commission upon a note given to the wife dum sola. *Ex parte Barber*, 1 Glyn & J. 1.

**Infants.**—An infant cannot be a petitioning creditor, because he cannot enter into the necessary bond. *Ex parte Borrow*, 3 Ves. jun. 554.

A commission cannot be supported upon a petitioning creditor's debt, made up of debts due to several persons, if one of them be an infant and a separate creditor of the trader. *Ex parte Merton*, *Buck*, 42.

**Partners.**—One partner cannot be a petitioning creditor against another, unless the debt be such as he might maintain an action upon. *Windham v. Patterson*, 1 Stark. 144; 2 Rose, 466—*Ellenborough*. And see *Marson v. Barber*, *Gow*, 17.

But it is no objection that the petitioning creditor was in partnership with the bankrupt in a particular transaction, provided the debt does not arise out of that particular transaction. *Id.*

If one of three partners undertake to provide for two bills drawn by the three, and accepted by a fourth person, such three partners cannot be petitioning creditors on a commission against the acceptor, although the conduct of the partner may, as against his co-partners, have been fraudulent. *Richmond v. Heapy*, 1 Stark. 202; S. C. not S. P. 4 Camp. 207—*Ellenborough*.

A commission cannot be supported on the petition of one only of two partners to whom a joint debt is due. *Buckland v. Newsome*, 1 Taunt. 477; 1 Camp. 474.

**Other Persons.**—Creditors having collateral securities for their debts may still be petitioning creditors,—as mortgagees. *Ex parte Jackson*, 5 Ves. jun. 357; *Ex parte Topham*, 1 Madd. 38.

Holders of warrants of attorney. *Miles v. Resolvins*, 4 Esp. 194—*Ellenborough*.

Judgment creditors. *Bryant v. Wickers*, 2 M. & S. 123; 2 Rose, 8.

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Holders of bills or notes. *Ex parte Douthat*, 4 B. & A. 67.

By a private act of parliament, intituled "An Act to enable the Norwich Union Society to sue in the name of their secretary, and to be sued in the names of their directors, treasurer, and secretary," that society were empowered to commence and prosecute all actions and suits in the name of their secretary as the nominal plaintiff:—Held, that it did not empower the secretary to sue out a commission of bankruptcy on behalf of the society, against a person indebted to them as a society. *Guthrie v. Fisk*, 5 D. & R. 24; 3 B. & C. 178; 3 Stark. 153.

If a creditor has received and transferred a bill of exchange, the holder of the bill is the proper petitioning creditor. *Ex parte Botten*, 1 Mont. & Bligh, 412.

The having proved under a former invalid commission, will not of itself prevent a man from being a petitioning creditor. *Beardmore v. Shaw*, 1 N. R. 263.

But the debt of a creditor, who has joined in a petition to supersede a prior commission, and proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the second commission is founded, may be set up to defeat such second commission, by a defendant in an action at the suit of the assignees under that commission. *Id.*

Semble, that an uncertificated bankrupt can petition for a commission if his assignees make no claim to the debts. *Ex parte Cartwright*, 2 Rose, 230.

But a bankrupt who has not paid 15s. in the pound under a second commission, although he has obtained his certificate under it, cannot be a petitioning creditor. *Ex parte Robinson*, 1 Mont. & M. 44.

A party who has been discharged twice under the insolvent act, and is afterwards bankrupt, and not paid 15s. in the pound, cannot have property, and therefore cannot be a petitioning creditor. *Ex parte Mascarnas*, 1 Deac. & Chit. 507.

Assignees may sue out a commission in respect of a debt due to their bankrupt. *Ex parte Blakey*, 1 Glyn & J. 197.

So, though one of the assignees be a solvent partner of the bankrupt, if the debt be a partnership debt. *Id.*

A petitioning creditor who has neglected to prosecute a commission, shall not have another. *Ex parte Masterman*, 2 Rose, 443.

## 2. Duty of Petitioning Creditor.

**To attend Meeting for Adjudication.**—The presence of the petitioning creditor at the meeting to declare the party a bankrupt, is required by a general order of Lord Rosslyn, 26th of November, 1798. *Ex parte Edwards*, 18 Ves. jun. 318.

Such attendance is not dispensed with on the ground of inconvenience to himself. *Ex parte Williamson*, 1 J. & W. 240.

A distance of 80 miles is not a cause for non-

attendance. *Ex parte Cox*, 1 Mont. 390; 1 Deac. & Chit. 205.

A distance of 200 miles allowed. *Ex parte Ross*, 1 Mont. & Bligh, 265; 1 Deac. & Chit. 552.

The petitioning creditor to a separate commission against A. will not be compelled to attend to give evidence in support of a subsequent joint commission against the same party and his co-partner. *Ex parte Stones*, 1 Glyn & J. 7.

*Other Matters.*—The petitioning creditor is bound to give every information in his power upon every subject which comes within his knowledge as petitioning creditor. *Ex parte Graves*, 1 Glyn & J. 86.

A petitioning creditor is bound to be assistant to the commission in all its stages; therefore, where a petitioning creditor had declared a commission to be invalid, he was held liable for the costs of inquiries occasioned by that declaration. *Ex parte Glossop*, 2 Rose, 386.

He is responsible for the production of a bill of exchange upon the direct proof of which his debt has been established. *Id.*

In one case, the petitioning creditor was directed to have the management of the defence to an action brought by the bankrupt, to try the validity of his commission, but the assignee to be fully indemnified. *Ex parte Stewart*, 2 Rose, 6.

### 3. Liability of Petitioning Creditor.

#### (a) Generally.

The petitioning creditor is to sue for and prosecute the commission at his own costs until the choice of assignees. 6 Geo. 4, c. 16, s. 14.

By statute 5 Geo. 2, c. 30, s. 25, the petitioning creditor was liable to pay the costs and expenses incurred in suing out and prosecuting a commission, until the assignees were chosen; therefore it was held on that statute, that an action for the expenses of suing out and prosecuting a commission, till the choice of assignees, could not be maintained against the petitioning creditor and another person jointly, who had been appointed assignees. *Finchett v. How*, 2 Camp. 275—Ellenborough.

A petitioning creditor cannot petition to be paid his taxed bill by a removed assignee, unless he charges collusion. *In re Gibson*, 1 Glyn & J. 303.

Where an attorney is employed by one person to sue out a commission on the petition of another person, the person so employing the attorney, and not the petitioning creditor, is the person liable to pay the attorney the costs of suing out the commission. *Pocock v. Russell*, 4 C. & P. 14; S. C. nom. *Pocock v. Russen*, M. & M. 357—Tenterden.

Quære, if an attorney can guarantee the petitioning creditor against the costs of the commission, on condition of being employed as solicitor to the commission? *Gillett v. Rippon*, M. & M. 406—Tenterden. And see *Murray v. Reeves*, 8 B. & C. 421.

It is a contempt of the great seal for a petitioning creditor to strike a docket at the instance of a solicitor who undertakes to prove the act of bankruptcy, and to guarantee him against any expenses he may be put to by issuing the commission; and the court therefore will not, upon the petition of such a creditor, tax the solicitor's bill of costs. *Ex parte Wilson*, Buck, 306.

The assignees, after the trial of an action commenced by them, where it appeared that there was not a sufficient trading to support the commission, and after acts under the commission, presented a petition to have the commission superseded, and that all costs and expenses incurred might be paid by the petitioning creditor:—Held, that the application came too late, and that the petitioning creditor was not responsible. *Ex parte Paul*, 1 Mont. & Mac. 185.

The Chancellor had not jurisdiction in bankruptcy to order the petitioning creditor to pay the solicitor's bill up to the choice of assignees. *Ex parte —*, Buck, 475.

Rule as to the liability of the original petitioning creditor for costs upon substitution of a petitioning creditor's debt. *Ex parte Cousins*, 2 Glyn & J. 270.

A petitioning creditor was allowed his costs of resisting an application to supersede the commission of the bankrupt's estate. *Ex parte Bottomley*, 5 Madd. 91.

By 6 Geo. 4, c. 16, s. 32, in actions against the petitioning creditor, either alone or jointly with others, for any thing done under the commissioner's warrant, proof of the fact of his being so is sufficient, in the same manner, and to the same extent as if he had himself committed the act.

## VI. PETITIONING CREDITOR'S DEBT.

### 1. Amount.

By 6 Geo. 4, c. 16, s. 15, the petitioner's debt, if a single debt, due to one creditor, or more, being partners, must amount to 100*l.* or upwards: if due to two separate creditors to 150*l.* or upwards; and if due to three or more separate creditors to 200*l.* or upwards.

A commission sued out upon the affidavits of four petitioning creditors, whose debts did not appear upon the face of those affidavits to amount to 300*l.*, was not void under the 5 Geo. 2, c. 30, s. 23; the provision respecting such affidavits being directory only, and not conditional. *Ellis v. Neale*, 2 N. R. 196.

Quære, whether proof of a debt of 161*l.* to one of the petitioning creditors, there being more than three, will support a commission? *Smith v. Miles*, 1 T. R. 475.

### 2. Time of accruing.

#### (a) Whilst Bankrupt a Trader.

A party must be a trader at the time of the petitioning creditor's debt; but if that was contracted while he was a trader, and he leave off trade, he may still become a bankrupt. *Dee &*



*Barnard v. Lawrence*, 2 C. & P. 134—Abbott; *S. P. Daise v. Holdsworth*, Peake, 64.

But if the debt be contracted whilst he is in trade, and a bond be given for it afterwards, it is sufficient. *Id.*

And a debt contracted before a man entered into trade is sufficient. *Butcher v. Easto*, 1 Dougl. 293.

A commission may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he has ceased to be a trader. *Beilie v. Grant*, 9 Bing. 121; 2 M. & Scott, 193.

(b) Before Act of Bankruptcy.

Generally.]—Although the petitioning creditor's debt must have accrued, and be due at the time of the act of bankruptcy, it need not then be payable; for a person who has given credit to a trader upon valuable consideration for any sum payable at a certain day, which may not have arrived at the time of the act of bankruptcy, may, nevertheless, be a petitioning creditor in respect of such debt, whether he shall have any security in writing, or otherwise, for such sum or not. 6 Geo. 4, c. 16, s. 15.

The debt must be a subsisting debt at the time of the act of bankruptcy upon which the commission is grounded; it is not sufficient that the debt accrued before the commission was sued out. *Moss v. Smith*, 1 Camp. 469—Ellenborough.

And rule for a new trial was refused. *Id.*

And that fact should appear upon the deposition. *Lawson v. Robinson*, 1 Stark. 456—Ellenb. *S. P. Clarke v. Askew*, 1 Stark. 457; *Key v. Cook*, 2 M. & P. 720. And see *Thackrah v. Wood*, 3 Stark. 141.

Where C. before the act of bankruptcy, accepted, for the accommodation of the bankrupt, a bill drawn by him, and, after the act of bankruptcy, paid the amount of the bill to T. S., to whom it had been negotiated:—Held, that such payment did not constitute a good petitioning creditor's debt. *Ex parte Holding*, 1 Glyn & J. 97.

Upon proof that a good debt once existed, the law will presume that it continued down to the time of the bankruptcy. *Jackson v. Irwin*, 2 Camp. 50—Ellenborough.

But in a late case the contrary was held. *Gresley v. Price*, 2 C. & P. 48—Abbott.

If it be necessary to prove a good petitioning creditor's debt on the 20th May, it is not sufficient to shew that on the 29th of January previous, a sum of 700*l.* was due, and that there were receipts and payments afterwards; but it must be proved that on the specific day as much as 100*l.* was owing. *Id.*

It is prima facie evidence that a promissory note was in existence before an act of bankruptcy, that it is proved to have been in existence before the docket is struck, and bears date on the face of it before the act of bankruptcy. *Obbard v. Betham*, M. & M. 486—Tenterden.

The date of a promissory note made by a bankrupt is prima facie evidence to shew that the note

existed before the act of bankruptcy was committed. *Taylor v. Kinloch*, 1 Stark. 175—Ellenb.

But no declaration by the bankrupt, whether oral or written, subsequent to his bankruptcy, would be admissible in evidence to prove this. *Id.*

If, in an action against the sheriff, the defendant do not give notice to dispute the requisites to support the commission, and the assignees give evidence of an act of bankruptcy committed between the sale and issuing the commission, it seems that they must prove the petitioning creditor's debt before the act of bankruptcy:—the judges equally divided. *Norman v. Booth*, 10 B. & C. 703.

On Bills not due.]—Where the petitioning creditor's debt is a bill drawn by the bankrupt, and indorsed to the petitioning creditor, evidence must be adduced that it was indorsed before the suing out of the commission. *Rose v. Roscroft*, 4 Camp. 245—Gibbs; *S. P. Dixon v. Evans*, 6 T. R. 59, overruling *Anon.* 2 Wils. 135; *Bingley v. Mallison*, 3 Dougl. 333.

So, where the debt arises on a note indorsed, or a bill accepted by the bankrupt, evidence must be given that the indorsement or acceptance was prior to the act of bankruptcy: the mere production of the instrument bearing an earlier date is insufficient. *Cowie v. Harris*, M. & M. 141—Tenterden.

But if the course of dealing between the parties raises the presumption that the petitioning creditor received the bill before the act of bankruptcy, it is prima facie sufficient. *Id.*

The petitioning creditor's debt did not amount to 100*l.* at the time of the act of bankruptcy, but was increased to a little more than 100*l.* by a note of the bankrupt, due at that time, being indorsed to him before he petitioned for the commission; this debt was deemed sufficient to support the commission. *Gleisier v. Hewer*, 7 T. R. 498.

Bills to the amount of 100*l.* drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, are sufficient, when due, to found a petition for a commission against him. *Brett v. Levett*, 13 East, 213; 1 Rose, 102.

But note, the bankrupt was in fact indebted to different persons at the time of the act of bankruptcy in more than 100*l.* even allowing the rebate of interest upon the bills, calculated back to that period. *Id.*

So, where A., having drawn a bill for 148*l.* in favour of B., to whom he was previously indebted to that amount, committed an act of bankruptcy before the bill became due, or had been presented for acceptance:—Held, that such bill was a good petitioning creditor's debt, although it appeared that it had been duly presented and paid by the acceptors subsequently to the commission. *Ex parte Douthat*, 4 B. & A. 67.

If two persons exchange acceptances, and, before the bills are mature, one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission before the other has paid his own ac-

ceptance. *Serrett v. Austin*, 4 Taunt. 200; 2 Rose, 112.

Semble, that evidence of the mere fact of a bankrupt having drawn or indorsed a bill for 100*l.*, and of its being over-due in the hands of a holder, is not of itself sufficient proof of a petitioning creditor's debt, without shewing a default by the acceptor. *Giles v. Powell*, 2 C. & P. 259—Best.

So, where the petitioning creditor's debt was created by his giving a check to the bankrupt on his bankers:—Held, that payment of the check must be proved, it not being sufficient, especially as the bankrupt's papers had come to the hands of the petitioning creditor, to prove that the check came to his hands again, and that the bankers, the day after the date of it, paid on his account to the bankers of the bankrupt a sum corresponding in amount with the check. *Bleasby v. Crossley*, 3 Bing. 430; 11 Moore, 327; 2 C. & P. 213.

A. purchases coals of B., and agrees to give him a bill for part of the purchase, payable at two months: A. afterwards sends to B. a paper purporting to be a bill accepted by him, with a blank left for the name of B. as the drawer. B. keeps the paper, but does not fill up the blank till after he had sued out a commission against A.:—Held, that the bill did not constitute a valid petitioning creditor's debt, and that B. having elected to keep the bill could not prove his debt. *Ex parte Farenden*, Buck, 34.

By deed of the 10th of June, 1780, made on the marriage of the bankrupt, his estate was limited to himself for life, remainder to his wife for life, remainder to T. G. for 500 years, in trust, in case the wife should die in the lifetime of her husband without issue between them, to raise by sale or mortgage, after the death of the husband, 300*l.*, and pay the same as the wife should by deed or will appoint; in June, 1809, the bankrupt borrowed 500*l.*, and, for securing the same, he and his wife, after levying a fine, together with T. G., executed a mortgage of the estate, and the bankrupt gave T. G. his promissory note for 200*l.*, payable on demand, as part of the sum of 300*l.*, secured by the settlement:—Held, that the note was not a good petitioning creditor's debt. *Ex parte Page*, 1 Glyn & J. 100.

It has been doubted whether a debt founded upon notes of a country banker, payable on demand, where no demand had been made, is sufficient to support a commission. *Stimpon v. Sykes*, 6 M. & S. 295.

Where there was a debt due for money had and received, and the same was secured by a note on an improper stamp, the debt was held sufficient to support a sequestration in Scotland. *Geddes v. Mowat*, 1 Glyn & J. 414.

*Where Credit not expired.*—Before the late statute, only such persons as had written securities for their debts could be petitioning creditors, by 5 Geo. 2, c. 30, s. 22, where the debt was not actually payable at the time of the act of bankruptcy; accordingly it was held, that a debt due upon an executory contract would not be good to found a commission, unless it was upon a written secu-

urity. *Ex parte White*, 3 Ves. & B. 130. But see 6 Geo. 4, c. 16, s. 15.

Therefore, a debt due for goods, where the credit was not expired, was not a good petitioning creditor's debt. *Cox v. Cripps*, 9 East, 504.

Goods sold, payable for, by the custom of the trade, two months after the sale, did not create a debt to support a commission, until the time of credit had elapsed. *Ex parte Roberts*, 1 Madd. 72; 2 Rose, 378.

Nor was a debt for goods sold upon an agreement to be paid for by a present bill, payable at a future day. *Hoskins v. Duperey*, 9 East, 498; 6 Esp. 58. But see *Hembsel v. Brown*, Peake, 54.

Where goods were sold to be paid for by a bill at four months, and no bill was given, there was not a good petitioning creditor's debt arising from this sale for the seller to support a commission against the purchaser, till the four months had expired. *Cothay v. Murray*, 1 Camp. 235—Ellenborough.

Upon a sale of goods at six or nine month's credit, the purchaser, by not paying at the end of six months, made his election to take credit for the nine months, and there was no debt to support a commission till the nine months were expired. *Price v. Nixon*, 5 Taunt. 338; 2 Rose, 438.

If a party agree to take a work which is to be published in eighteen months, at intervals of two months, the debt due for the numbers delivered is sufficient. *Mavor v. Pynes*, 3 Bing. 285; 11 Moore, 2 C. & P. 91.

A debt for money lent on mortgage, payable after six months' notice, such notice not to expire before a certain day, is a good petitioning creditor's debt, without any notice given, and more than six months before that day. *Hill v. Harris*, M. & M. 448—Tenterden.

#### (c) Another Act of Bankruptcy.

By 6 Geo. 4, c. 16, s. 19, no commission shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt.

Neither the bankrupt, nor any person claiming from him by assignment, subsequent to the commission, shall be permitted in an action at law to question the validity of such commission, and recover from assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donnan v. Duff*, 9 East, 21; 8 C. nom. *Kennet v. Duff*, 2 Smith, 44; 8 P. Bryant v. Withers, 2 M. & S. 123, 131; 2 Rose, 8; *Parker v. Manning*, 2 Esp. 598, n.

Though it is shewn that an act of bankruptcy has been committed, the party impeaching the existing commission, must shew a petitioning creditor's debt then legally subsisting to support a commission. *Miles v. Rawlins*, 4 Esp. 194—Ellenborough.

The creditors at large of a bankrupt, represented by the assignees, cannot avail themselves of an act of bankruptcy prior to the one on which the commission is founded, but which the petitioning creditor could not take advantage of, on account of being privy to it, inasmuch as the assignees derive all their rights under the commission from the petitioning creditor. *Type v. Hockin*, 7 B. & C. 101; 9 D. & R. 881.

### 3. Must not be discharged.

A., a creditor of B. to the amount of 115l. 3s. 8d., took his bill for 20l. on C., who had not then, nor afterwards, any effects of B. in his hands: the bill, when due, was dishonoured, and no notice thereof was given by A. to B.:—Held, that A.'s demand was not discharged; but that his debt would support a commission against B. *Bickerdike v. Bolman*, 1 T. R. 405.

A creditor to the amount of 112l. previous to the bankruptcy, receiving 50l. after notice of an act of bankruptcy, is not thereby precluded from suing out a commission, for by that act he waives his claim to the payment; and he may still retain the money in his hands for the credit of the estate. *Mann v. Shepherd*, 6 T. R. 79.

If there is a good petitioning creditor's debt at the time of the act of bankruptcy, after which payments are made and credits given, but there is 100l. due, though if the payments are applied in order of time, they will be sufficient to discharge the balance due at the time of the act of bankruptcy, there is a good petitioning creditor's debt. *Shaw v. Harvey*, M. & M. 526—Tenterden.

A debt which the creditor has covenanted with the debtor not to sue him for, is not a good petitioning creditor's debt. *Small v. Marwood*, 4 M. & R. 181; 9 B. & C. 300.

If a bill of sale of goods be given in satisfaction of a bond debt, and it is afterwards discovered that the obligor had previously committed an act of bankruptcy, the obligee may abandon the bill of sale, and sue out a commission against the obligor, and a co-obligor cannot plead this bill as an accord and satisfaction. *Hall v. Smallwood*, Peake's Add. Cas. 13—Kenyon.

Where the consignee transfers bills of lading to a creditor, as a security for his debt, and the consignee stops the goods in transitu, the consignee may issue a fiat against the consignee on his original debt. *Ex parte Ashton*, 2 Deac. & Chit. 5.

### 4. Must be maintainable by Action.

#### (a) Parties.

To support a commission, where there is only one petitioning creditor, there must be a debt due to him separately, for which he could maintain an action at law in his own name. *Buckland v. Newsome*, 1 Taunt. 477; 1 Camp. 474.

Therefore, one of two obligees is not by himself a good petitioning creditor against the obligor. *Id.*

The debt must be due from the bankrupt in

his own right, and not in autre droit, as executor or otherwise. *Pattison v. Banks*, Cowp. 540.

#### (b) Statute of Limitations.

A debt which could not be recovered in an action against a plea of the statute of limitations, nor in equity by analogy to it, will not be a good petitioning creditor's debt to support a bankruptcy. *Ex parte Dewdney*, 15 Ves. jun. 479.

Where the plaintiff sued two partners in K. B., in 1812, for a debt of 1000l., and one of them being abroad, writs were issued against him with a view to outlawry; but a commission having issued against the other partner resident in this country, the proceedings as to the outlawry were suspended, and the absent partner never returned to this country, except by touching at Deal, in 1814, for a mere temporary purpose, on his passage from one foreign port to another; and, in 1821, the plaintiff commenced a fresh action in K. B. against him for the same debt; but, being unable to arrest him, issued a commission against him in that year; and he afterwards brought an action against the plaintiff to try the validity of the commission, but, previously to the trial, the latter entered up continuances in the action commenced in 1812:—Held, that, at the time of issuing the commission, the debt was a good petitioning creditor's debt, and sufficient to support such commission. *Gregory v. Hurvill*, 8 Moore, 189; 1 Bing. 324. *And see S. C.* 6 Moore, 525; 3 B. & R. 212; 5 B. & C. 341; 8 D. & R. 270.

A debtor to a bankrupt, when sued by his assignee, cannot set up the statute of limitations as an objection to the petitioning creditor's debt. *Id.*

Objection, that the petitioning creditor's debt was of more than ten years' standing, cannot be taken advantage of by a third person, where the bankrupt submitted to the commission. *Quantock v. England*, 5 Burr. 2628; 2 W. Black. 702.

Where a verdict is found for the plaintiff in an action by assignees, on a contract entered into with a bankrupt before his bankruptcy, it is no ground for setting aside the verdict, that it did not appear that 100l. of the petitioning creditor's debt was contracted within six years before the suing out of the commission. *Mavor v. Pyne*, 3 Bing. 285; 11 Moore, 2; 2 C. & P. 91.

#### (c) Insolvent's Discharge.

A creditor of an insolvent trader may, after his discharge under the 53 Geo. 3, c. 102, take out a commission of bankruptcy against him; and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt. *Jellis v. Mountford*, 4 B. & A. 256. *And see Beardmore v. Shaw*, 1 N. R. 263.

A creditor whose debt had been omitted in the schedule filed in the Insolvents' Court by an insolvent who had obtained his discharge, might maintain a commission founded on that debt. *Ex parte Shuttleworth*, 2 Glyn & J. 68.

#### (d) Debts due on Judgments.

A plaintiff, in an action, for a breach of pro-

mise of marriage, having recovered above 100l. damages against a trader, who, between verdict and judgment, committed an act of bankruptcy:—Held, that the debt due upon the judgment after it was entered up, was not a good petitioning creditor's debt. *Ex parte Charles*, 14 East, 197; 1 Rose, 372; 16 Ves. jun. 256. *And see Buss v. Gilbert*, 2 M. & S. 70.

It is no objection to a commission when the petitioning creditor's debt is on a judgment, that, prior to presenting a petition for a commission, the petitioning creditor had not relinquished his judgment. *Bryant v. Withers*, 2 Rose, 8; 2 M. & S. 123.

A debt for money lent, due to a creditor at the time when an act of bankruptcy is committed by the debtor, is sufficient to support a commission against him, though afterwards, and before petitioning for such commission, the creditor obtains judgment against him for a sum of money including such debt. *Id.*

A judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission against him upon the same debt. *Cohen v. Cunningham*, 8 T. R. 123.

A petitioning creditor, who, shortly before the commission, had taken out execution against the bankrupt for part of the debt on which the commission issued, was ordered to furnish the assignees with the particulars of his debt, and the time at which it was contracted, in aid of an action brought by the assignees against the sheriff impeaching the execution, on the ground of its being overreached by an act of bankruptcy, which was available against the execution, if a competent part of the petitioning creditor's debt was contracted before it. *Ex parte Glover*, 2 Glyn & J. 60.

#### (c) *Other Cases.*

*Arising from Awards.*—A sum awarded by arbitrators may constitute a good petitioning creditor's debt. *Dawson v. Holdsworth*, Peake, 64—Kenyon.

If the award be not bad on the face of it. *Ex parte Lowndes*, 1 Mont. 24.

Or the submission void. *Antram v. Chace*, 15 East, 209; 1 Rose, 344.

*Money due for Costs.*—Taxed costs upon a judgment as in case of a nonsuit under a rule of court, do not constitute a good petitioning creditor's debt; such costs being recoverable only by attachment, in the nature of execution. *Ex parte Stevenson*, 1 M. & M. 262.

*Debts arising out of equitable Rights.*—A commission cannot be taken out upon an equitable debt. *Ex parte Sutton*, 11 Ves. jun. 163; S. P. *Ex parte Hawthorn*, 1 Mont. 132.

Therefore a claim founded on a decree of a court of equity, for interest in a suit for a specific performance of an agreement, is not sufficient. *Carpenter v. Thornton*, 3 B. & A. 52.

Nor is a claim arising out of an equitable mortgage a good debt. *Ex parte Yonge*, 3 Ves. & B. 31; 2 Rose, 40.

*For Interest.*—Interest cannot be added to the principal sum due on a bill, so as to constitute a good petitioning creditor's debt, unless specially made payable on the face of the bill. *Cameron v. Smith*, 2 B. & A. 305; S. P. *In re Burgess*, 2 Moore, 745; 8 Taunt. 660.

Even though the bill be noted and protested according to the 9 & 10 Will. 3, c. 17. *Ex parte Greensay*, Buck, 412.

*Attorney's Bills.*—A solicitor may sue out a commission upon his debt for costs, without, as in the case of an action, having delivered his bill one month previous thereto, under stat. 2 Geo. 2, c. 23, s. 22. *Ex parte Sutton*, 11 Ves. jun. 163.

But it is quite of course after the commission to refer such bill to the Master to be taxed. *Ex parte Howell*, 1 Rose, 312.

For his debt must be afterwards examined. *Ex parte Steele*, 16 Ves. jun. 166.

Where a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill of costs taxed, if the bankrupt at the time of his bankruptcy was not concluded. *Ex parte Prideaux*, 1 Glyn & J. 28.

*Other Cases.*—A debt founded on an illegal consideration is not a good petitioning creditor's debt. *Wells v. Girling*, 1 B. & B. 447; 4 Moore, 78.

Where A. deposits with B. goods to be sold, and, on a sale being effected, the profits, after deducting the cost price, &c. are to be equally divided between them; but the loss, if any, is to be borne exclusively by A.; if B. effect a sale and receive the money, the debt due from him to A. is sufficient to support a commission against B. *Marson v. Barber*, Gow, 17—Dallas.

A delivery of salt-petre to the bankrupt, a refiner, to be refined, and no demand made till after bankruptcy:—Held, not to constitute a debt within the meaning of the bankrupt laws. *Asses Loft*, 341.

#### 5. *Proof under Fiat.*

If a sufficient petitioning creditor's debt on bills be legally proved at a meeting of commissioners, who thereupon declare the acceptor a bankrupt, the subsequent loss of the bill affords no ground to impugn the commission in an action by the assignees for conversion of goods belonging to the estate. *Pooley v. Millard*, 1 Tyr. 331; 1 C. & J. 411.

The deposition of a petitioning creditor, that the bankrupt was indebted to him upon and by virtue of certain bills, at and before the date and suing forth of the commission, which bills appeared by a schedule underwritten to have been drawn and indorsed by the bankrupt, is not sufficient, as it should have been shown that the bills were indorsed to the petitioning creditor before the act of bankruptcy. *Key v. Cook*, 2 M. & P. 720.

Where the petitioner swore positively to a debt, and was contradicted by the bankrupt, there being no other evidence, an issue was directed, at the trial of which the bankrupt and the petitioner

were to be examined. *Ex parte Williamson, Buck, 546.*

### 6. Proof in Actions.

**Declarations of Bankrupt.]**—Declarations made by a bankrupt before and after the issuing of a commission against him, are inadmissible in evidence to shew that it was founded in fraud. *Lloyd v. Heathcote, 5 Moore, 129; 2 B. & B. 388.*

A declaration made by a bankrupt, previous to his bankruptcy, "that he did not owe 10*l.* to any one, and inquired whether a friendly commission could not be issued out against him," is admissible in evidence, to shew a collusion between the bankrupt and petitioning creditor to create a debt, although the latter was not an assignee under the commission. *Thomson v. Bridges, 2 Moore, 376.*

To prove a petitioning creditor's debt, an account signed by the bankrupt, charging himself with a balance brought over on a day before the bankruptcy, is not admissible evidence, without positive proof that the bankrupt allowed the account before the bankruptcy. *Hoare v. Coryton, 4 Taunt. 560; 2 Rose, 168.*

An acknowledgment by the bankrupt, that, before the act of bankruptcy, he owed the petitioning creditor above 100*l.*, made before the suing out of the commission, is evidence to prove the petitioning creditor's debt. *Douton v. Cross, 1 Esp. 168—Kenyon.*

In an action by assignees, entries made by the bankrupt in his books before the act of bankruptcy, are good evidence to prove the petitioning creditor's debt. *Watts v. Thorpe, 1 Camp. 376—Ellenborough.*

In an action by a bankrupt against the petitioning creditor, to try the validity of the commission, proof that the bankrupt and petitioning creditor attended the second meeting of the commissioners, and discussed before them the debt due to the petitioning creditor, and produced their accounts, and that the bankrupt objected to part of the petitioning creditor's account, and the commissioners ticked off such items in it as they allowed, and struck a balance of 169*l.*, was held to be evidence to be left to the jury, of an implied admission by the bankrupt, from his conduct and demeanour before the commissioners, that such a balance was due, but not of an adjudication by them, by their own authority, or of an award made by them with the consent of parties; and therefore, where it had been so left to the jury, the Court granted a new trial. *Jarrett v. Leonard, 2 M. & S. 265; 2 Rose, 262.*

An acknowledgment of a debt by a trader, made after an act of bankruptcy, though before the issuing of the commission, is not admissible in evidence, in an action by his assignees, to prove the petitioning creditor's debt. *Smallcombe v. Bruges, M'Clel. 45; 13 Price, 136.*

**Creditors.]**—An affidavit to procure a commission of bankruptcy, in which the party swears that the party is indebted to the deponent in the sum of 100*l.* and upwards, and is become bankrupt, is, as against the deponent, conclusive evidence of

the bankruptcy in any ulterior proceedings. *Ledbetter v. Salt, 4 Bing. 623; 1 M. & P. 597; S. P. Harmer v. Davis, 1 Moore, 390; 7 Taunt. 577; Gervie v. Wootton Canal Company, 5 M. & S. 76; Gibbons v. Phillips, 7 B. & C. 529.*

In an action against the sheriff for a false return to a *fi. fa.*, where the defence rests on the validity of a commission of bankruptcy, if it appears that the assignees are the real parties, a declaration by one of them, who was the petitioning creditor, made subsequently to the suing out of the commission, that the bankrupt did not owe him 100*l.*, is admissible evidence on the part of the plaintiff. *Dowden v. Fowle, 4 Camp. 38; 2 Rose, 283—Dampier.*

An admission respecting his debt, made by the petitioning creditor, is admissible evidence in an action in which the validity of the commission of bankruptcy comes in question. *Young v. London (Sheriffs), 6 Esp. 121—Mansfield.*

And assignee having released his claim as a creditor on the estate, is a competent witness to support the petitioning creditor's debt, as he merely stands in the situation of trustee to such estate. *Tomkinson v. Wilkes, 5 Moore, 172; 2 B. & B. 397. And see Ward v. Wilkinson, 4 B. & A. 410.*

A creditor under a former commission of bankruptcy, to whom the bankrupt made a promise to pay, is an incompetent witness to prove the petitioning creditor's debt under a second commission. *Roberts v. Morgan, 2 Esp. 736—Eyre.*

**Depositions.]**—In an action for goods sold, by the assignees of A., against whom a commission was sued out on the petition of the assignees of B., and no notice being given to dispute the validity of the commission:—Held, under the statute 49 Geo. 3, c. 121, s. 10, that the production of the proceedings under A.'s commission was sufficient evidence of the petitioning creditor's debt, without the defendant's going into any evidence of the validity of B.'s commission, or that the petitioning creditors were his assignees. *Skaife v. Howard, 4 D. & R. 37; 2 B. & C. 560.*

But depositions taken under a commission are not conclusive evidence of such debt under that statute. *Cooper v. Machin, 8 Moore, 536; 1 Bing. 426. And see Foster v. Compton, 2 Stark. 364.*

In trover by assignees against the sheriff and an execution creditor, where the defendants had given notice under the statute that they intended to dispute the petitioning creditor's debt: proof by the plaintiffs that one of the defendants, the execution creditor, had proved his debt, is no proof of the petitioning creditor's debt, either against the sheriff or such execution creditor. *Rankin v. Horner, 16 East, 191.*

In an action by assignees, if no notice have been given under the 49 Geo. 3, the petitioning creditor's debt is sufficiently proved by his deposition. *Biese v. Randall, 3 Camp. 493—Lawrence.*

Where a petitioning creditor's debt is proved by the depositions under the provisions of the 6 Geo. 4, c. 16, s. 92, it is not competent for the defendant to prove that such petitioning creditor's

debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. *Young v. Timmins*, 1 C. & J. 148; 1 Tyr. 15.

#### 7. Substitution.

By 6 Geo. 4, c. 16, s. 18, if, after adjudication, the petitioning creditor's debt shall be found insufficient, the Chancellor, on the application of any creditor who has proved a debt incurred not anterior to the petitioning creditor's debt, and sufficient to support the commission, may order the commission to be proceeded in.

This is applicable to a case not only of deficiency in the amount, but to an original defect in the nature of the debt. *Ex parte Hall*, 1 Mont. & Mac. 39.

The debt must be found insufficient before the Chancellor can order a new debt to be substituted. *Muskett v. Drummond*, 10 B. & C. 153.

Quære, whether an order of substitution is sufficient to support the commission in an action commenced by the assignees against a debtor before the order is made? *Id.*

An order was made by the Chancellor, whereby, after reciting a petition to him by one of the assignees, he ordered, that, if the commissioners should be satisfied that such assignee had proved under the commission against B. a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the commission should be proceeded in:—Held, that this was not a valid order, inasmuch as it did not find, or call upon the commissioners to find, that the original petitioning creditor's debt was insufficient. *Id.*

The debt should be expunged before the application to the court for the substitution of another debt to support the commission. *Ex parte Chap-pell*, 2 Glyn & J. 131.

But, although a previous application to the commissioners be required, an order by them to expunge the petitioning creditor's debt is not absolutely necessary. *Ex parte Robinson*, 1 Mont. & Mac. 44.

Quære, whether an order of the Court of Review in bankruptcy (under the 6 Geo. 4, c. 16, s. 18, and the 1 & 2 Will. 4, c. 56, s. 2), for substituting another debt to support a commission, in lieu of that of the original petitioning creditor, can be used to the prejudice of a party who has already brought an action, in which he seeks to impeach the validity of the commission by reason of the insufficiency of the petitioning creditors debt? *Aireton v. Davis*, 3 M. & Scott, 138.

#### 8. Under joint and separate Fiats.

By 6 Geo. 4, c. 16, s. 16, any creditor whose debt is sufficient to entitle him to petition for a commission against all the partners of a firm, may petition against one or more of such partners.

A joint creditor is a good petitioning creditor for a separate commission. *Ex parte Elton*, 3 Ves. jun. 239; *S. P. Ex parte Dewdney*, 15 Ves. jun. 499. And see *Ex parte Ackerman*, 14 Ves. jun. 604; *Ex parte Chandler*, 9 Ves. jun. 35.

#### 9. Forfeiture.

By 6 Geo. 4, c. 16, s. 8, every petitioning creditor receiving money, gift, delivery, satisfaction, or security for his debt, after a docket struck, whereby he may receive more than the other creditors, forfeits his whole debt, and must repay or deliver up such money, &c. to such person as the commissioners shall appoint, for the benefit of the creditors.

This is similar to the enactment in 5 Geo. 2, c. 30, s. 25.

Under the 5 Geo. 2, it was held, that a creditor, by compromising his debt after having struck a docket, forfeited the debt. *Ex parte Gadge*, 3 Ves. jun. 349.

So, where he received his debt from the bankrupt with the knowledge of two or three of the creditors. *Ex parte Brine*, Buck, 108.

Security or satisfaction taken after a docket struck, not followed by a commission, though it cannot be retained, and may amount to contempt, was not within the stat. 5 Geo. 2, c. 30, s. 24: the original debt therefore not forfeited. *Ex parte Browne*, 15 Ves. jun. 472.

Under the stat. 5 Geo. 2, c. 30, s. 24, the creditor forfeited the whole of his debt, whether the composition made by him extended to the whole, or to a part only. *Ex parte Vernon*, 2 Cox, 61.

And the forfeiture took place as well under a commission founded on any other act of bankruptcy, as upon the act thereby created. *Id.*

W. & T. arrested M. & S. for debt, and shortly afterwards issued a commission against them; but, after proving their debt, abandoned the commission in order to proceed against the bail in the action. They then obtained the joint note of H. (one of the bail), and of M. & S., and compelled H. to pay the note; soon after which a second commission issued against S. as surviving partner of M. After giving this note, the bail took an assignment from M. & S. of all their stock in trade, &c. as an indemnity against the consequences of becoming bail: Held, that none of these circumstances operated as a forfeiture of the debt of W. & T. within the meaning of the 8th section of 6 Geo. 4, c. 16. *Ex parte Green*, 1 Deac. & Chit. 230.

Quære, whether, in case of such a forfeiture of the debt by the petitioning creditor, the court of bankruptcy can order him to pay over the amount to the assignees? *Id.*

A petition by an assignee, praying that the petitioning creditor under a prior commission, who had received a sum of money from the bankrupt on condition of not proceeding with such commission, and had accordingly abandoned such commission, might refund the money so received, was dismissed by the Chancellor with costs, on the ground that the court had not jurisdiction. *Ex parte Marshall*, 2 Glyn & J. 53.

#### VII. DOCKET.

1. *Affidavit of Petitioning Creditor.*  
Statutes.]—By 6 Geo. 4, c. 16, s. 13, the pe-

petitioning creditor must make an affidavit before a master ordinary or extraordinary in Chancery of the truth of his debt before a commission issues.

And the same is necessary for a fiat, 1 & 2 Will. 4, c. 56, s. 12.

The provision requiring an affidavit, on striking a docket, that the party is bankrupt, is directory only, and the commission would be valid without any such affidavit. *Simpson v. Sikes*, 6 M. & S. 311; *S. P. Wydown's case*, 14 Ves. jun. 80.

A docket is not to be struck without a solid ground of belief that an act of bankruptcy has been committed. *Ex parte Bourne*, 16 Ves. jun. 145.

*Swearing.*—It was held to be an objection to the affidavit that it was sworn before the solicitor to the petitioning creditor. *Ex parte Elford*, 2 Glyn & J. 65. And see *Ex parte White*, 1 Mont. & Mac. 44.

But where there are two dockets, the one which is founded on an affidavit not sworn before the solicitor will be preferred. *Anon.* 1 Mont. 137.

A docket on an affidavit sworn in Ireland was refused. *Id.*

An affidavit upon which a commission has issued cannot be re-sworn to correct an error in it, a new docket must be struck. *In re Rutledge*, 2 Rose, 369.

*By whom made.*—Where partners are petitioning creditors, one of them may make the affidavit. *Ex parte Peel*, Buck, 457; *S. P. Ex parte Hodgkinson*, 19 Ves. jun. 291; 2 Rose, 172; *Coop. C. C. 99*.

One of several assignees may make the affidavit alone in respect of a debt due to their bankrupt. *Ex parte Blakey*, 1 Glyn & J. 197.

So, though such assignee be a solvent partner of the bankrupt. *Id.*

*Defects in.*—Where, in a joint affidavit by two petitioning creditors, the amount of one of the debts was incorrectly stated, it was ordered that a supplemental affidavit should be made without new bonds. *Ex parte Maugham & Smith*, 1 Glyn & J. 365.

An omission to state a judgment obtained for the debt, originally by specialty or simple contract, forms no objection to the commission. *Ex parte Bryant*, 1 Ves. & B. 211; 1 Rose, 288; *S. P. Bryant v. Withers*, 2 Rose, 8; 2 M. & S. 123.

Where a petitioning creditor made affidavit of his debt as for goods sold and delivered, although at the time he had entered up judgment in an action for the goods; upon an application for a supersedeas, it was contended that he had not made affidavit of the "truth and reality of his debt," but the objections were overruled. *Id.*

## 2. Bond of Petitioning Creditor.

*Statutes.*—By 6 Geo. 4, c. 16, s. 13, the petitioning creditor must also give a bond to the Chancellor

in the penalty of 200*l.*, conditioned for proving his debt as well before the commissioners as upon any trial at law when necessary, and for proving an act of bankruptcy, and to proceed on the commission.

And the same is necessary for a fiat, 1 & 2 Will. 4, c. 56, s. 12.

And if the debt be not really due, or if no act of bankruptcy be proved, or if the commission was taken out fraudulently or maliciously, the Chancellor may, on petition of the bankrupt, upon examination, order satisfaction for the damage, and, for the better recovery of the same, assign the bond to the bankrupt, who may sue on it in his own name. *Id.*

It is not necessary that the bond and affidavit should be of the same date. *Ex parte Maugham & Smith*, 1 Glyn & J. 365.

*By whom given.*—The bond is to be given by the petitioning creditor who makes the affidavit. *Ex parte Barrow*, 3 Ves. jun. 554.

Where partners are petitioning creditors, the practice is for one of them to make the affidavit of the debt, and the partner making the affidavit alone enters into the bond to the great seal. *Ex parte Peele*, Buck, 457; *S. P. Ex parte Hodgkinson*, 2 Rose, 172; 19 Ves. jun. 291; *Coop. C. C. 99*.

So it may be given by one only of several assignees for a debt due to the bankrupt. *Ex parte Blakey*, 1 Glyn & J. 197.

Even where the obligor is a solvent partner of the bankrupt as well as his assignee. *Id.*

And where husband and wife are petitioning creditors, the bond is given by the husband alone. *Ramsay v. George*, 1 M. & S. 176; 1 Rose, 108.

The husband must join in a docket by a feme covert upon a debt due to her in autre droit. *Ex parte Mogg*, 2 Glyn & J. 397.

## 3. Assignment of Bond.

The jurisdiction in bankruptcy to assign the bond, being with reference to the bankrupt confined to the case of malice, and conclusive, the Lord Chancellor, in a case of strong suspicion only, would not assign the bond, but superseded the commission with costs, without prejudice to an action. *Ex parte Lane*, 11 Ves. jun. 415.

The assignment of the bond by the Chancellor is conclusive evidence of fraud or malice, in an action brought on such bond; it is not necessary to state in a declaration on such bond, that the commission was fraudulently or maliciously sued out. *Smith v. Broomhead*, 7 T. R. 300; *S. P. Holmes v. Wainwright*, 1 Swans. 20.

Where a commission was taken out fraudulently or maliciously, the Chancellor might, under stat. 5 Geo. 2, c. 30, order a specific sum, by way of damages, to be paid by the petitioning creditor to the bankrupt, or assign the bond given by the former, and enable the latter to recover the whole penalty of the bond. *Id.*

And it seems that such a bond is not within the stat. 8 & 9 Will. 3, c. 11, s. 8, by which a jury is to assess damages: because, by the stat. 5 Geo. 2, c. 30, the damages are to be ascertained by the Lord Chancellor; although he may assist his con-

science, by directing an inquiry before a master, or an issue at law. *Smith v. Edmonson*, 3 East, 22. And see *Brown v. Chapman*, 3 Burr. 1416; 1 W. Black. 497.

In an action by the assignee of the bond, assigned by the Chancellor to a creditor of the bankrupt, on the ground of the commission having been sued out fraudulently, wherein the defendant by his plea set forth the order for the assignment, whereby it appeared that he had previously ordered a certain sum, received by the defendant of the bankrupt, to be refunded, and further ordered the bond to be assigned to the plaintiff, and the costs of the petition to be paid by the defendant; and the plea averred payment before the suing out of the plaintiff's writ of the particular sum mentioned, and the costs, in satisfaction of the damages sustained by the bankrupt's estate, and that neither the plaintiff nor the bankrupt's estate had sustained any other damage ultra the sums so paid to the plaintiff:—Held, that such plea was no answer to the action; for, by such order of the Lord Chancellor, must be understood that the whole penalty of the bond was assigned to the plaintiff, as creditor and assignee of the estate under a second commission, (and therefore a party grieved by the first fraudulent commission), by way of satisfaction, in damages for the injury sustained. But it was also considered to be competent to the Lord Chancellor to review his former order, even after judgment for the plaintiff for the whole penalty, and to direct the whole, or any part of such penalty, to be applied accordingly. *Id.*

An action on the case is a waiver of a right of action on the bond, and to restore that right the agreement of the parties must be unequivocal. *Molnes v. Wainwright*, 1 Swans. 20.

A creditor aggrieved by the issuing of a fraudulent commission could not, under 5 Geo. 2, c. 30, s. 23, call for an assignment of the bond given to the Chancellor. *Ex parte Dumford*, 2 Madd. 1.

Where the conduct of the petitioning creditor, though improper in swearing to a bankruptcy which he could not establish, was not such as to justify an assignment of the bond, upon which the whole penalty must be recovered, the Lord Chancellor would have ordered it to stand as a security for the costs to be ascertained in an issue, but the creditor having become a bankrupt, to obviate the objection that the costs so ascertained would be a debt liquidated after the bankruptcy, a specific sum was named. *Ex parte Rinene*, 14 Ves. jun. 600.

The correctness of the bond cannot be disputed at Nisi Prius. *Folke v. Scudder*, 3 C. & P. 232.—Best.

#### 4. Several Applications for Dockets.

Where two or more persons apply at the same time to strike a docket, and both are equally prepared, the preference is given by lot; but where only one is prepared the commission was issued to him. Order, Eldon, 13th April, 1815.

And where instructions to strike a docket were received from the country on a Sunday by a solicitor, who, before the bankrupt office opened on

the following morning received similar instructions from another client, it was held that they must draw lots, as according to the course upon two applications at the same instant. *Haye's case*, 13 Ves. jun. 197.

Where two or more dockets are struck, the first regular docket in the office has the priority. *Ex parte Stocker*, 1 Glyn & J. 249.

The drawing of lots, as directed in the order in bankruptcy of the 29th December, 1806, only applies to those cases where both parties are at the time prepared to issue a commission forthwith. Where one party was not prepared to certify respecting the intended commissioners, as required by the order of the 25th July, 1817, the other was held entitled to the commission. *Ex parte Hardman*, 1 J. & W. 293.

If, after drawing lots in the bankrupt office, it is discovered that two of the commissioners named by the party in whose favour the lot fell are creditors, the court will prefer the other docket. *Ex parte Kemp*, 1 Mont. 257.

An affidavit not sworn before the solicitor preferred where there are two dockets. *Anon.* 1 Mont. 136.

A commission ordered at a private seal, will, in the vacation, be preferred. *Ex parte Atkinson*, 1 Mont. 137.

Where, from the hurry of business, the clerk at the bankrupt office omitted to make the entry of an application for a docket, (according to the directions of the general order), previously to the application of another solicitor, the first solicitor was held to be nevertheless entitled to the commission. *Anon.* 2 Rose, 323.

If two dockets are struck, one omitting to state that the bankrupt traded in London, and the other giving a perfect description, the court will prefer the perfect description, although the majority of trade and creditors are in the country, where both commissions were intended to be worked. *Ex parte Hill*, 1 Mont. 260.

Where a party in the country applied to strike a docket, and issue a fiat, on the 14th January, on papers sent from Worcester, the day after the issuing of the orders of the 12th January, which papers used the word "commission" instead of "fiat," and, upon the application being refused at the office, the papers were sent back to the country to be altered, and in the mean time another party applied for and struck a docket:—Held, that the first applicant was entitled to the fiat upon his amended papers. *Ex parte Lechmere*, 1 Deac. & Chit. 10.

A solicitor, having struck a docket, ordered within the regular time a commission to be sealed, but, through the mistake of his clerk, the fees were not paid to the secretary. Another solicitor then struck a docket against the same bankrupt. The Lord Chancellor held, that the mistake of the clerk was a sufficient ground for the court to uphold the first commission, as the general order, 29th Dec. 1806, ought not to be construed too strictly. *Ex parte Slatford*, Back, 1: & P. *Ex parte Evans*, 1 Rose, 162.

A docket struck after the Vice-Chancellor had



pronounced an order for the superseding of a commission against the same party, on the production of the necessary consents, but before the order was drawn up or the consents produced, held regular. *Ex parte Bower*, 1 Glyn & J. 263.

#### 5. Fiats in Town or Country.

Under stat. 6 Geo. 4, c. 16, the commissions were the same in effect, whether to be worked in the country or in town; and under that statute it was held that leave of the court must be obtained to issue a country commission against a London trader. *Ex parte Hill*, 1 Mont. 260.

Now, the fiat in town cases authorizes the petitioning creditor to prosecute his complaint in the court of bankruptcy, or in country cases before such other persons as may be nominated in the fiat, as commissioners for that purpose. 1 & 2 Will. 4, c. 56, ss. 13 & 14.

Unless there be a competition for a town or country commission, the court would not interfere. *Ex parte Bowdler*, 1 Rose, 48.

Where all the creditors lived in London except two, a London fiat was directed instead of the country commission already issued, which last was ordered to be impounded. *Ex parte Johnson*, 1 Deac. & Chit. 321.

Where a bankrupt has houses of business at L. and M., the majority of creditors living at M., an order is necessary to obtain a country commission at M. *Ex parte Wood*, 1 Deac. & Chit. 410.

An affidavit in support of an application that a town fiat might be annulled, and a country commission issue in lieu thereof, stating "that the major part in number of the creditors resided at B., and although the bankrupt resided in L., yet it would be a great saving to the estate to allow this course," is not sufficient, as the majority mentioned in the affidavit might be produced merely by the smallest difference in amount or value. *Ex parte Leonard*, 2 Deac. & Chit. 189.

It was not sufficient upon an application to seal a commission, as a country commission, for the affidavit to state that the major part in value of the creditors did not live within fifty miles of London, and that the major part of the creditors resided at a certain town in the country. *In re Child*, Buck, 425.

### VIII. FIAT OR COMMISSION.

#### 1. Issuing.

**Statutes.**—By 6 Geo. 4, c. 16, s. 12, power is given to the Chancellor to issue a commission of bankruptcy on a petition in writing of any creditor of a trader who has committed an act of bankruptcy.

Now, in all similar cases, by 1 & 2 Will. 4, c. 56, s. 12, the Chancellor is to issue his fiat in lieu of a commission, which authorizes the creditor to prosecute his complaint in the court of Bankruptcy, or before the persons mentioned in the fiat. The creditor is to proceed by petition, and to file an affidavit of his debt, and give a bond, as was before required by law.

All laws and statutes, rules and orders, relat-

ing to bankruptcy, to extend as far as applicable to fiats, as if every fiat were a commission. 1 & 2 Will. 4, c. 56, s. 16.

By 1 & 2 Will. 4, c. 56, s. 13, all fiats are to be filed and entered of record in the court of Bankruptcy.

Every fiat to be prosecuted in the court of bankruptcy is to be filed of record in the registrar's office within seven days from the date thereof, and no appointment for the opening of any such fiat shall be made until it shall have been so filed. *Reg. Gen.*, H. T. 2 Will. 4, 1 D. & C. xxv.

Proof of a commission having issued under the "great seal of Great Britain and Ireland," was no variance from an averment that it issued under the "great seal of Great Britain." *Rees v. Bullock*, 2 Leach, C. C. 936; 1 Taunt. 71.

Where bankruptcy is pleaded, the date of the commission, if it is subsequent to the date of the debt sued for, shall be sufficient for the defendant to rely on, at least sufficient to entitle the defendant to call on the plaintiff to prove an antecedent act of bankruptcy. *Pearson v. Fletcher*, 5 Esp. 90—Ellenborough.

**Within what Time.**—The general order of December 29th, 1806, which directed that a commission should be sealed at the next public seal, in case there should be one within seven days, meant that it should be sealed at the next immediate seal, without any discretion on the part of the bankrupt office to defer it till another seal within seven days. *In re Lambert*, 1 Rose, 258.

A commission must have been sealed within four days after the docket, though within less than seven days. *Ex parte Hyne*, 19 Ves. jun. 61.

When the fourth day after a docket struck was a holiday, the practice of the bankrupt office was to permit a docket to be struck upon the first application the next day, as, though the office was shut, the party might apply at the clerk's residence. *Ex parte Cooper*, 12 Ves. jun. 418.

An application for a commission on the evening of the fourth day from striking the docket, immediately before eight o'clock, the hour before shutting the office, was sufficient within the order. *Nichols's case*, 19 Ves. jun. 616.

Where a docket was struck on the 10th, but the commission was not bespoken till the 16th, on which day another creditor applied to strike a docket, but after the first commission was bespoken:—Held, that the first creditor's right to have his commission issue was preferable to that of the second. *In re Graham*, Buck, 539.

If a petitioning creditor did not proceed to issue the commission till after a month had elapsed from the striking of the docket, he must have made an affidavit that the debt had not been satisfied before the commission could be issued. *Ex parte Buckley*, Buck, 367.

A commission ordered to be opened near four months after its date; the delay arising from the bankrupt, not the petitioning creditor. *Harrison's case*, 3 Ves. & B. 174.

**Enlargement of Time.**—Time of opening a fiat enlarged, where the witness in support of the bankruptcy keeps out of the way. *Ex parte Fox*, 1 Deac. & Chit. 572; 1 Mont. & Bligh, 264.

Particularly where it was by concert with the bankrupt. *In re Hayes*, 1 Glyn & J. 255.

But the time for opening a fiat will not be enlarged on the application of the petitioning creditor, to give time to effect a composition, although the court might interpose on a petition by the bankrupt for that purpose. *Ex parte Downton*, 1 Mont. & Bligh, 264; 1 Deac. & Chit. 111; *S. P. In re Moody*, 2 Deac. & Chit. 210.

Under special circumstances the time was enlarged, and a petition was answered for the same day on which the order was applied for. *Ex parte Moody*, 1 Deac. & Chit. 34.

Where a fiat was not prosecuted in due time, on account of a mistake in the name of the bankrupt, an order is necessary to enable the same party to sue out a new fiat. *Ex parte Edwards*, 1 Mont. & Bligh, 263; 1 Deac. & Chit. 531.

Where the time expired through the contrivance of the bankrupt, the petitioning creditor obtained leave to strike a new docket. *In re Matthews*, 1 Deac. & Chit. 35.

In a case of emergency, a petition will be answered instant. *Id.*

Where a bankrupt resided so far off, that, before his signature to a petition to enlarge the time (to which he assented) could be obtained, the time for opening the fiat would expire, his solicitor was allowed to sign the petition on his behalf. *Ex parte Craddock*, 1 Deac. & Chit. 487.

**By and to whom.**—An attorney of K. B. may sue out a commission of bankruptcy without being a solicitor in Chancery. *Wilkinson v. Diggle*, 2 D. & R. 302; 1 B. & C. 158; *And see Ford v. Webb*, 3 B. & B. 241; 7 Moore, 54.

For, any person, not a solicitor, may take out a commission. *Ex parte Smith*, 19 Ves. jun. 473.

Upon making an appointment for opening a fiat, the registrar shall, in the presence of the attorney or solicitor, write upon the face of the fiat the name of the commissioner before whom the same is to be opened. *Reg. Gen. in bank. H. T.* 2 Will. 4, 1 Deac. & Chit. xxv.

Each fiat shall be prosecuted before the commissioner so appointed, unless otherwise especially ordered by the Court of Review, or one of the judges thereof. *Reg. Gen. in bank. H. T.* 2 Will. 4, 1 Deac. & Chit. xxv.

Where a commission (issued before the new act) had been transferred to one commissioner, and a fiat against the same bankrupt had been directed to another, the court ordered the commission to be transferred to the commissioner to whom the fiat was directed. *In re Knox*, 1 Deac. & Chit. 317.

A commission directed to new commissioners could not issue after judgment by another list of commissioners against the bankruptcy. *Ex parte Nicholls*, 2 Glyn & J. 266.

## 2. Operation of Commission.

### (a) Generally.

An instrument, although the great seal has been affixed to it, is inoperative while it remains in the hands of the Lord Chancellor; but a delivery to a messenger, although the instrument is not taken out of the bankrupt office, is a delivery to the party. *Ex parte Freeman*, 1 Rose, 390; 1 Ves. & B. 34.

Queere, whether the striking a docket merely can be considered the issuing a commission within the stat. 5 Geo. 2, c. 30, s. 24, a penal clause? *Ex parte Paxton*, 15 Ves. jun. 463.

The effect of a commission is, that the creditor suing it out thereby elects to proceed for his debt under the commission, and not by action; and relinquishes his proceedings by action if he has taken any. *Ex parte Prouse*, 1 Glyn & J. 92.

And, if necessary, he may be enjoined from proceeding at law. *Ex parte Bonannet*, 1 Rose, 184.

Before 1 & 2 Will. 4, c. 56, a commission had no effect in passing the property of a bankrupt, unless there was an assignment. *Warner v. Barber*, 2 Moore, 71; 8 Taunt. 176.

The bankrupt represented his estate until assignees were chosen. *Ex parte Moline*, 19 Ves. jun. 217.

A commission differs from an execution in vesting all rights and possibilities of the bankrupt, the latter passes only what the sheriff seizes. *Ex parte Brown*, 2 Ves. jun. 68.

The committee of the person of a lunatic is not to be removed in consequence of his bankruptcy. *Ex parte Proctor*, 1 Swann, 531.

Whether, in general, bankruptcy revokes a submission to arbitration is not settled—*Per Lord Tenterden. Marsh v. Wood*, 9 B. & C. 659; 4 M. & R. 504. *And see Snook v. Hellyer*, 2 Chit. 43; *Andrew v. Palmer*, 4 B. & A. 250.

Bankruptcy is not a forfeiture under a clause in a will against alienation. *Wilkinson v. Wilkinson*, 2 Rose, 445; *Coop. C. C.* 259.

Nor is it a revocation of a devise of realty. *Charman v. Charman*, 14 Ves. jun. 580.

The bankruptcy of one partner operates as a dissolution of the partnership. *Crawshay v. Collins*, 15 Ves. jun. 218.

A power of attorney to execute the indorsement of a sale on a ship's register, when she returns home, is not revoked by the bankruptcy of the party giving the power. *Dixon v. Esart*, Buck, 84.

A London house guaranteed certain payments to be made by a Paris house. The solvency of the Paris house becoming doubtful, the London house duly authorized the creditor to act according to the best of his discretion in the settlement of the affairs; the creditor, accordingly, went to Paris, and entered into a composition for the debt with the Paris house. After the departure of the creditor from England, and previous to the composition, a commission of bankruptcy issued against the London house, of which fact

the parties to the composition were ignorant:—Held, that the bankruptcy did not determine the authority. *Ex parte Mac Donnell*, Buck, 399.

A covenant not to sue, arrest, impound, or prosecute a debtor, or his goods or chattels, lands or tenements, on account of a debt, extends to the issuing of a commission, which is a species of suit and proceeding against the goods of the bankrupt. *Small v. Marwood*, 9 B. & C. 300; 4 M. & R. 181.

### 3. Form of Commission.

#### (a) Statement of Trading.

It is not necessary, under the stat. 6 Geo. 4, c. 16, that the particular species of trading should be set forth in the commission; and it was held that a commission would be good, if, instead of calling them bankers, the bankrupts had been described as esquires or gentlemen. *Bernasconi v. Farebrother*, 10 B. & C. 549.

So, where a commission stated that "A. and B., bankers, being traders according to the provisions of the 6 Geo. 4, c. 16, some time since became bankrupts, within the intent and meaning of that statute:"—Held, a sufficient allegation that the bankrupts had traded, and had committed an act of bankruptcy since the passing and within the operation of that statute. *Bernasconi v. Glengall*, (Earl), 1 M. & R. 326.

And where the business of a banker had ceased before the 6 Geo. 4, the word "banker" was considered as descriptive of the person only, and it was held that the commission might be supported by evidence of other trading. *Id.*

So, although a trader was described in the commission as a money scrivener only, and the general words "dealer and chapman" were omitted; yet it was considered competent to a plaintiff to support the commission by proof of any species of trading. *Smith v. Sandilands*, Gow, 171—Holroyd.

Where a commission was issued against a trader, describing him as "a dealer in cattle, and seeking his trade of living by buying and selling," without the words "dealer and chapman;" and at the trial of an action of trespass brought by him against the assignees under the commission, evidence was received of a dealing in hops, and a verdict was found for the defendants as such assignees, which was afterwards set aside, and a new trial granted, on the ground that it might operate as a surprise on the plaintiff:—Held, on a second trial, that such evidence was properly admitted, as the words "dealer in cattle" were descriptive of the person only; and that the general statement that the bankrupt got his living by "buying and selling," was sufficient to admit evidence of any trading whatever. *Hale v. Small*, 4 Moore, 415; 2 B. & R. 25, overruling & C. 3 Moore, 58; 8 Taunt. 730.

Where commission and affidavit described the bankrupt only as a waterman, it was supported by the statement that he got his living by buying and selling. *Ex parte Herbert*, 2 Ves. & B. 399.

"Dealer and chapman" is a sufficient description of trading to support a commission. *Id.*

A fraudulent misdescription of the trading is a ground for staying the certificate. *Ex parte Turner*, 1 Mont. & Bligh, 391.

#### (b) Description of Bankrupt.

*His Name.*—The bankrupt should have been described correctly by his name; therefore a commission against a person by the name of Laidlon, was superseded at the instance of a creditor who had taken out a commission by his right name of Laidlow, although the bankrupt had used as well one name as the other. But quære, whether the commission would have been superseded at the instance of the bankrupt himself? *Ex parte Schofield*, 2 Rose, 246.

An order was made for a commission against James Stevenson, otherwise Stephenson, in an urgent case. *Stevenson's case*, 19 Ves. jun. 277.

A commission against A., describing him to be partner with B., is a separate commission. *Ex parte Woodmason*, 1 Cox, 308.

If a commission issue against a man by a wrong name, under which he obtains his certificate, while the commission remains unsuperseded, a plea of bankruptcy to an action brought against him by his right name will be supported by production of the certificate, and proof that he is really the person against whom the commission issued. *Stevens v. Elizee*, 3 Camp. 256; 1 Rose, 360—Ellenborough.

A commission issues against a man of the name of "Wicks," under which name he traded, and contracted debts, although "Knox" was his real name. Two years afterwards, and before the bankrupt had passed his last examination under the commission, a fiat is issued against him by his right name, the commission was preferred to the subsequent fiat. *Ex parte Sambourne*, 2 Deac. & Chit. 22. And see *Ex parte Smith*, 2 Rose, 25.

*His Residence.*—It was necessary that the bankrupt should be described of the place where he was generally known. *Ex parte Shadbolt*, 1 Mont. 89.

And it was held that a commission wholly omitting to describe the bankrupt of the place where he had chiefly been known as a trader was bad, though his last place of trading were correctly described. *Ex parte Parry*, 2 Glyn & J. 225.

So, the omission to describe the bankrupt as of the place where he actually traded, was considered fatal. *Ex parte Beades*, 2 Glyn & J. 243.

Where the bankrupts were described as "late of the Kent Road, coal merchants," and it appeared that they had quitted that trade in 1836, and had since been separately engaged in farming:—Held, that the description was insufficient, and that the commission should be superseded. *Ex parte Day*, 1 Mont. & Mac. 208.

A commission will not be superseded on account of a misdescription of the bankrupt, if he is well known as described in the commission. *Ex parte Horeley*, 2 Madd. 11.

Bankrupts should be described in the commission according to their legal or known description; where the bankrupts were described as of Iron Wharf, London and Wolverhampton, they having no residence or establishment at Wolverhampton, the commission was superseded. *Ex parte Beckwith*, 1 Glyn & J. 20.

If a bankrupt be described in the commission as he described himself in carrying on his trade, and, according to the popular description of his residence, the commission will not be superseded, because it happens not to be the legal description of his residence. *Ex parte Wride*, 2 Glyn & J. 99.

"L. H. M., of Finsbury Square, in the city of London," instead of the county of Middlesex, is not a material misdescription. *Ex parte Smith*, 1 Glyn & J. 256.

#### (c) Amendment.

A fiat cannot be altered or amended after it has been opened. *Ex parte Todd*, 1 Mont. 455; 1 Deac. & Chit. 321: *S. P. Ex parte Thwaites*, 13 Ves. jun. 825.

Nor could a commission be resealed, even to correct a mere clerical error, after any dealing upon it, as if it had been opened. *Fisher's case*, 10 Ves. jun. 190: *S. P. In re Stephenson*, Mont. 116; *Ex parte Horrocks*, 1 Glyn & J. 368. But see 6 Geo. 4, c. 16, s. 98.

A petition to have the tests altered and a commission resealed, under which no proceedings had taken place, in order to let in a subsequent act of bankruptcy, was dismissed. *Ex parte Cheesewright*, 1 Rose, 228; 18 Ves. jun. 480.

Where, after the opening of the commission, the name of the bankrupt had been erroneously altered by the clerk of the solicitor, the Lord Chancellor refused to allow the commission to be amended, and directed that it should be superseded. *In re Stammers*, 1 Mont. & Mac. 290.

Where there was error in the description of the petitioning creditor in the petition and commission, but the docket papers were correct, the petition and commission were ordered to be amended and made conformable to the docket papers, after the commission had been prosecuted. *Ex parte Guthrie*, 1 Glyn & J. 245.

An alteration in the description of a bankrupt refused. *Ex parte Thompson*, 9 Ves. jun. 207.

A commission could always be resealed, and amended to correct a mistake in a name, if not opened. *Ex parte Cheesewright*, 18 Ves. jun. 480; 1 Rose, 228: *S. P. Burrow's case*, 10 Ves. jun. 286; *Ex parte Herman*, 2 Glyn & J. 25.

So, a fiat may be amended where no proceedings have taken place under it. *In re Graham*, 1 Deac. & Chit. 458.

The Lord Chancellor has no jurisdiction to order a fiat to be amended. *In re Wright*, 1 Deac. & Chit. 547.

If the fiat has been filed, the court of review has power only to order the fiat to be taken off the file of the court, for the purpose of the Lord

Chancellor amending it, if he shall think fit. The court cannot amend the fiat, they having nothing to amend by. *Ex parte Walker*, 1 Deac. & Chit. 381.

#### 4. Validity.

##### (a) Bankrupt's Instance.

A commission issued at the desire and request of a bankrupt is good at law. *Shaw v. Williams*, R. & M. 19—Abbott.

Although it is supersedeable. *Ex parte Gardner*, 1 Rose, 377: *S. P. Ex parte Gang*, 1 Mont. & Mac. 399.

It is said to be an invariable rule, that a commission taken out at the instance of the bankrupt cannot be supported, however hostilely it may be prosecuted. *Ex parte Grant*, 1 Glyn & J. 17.

But in one case the court refused to supersede, merely on that ground. *Ex parte Staff*, Buck, 249.

Semble, where the circumstances are such as to make the bankrupt the agent of the petitioning creditor, such a commission would be bad at law, on the ground of an implied concert on the part of the petitioning creditor. *Id.*

In one case, a commission was established under strong circumstances of suspicion, particularly that the affidavit and bond for the docket were written by the bankrupt, whose brother was the petitioning creditor. *Ex parte Steele*, 16 Ves. jun. 161.

*No commission shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason of concert between the petitioning creditor and the bankrupt, or their agents, except where there is a petition to supersede pending.* 1 & 2 W. 4, c. 56, s. 42.

The declarations of the petitioning creditor (since dead), made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Hurwood v. Keys*, 1 M. & Rob. 204—Patteson.

##### (b) In breach of Faith.

If a commission be sued out by one of several creditors, in breach of good faith to the others, it is in general supersedeable. *Ex parte Lowe*, 1 Glyn & J. 78.

Application may be made to the court to supersede it, notwithstanding that it is supersedeable at the bankrupts office for want of prosecution. *Id.*

Though the requisites for sustaining a commission have been complied with, and the commission be legally valid, yet, if it has been taken out against good faith, and with a view to force compliance with an arrangement then pending between the parties, the court will supersede it upon the general principle which all courts apply in controlling the abuse of their process. The commission of bankruptcy introduced by the 4 Geo. 3, c. 33, is within that general principle. *Ex parte Harcourt*, 2 Rose, 203.

(c) *For a particular Object.*

*To dissolve a Partnership.*—A commission issued merely to dissolve a partnership is supersedeable. *Ex parte Christie*, 1 Mont. & Bligh, 314.

Although there be a trading, a debt, and an act of bankruptcy, yet if the commission be taken out for a purpose foreign from its object, as to work a dissolution of partnership, it is invalid and supersedeable at the costs of those who take it out. *Ex parte Browne*, 1 Rose, 151.

V. & Co., creditors of U. & Co., being displeased with the conduct of Wilbran, one of the partners in the firm of U. & Co., arrested U. & Co.; all the partners of which firm, except Wilbran, put in bail, but he continued in prison two months, and a commission having issued against U. & Co. it was superseded on the petition of Wilbran, on the ground that it was taken out for the purpose of dissolving the partnership as to him. *Ex parte Wilbran*, 5 Madd. 1; S. C. nom. *Ex parte Wilbeam*, Buck, 459.

*To determine a Lease.*—If a commission be issued by a landlord for the purpose of determining a lease, it is invalid. *Ex parte Gallimore*, 2 Rose, 424.

Quære, how far a landlord issuing a commission may effect his interest, as landlord, in competition with the creditors? *Id.*

*To compel a Compromise.*—Where the intention is to force the bankrupt to a compromise, the commission is invalid. *Ex parte Harcourt*, 2 Rose, 203.

The practice of striking a docket for the purpose not of a commission of bankruptcy, but of compelling a composition disapproved and was not aided. *Ex parte Masterman*, 2 Rose, 444.

Where the time for opening a fiat expires by the voluntary act of the petitioning creditor, and it appears that it was issued under suspicious circumstances, namely, for effecting a compromise with the creditors, and not with a bona fide intention of working it, and a second fiat is issued by another creditor under Lord Loughborough's general order, the court will not supersede the second fiat merely because it was issued by a creditor who was a party to the intended compromise under the first, unless it is clearly for the advantage of the general creditors that the first should stand, and the second be superseded. *Ex parte Anjer*, 2 Deac. & Chit. 67.

Where a party, by pretence of coming into a proposed arrangement with other creditors, protracts the prosecution of the fiat over the fourteen days, and then applies for a new fiat and to supersede the first, even if such second fiat be granted, the court will supersede the second, and order the first to stand: a fortiori, if the second be not in fiat granted, but the first is proceeded with, the court will sustain the first under such circumstances. *Ex parte Baker*, 1 Deac. & Chit. 533.

*To defeat Actions and Executions.*—Where a commission is taken out for the purpose of putting an end to an action by the bankrupt against the

petitioning creditor, and not for the purpose of its operating as a commission for the benefit of the creditors, it will not be permitted to stand, even though an intention of working it for the legitimate purposes of a commission be afterwards adopted. *Ex parte Bourne*, 2 Glyn & J. 137.

It is no objection that it was sued out with intent to defeat a previous execution, if no collusion appear on the part of the bankrupt, *Messham v. Edmonson*, 1 B. & P. 369; S. P. *Ex parte Gardener*, 1 Rose, 377; 1 Ves. & B. 45; *Ex parte Edmonson*, 7 Ves. jun. 303; *Ex parte Arrowsmith*, 14 Ves. jun. 209; *Ex parte Bovee*, 11 Ves. jun. 541. And see *Smith v. Broomhead*, 7 T. R. 300.

(d) *Fraud.*

If fraud be established, the court will supersede the commission before the finding of the commissioners. *Ex parte Bather*, Buck, 426.

A commission was superseded with costs for fraud and misconduct. *Ex parte Conway*, 13 Ves. jun. 62.

But a commission will not be superseded for fraud, where purchases have been made under it. *Ex parte Edwards*, 10 Ves. jun. 104.

A separate commission was superseded for fraud, after the bankrupt had obtained his certificate under it, and had entered into trade again, and the separate effects had been delivered up to the assignees under a joint commission, issued after the separate commission. *Ex parte Poole*, 2 Cox, 227.

Though a commission be taken out for an undue purpose, yet, if that purpose can be defeated without superseding the commission, the court will not interfere; otherwise, if the fraudulent object can only be prevented by the superseding of the commission. *Ex parte Bourne*, 2 Glyn & J. 137.

If it appear that persons have conspired together in the issuing of a fraudulent commission, the Lord Chancellor will direct the necessary documents to be laid before the Attorney-General, with a view to the institution of criminal proceedings against the parties. *Ex parte Emery*, Buck, 429.

(e) *After a former Commission.*

By 6 Geo. 4, c. 16, s. 126, a certificated bankrupt may plead his bankruptcy to any action for a debt which was provable under the commission.

By s. 127, where a bankrupt has been before a bankrupt, or has compounded with his creditors, or been discharged under any insolvent act, his certificate only protects his person from arrest and imprisonment, unless his estate produces 15s. in the pound; and his future estate (except tools, furniture, and wearing apparel) vests in his assignees, who may seize the same.

Seemingly, that s. 127, extends to cases where the former bankruptcy and certificate were anterior to the statute:—But held that the section, where applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate, for a debt which he might have proved under the commission. *Robertson v. Scora*, 3 B. & Adol. 338.

Section 127, does not apply to a bankrupt who had obtained his certificate under a subsequent commission, before the statute passed; and, therefore, where A., after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of that statute, but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule, it was held that his certificate did not bar the action. *Carew v. Edwards*, 4 B. & Adol. 351.

Under s. 127, the assignees under a second commission, where the bankrupt has not paid 15s. in the pound, take from the date of the assignment a present vested interest, by operation of law, in all future estate acquired by the bankrupt. *Ex parte Robinson*, 1 Mont. & Mac. 44.

A commission against an uncertificated bankrupt is void at law, and a nullity. *Nelson v. Cherrell*, 1 M. & Scott, 452; 8 Bing. 316; *S. P. Martin v. O'Hara*, Cowp. 823; *Ex parte Brown*, 1 Ves. & B. 60.

Inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission. *Till v. Wilson*, 7 B. & C. 684; 1 M. & R. 690. — And see *Ex parte Storke*, 2 Rose, 179; 3 Ves. & B. 105.

A bankrupt is not entitled to be discharged out of custody for a debt contracted previous to a second commission issued against him, under which he had obtained his certificate, where he had not obtained his certificate under the first commission. *Id.*

The ground that he is a reputed owner of property by consent of the assignee under the first commission does not avail. *Nelson v. Cherrell*, 7 Bing. 663; 5 M. & P. 680.

Whether separate or joint. *Ex parte Martin*, 15 Ves. jun. 114; *S. P. Ex parte Crew*, 16 Ves. jun. 236.

A commission having issued against A., B., & C., and it being subsequently discovered that B. was an uncertificated bankrupt, the commission was ordered to be wholly superseded. *Ex parte Wray*, 1 Mont. & Mac. 195.

Quære, whether a joint commission sued out against three persons, pending two previous separate commissions against two of them, is valid in law as against the third. *Butts v. Bilke*, 4 Price, 240.

A joint commission was held not supersedeable on the ground of a previous separate commission in Ireland. *Ex parte Cridland*, 3 Ves. & B. 94; 2 Rose, 164.

Where a prior and joint commission has been issued, but never acted on or superseded, such commission, not being in legal operation, does not invalidate a second separate commission. *Warner v. Barber*, 2 Moore, 71; 8 Taunt. 176; *S. P. Ex parte Bullen*, 1 Rose, 134.

A commission was issued against two partners. Subsequently a commission was issued against one of them, and three other persons: this latter

commission was then superseded as to the partner who was included in the first commission, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners; the purchaser objected, that the second commission was altogether void, but the court held otherwise, and made a decree for specific performance. *Burton v. Wall*, 1 Tam. 113.

A person against whom a second commission of bankrupt has been issued, and who has not paid 15s. in the pound, is liable to an action by any of his creditors, notwithstanding they have signed his certificate. *Philpott v. Corden*, 5 T. R. 287.

Even if the first commission had been superseded by consent. *Thornton v. Dallas*, 1 Dougl. 46.

It is a sufficient answer to an action by assignees, to prove that the party is an uncertificated bankrupt under a former commission still in force, and that on that occasion his effects were duly assigned; and this evidence may be given to invalidate the subsequent commission, without the notice required by 6 Geo. 4, c. 16, s. 90. An award, stating such former bankruptcy as the answer to an action by subsequent assignees, must expressly shew that the effects were assigned under the first commission. *Phillips v. Hopwood*, 1 B. & Adol. 619.

The bankrupt's property continues liable, notwithstanding his certificate under a second commission not paying 15s. in the pound, only by judgment in an action; it is not to be taken by the assignees under the commission. *Ex parte Hodgkinson*, 19 Ves. jun. 291; 2 Rose, 172.

Doubts have been entertained whether an action may be maintained for a debt due before the commission, against a certificated bankrupt under the second commission where 15s. has not been paid. *Eicke v. Nokes*, M. & M. 303—Tenterden.

Where a bankrupt under a second commission has not paid 15s. in the pound, but has effects whereon to levy, a creditor may take out execution upon a judgment recovered before the second commission. *Austin v. Denniford*, 9 D. & R. 600.

The sheriff having levied upon goods which were in the possession of the defendant, who was a bankrupt, paid over the proceeds to the assignees on their claiming them; and the defendant afterwards again became bankrupt, and obtaining his certificate, but not paying 15s. in the pound, (and therefore not protected by 5 Geo. 2, c. 30, s. 9,) a second execution issued for the same debt: — Held, that the latter execution was regular, without the first writ having been returned. *Priest v. Milnes*, 2 Chit. 114.

An action against a bankrupt who has obtained his certificate under a second commission, on a cause of action accruing previous to his second bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by 5 Geo. 2, c. 30, s. 37, is elapsed, if evidence be adduced to shew that it is not probable from the state of the effects in the hands of the assignees, that the bankrupt will be able to pay 15s. in the pound. *Jelfs v. Ballard*, 1 B. & P. 467. And see *Edmonson v. Parker*, 3 B. & P. 185.

And to make the certificate a bar to the action it must appear affirmatively that the estate has produced 15s. in the pound: evidence that it probably will produce so much is not sufficient. *Coverly v. Morley*, 16 East, 225; 2 Rose, 119.

Where, on the defendant's pleading his bankruptcy, issue is joined, on the fact whether he had been discharged under a former commission, the plaintiff must shew that the defendant obtained his certificate under that commission, either by the regular proof of it, or by secondary evidence after a notice to produce it: without such notice the defendant's affidavit of conformity under the former commission was held insufficient. *Grass v. Grill*, 4 Camp. 262—Ellenborough.

If a defendant rely on a certificate under a second commission of bankruptcy against him, under which he has not paid 15s. in the pound, the plaintiff, in order to deprive him of the benefit of it, may produce the proceedings under the former commission, and prove that he submitted to it, without proving the trading, the act of bankruptcy, and the other facts which are necessary to support the commission as against third persons. *Haviland v. Cook*, 5 T. R. 655: *S. P. Gregory v. Merton*, 3 Esp. 195.

It would be no answer to the action to produce such certificate, unless the defendant could shew that under it he had paid 15s. in the pound. *Id.*

Where a docket has been struck, a second commission, obtained upon a subsequent docket, cannot be sustained without an order of supersedeas for the first. *In re Hall*, 1 Smith, 190.

It is in the discretion of the great seal to supersede a second commission against an uncertificated bankrupt, and even under circumstances on the petition of the bankrupt. *Ex parte Lees*, *Poulton*, 16 Ves. jun. 473.

In general, the second will be superseded, but special circumstances, as consent, fraud or laches in the creditors under the first, will support the second, and supersede the first; and though it is wrong to encourage a bankrupt to trade pending a commission, and to sue out a second, yet if it does happen, and the assignees will pay creditors under the first 20s. in the pound, and all the costs, the first will be instantly superseded. *Ex parte Brown*, 2 Ves. jun. 67; 4 Bro. C. C. 210.

A second commission superseded, and a proceeding issued on a former commission, which had expired. The petitioning creditor under the first commission having been prevented from prosecuting his commission by the artifices of a person, who was desirous of covering certain transactions, between himself and the bankrupt, by a lapse of two months. *Ex parte Knight*, 2 Rose, 319.

No second commission to be sent to the Lord Chancellor, without a note of what has passed on the first. *Ex parte Freeman*, 1 Ves. & B. 34; 1 Rose, 380.

#### (f) Where three Commissions.

Where a bankrupt has been a bankrupt before, or compounded with his creditors, or taken the benefit of the Insolvent Act, his future effects belong to his assignees under the commission, notwith-

standing he obtains his certificate, unless his estate pays 15s. in the pound. 6 Geo. 4, c. 16, s. 127.

Where a defendant had been three times declared a bankrupt, and had not paid 15s. in the pound under the second commission, the court held, that the third commission was not void on that account, but voidable only. *Todd v. Maxfield*, 5 D. & R. 258; 3 B. & C. 222.

But it is void in equity, and may be superseded on the petition of a person summoned to attend the commissioners as a witness. *Ex parte Lane*, 1 Mont. 12.

A commission was sustained where one of the bankrupts had been the subject of two former commissions, and although he had obtained his certificate, yet he had not under the second paid 15s. in the pound. *Ex parte Hodgkinson*, 2 Rose, 172; 19 Ves. jun. 291.

A third commission issued against a trader who had not paid any dividend to his creditors under a first and second commission, is a nullity: and where a bankrupt had obtained his certificate under such circumstances:—Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission. *Fowler v. Coater*, 10 B. & C. 427.

It is no objection to the proof of a debt under a third commission, that the creditor might have proved it under the second commission, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 15s. in the pound under the second commission. *Ex parte Morley*, 2 Deac. & Chit. 45.

#### (g) After Composition and Commission.

A debtor having compounded with his creditors became bankrupt, and obtained his certificate, but without paying 15s. in the pound; another commission, afterwards issued against him, is not supersedeable on the ground that all his property belonged to the assignees under the first commission. *Ex parte Baker*, 1 Rose, 452.

Where a second commission issued against a person who had, previously to the first commission, compounded, the Lord Chancellor refused to supersede the second, because 15s. in the pound had not been paid under the first. *Ex parte Welsh*, 1 Mont. 276.

Under the 6 Geo. 4, c. 16, s. 127, no action can be maintained against a certificated bankrupt for a debt due before his commission, although he has compounded with his creditors before his commission, and his effects have not produced 15s. in the pound under it. *Eicks v. Nokes*, M. & M. 303—Tenterden.

The proving a debt under a commission of bankruptcy issued against a person who had before compounded with his creditors, and whose estate under the commission had not, nor would, produce 15s. in the pound, but who, before he became bankrupt, paid the creditors with whom he compounded the full amount of their debts, was held to discharge the bankrupt, in respect of his future estate and effects, from an action for

the debt so proved. *Read v. Sowerby*, 3 M. & S. 78; 2 Rose, 288.

A deed of composition, embracing all the creditors, under which many of them came in, is, in case of a subsequent commission of bankruptcy, such a "compounding with his creditors," as will, within the stat. 5 Geo. 2, c. 30, s. 9, deprive the bankrupt of the benefit of his certificate, to protect his future effects from being liable to be taken in execution, although some of the creditors did not come in under the deed of composition. *Slaughter v. Cheyne*, 1 M. & S. 182; 2 Rose, 110.

But a deed of composition, framed only for the joint creditors of two bankrupts, under which seven of the joint creditors, whose debts exceeded 2000*l.*, accepted of the proffered composition of 3*s.* in the pound, but which was not signed or accepted by three other joint creditors, whose debts amounted to 92*l.*, nor by the separate creditors of one of the bankrupts, is not such a "compounding with his or their creditors," as will within that statute avoid the effect of a subsequent certificate under a commission, to protect the future estate and effects, as well as person, of one of the bankrupts, who was afterwards sued to judgment, and had execution levied on his goods, by one of his separate creditors. *Norton v. Shakespeare*, 15 East, 619; 1 Rose, 347.

#### (h) After a Scotch Sequestration.

Seemle, that English creditors are precluded from suing out or sustaining a commission against a debtor who was the subject of an antecedent and operative Scotch sequestration. *Scotland (Bank) v. Stein*, 1 Rose, 462, App.

Whether an English commission or a Scotch sequestration is to be preferred, as the mode of administering the debtor's effects, depends upon their priority. *Id.*

Where a petition for a sequestration against a party domiciled in Scotland was on the 25th of January, and the first deliverance upon that petition on the 26th of January, and the sequestration awarded by interlocutor of the 16th of August, and a commission of bankruptcy issued on the 15th of March, upon an act of bankruptcy committed on the 4th of January, held that the sequestration had the priority. *Geddes v. Mowat*, 1 Glyn & J. 414.

### 5. Impeachment of Validity.

#### (a) By Bankrupt.

*In what cases.*—It is not competent for a bankrupt to set up a former act of bankruptcy, in order to invalidate his commission. *Rex v. Bullock*, 1 Taunt. 71; 2 Leach, C. C. 966; 14 Ves. jun. 452; *S. P. Mercer v. Wise*, 3 Esp. 221; *Kennett v. Duff*, 2 Smith, 44; 9 East, 21.

But a bankrupt, who has obtained his certificate under a joint commission issued against him and others, may, in an action of trover against a stranger, controvert the validity of the commission, or take advantage of its illegality, because between such stranger and the plain-

tiff there is no reciprocity. *Butts v. Bilke*, 4 Price, 240.

A bankrupt after he has obtained his certificate may petition to supersede because he was not a trader. *Ex parte Lewis*, 2 Glyn & J. 208.

It is in the discretion of the court to supersede a commission, whether the bankrupt has or has not got his certificate under it; but the court would not do so upon the petition of joint creditors who suffered a considerable time to elapse without having obtained an order to prove, for the purpose of assenting to or dissenting from the certificate, in a case where the certificate was lying for confirmation, and no misconduct was imputed to the bankrupt. *Ex parte Cutten*, *Ex parte Appleton*, Buck, 68.

Quære, whether a bankrupt, or any person in the same circumstances, can impeach the commission upon a prior act of bankruptcy, and a debt sufficient to support a commission, of which a third person may avail himself as a defence to an action by the assignees? *Ex parte Donovan*, 15 Ves. jun. 6.

Though a bankrupt would be restrained from repeated attempts to supersede the commission, amounting to vexation, he was not prevented from bringing a second action; and an inquiry was directed relative to an estate, by the sale of which he proposed to pay his debts; and the commission was ordered to proceed in the usual course. *Ex parte Bryant*, 1 Ves. & B. 506; 2 Rose, 1.

A bankrupt was permitted to petition against the commission in forma pauperia. *Ex parte Northam*, 2 Rose, 140.

A bankrupt, like a pauper, loses his privilege by misconduct; therefore where, after two petitions dismissed, he presented a third for the same purpose, it was dismissed with costs, and not being able to pay them he was committed, but the court would not make an order to restrain him from presenting any more. *Ex parte Shaw*, 2 Ves. jun. 40.

*Must not be attainted or committed.*—A person attainted of felony cannot be heard by petition to the Chancellor to supersede a commission of bankruptcy issued against him, whether his attainer directly arose out of the commission of bankruptcy, or is wholly irrelevant to it. *Rex v. Bullock*, 1 Taunt. 82; 14 Ves. jun. 452; *S. C.* not *S. P.* 2 Leach, C. C. 966.

In one case held that a bankrupt could not supersede his commission with consent of all the creditors, while under commitment by the commissioners. *Ex parte Bean*, 1 Rose, 211; 17 Ves. jun. 47.

Afterwards held that a bankrupt under commitment might petition to supersede. *Ex parte McGennis*, 18 Ves. jun. 289; 1 Rose, 60.

So, a commission was superseded on the petition of the bankrupt, under commitment for not answering, with the consent of all the creditors. *Ex parte Brown*, 2 Swans. 290.

*When also Proceedings at Law.*—A bankrupt



bringing an action to try the validity of the commission, cannot at the same time proceed with a petition to supersede it on the same ground. *Ex parte Burgess*, Jacob, 559.

A bankrupt was not allowed the costs of his petition to supersede the commission, where he was in a situation to try its validity at law in the first instance. *Ex parte Marks*, 1 Glyn & J. 70.

If it appear by the petition of a creditor to supersede a commission, that an action is commenced to try its validity, the court will not supersede the commission till the event of the trial is known. *Ex parte Price*, Buck, 230.

When a bankrupt petitions to supersede, and at the same time brings an action against the petitioning creditor to try the validity of the fiat, he must elect which remedy he will pursue. *Ex parte Drake*, 2 Deac. & Chit. 91; 1 Mont. & Bligh, 486.

Under the 1 & 2 Will. 4, c. 56, s. 17, a bankrupt cannot proceed on a petition to supersede, and also have an issue at law; he must elect his remedy, and if the petition be part heard he is precluded from an issue. *Ex parte Williamson*, 1 Deac. & Chit. 549.

A petition by the bankrupt to supersede the commission was dismissed without a counter petition, the commission having been established by an action at law, the bankrupt not appearing. *Ex parte Caponhurst*, Buck, 476.

Where a bankrupt has, in an action against the assignees, established that there was no act of bankruptcy, the court will not, unless under very special circumstances, delay superseding the commission till after another trial. It is not a sufficient ground that the assignees have evidence to support the commission, which they were prevented doing by surprise. *Ex parte Dick*, 1 Rose, 51.

Where a bankrupt is in a situation to try the validity of his commission at law, the court will leave him to his action, putting him upon terms as to the time of the trial. *Ex parte Billiald*, Buck, 220.

*Surrender necessary.*—A bankrupt cannot supersede his commission before a surrender. *Ex parte Bean*, 1 Rose, 211; 17 Ves. jun. 47: *S. P. Ex parte Jones*, 11 Ves. jun. 409; *Ex parte Roberts*, 1 Madd. 72.

The court of Review will not hear the petition of a bankrupt to supersede a fiat until he has surrendered, notwithstanding the petition is presented before the forty-second day, and the petition comes on before the time for surrendering has expired. *Ex parte Drake*, 1 Mont. & Bligh, 486; 2 Deac. & Chit. 91: *S. P. contra, Ex parte Nichols*, 2 Glyn & J. 101.

A commission may be superseded by consent, without surrender. *Ex parte Glyn*, 1 Mont. 124.

But not after the forty-second day. *Ex parte Peaker*, 2 Glyn & J. 337.

Although the adjudication has been reversed, a creditor has no right to the annulling the fiat, even on a petition presented before the forty-

second day, if, up to the hearing of petition, the bankrupt has never surrendered. *Ex parte Clarke*, 2 Deac. & Chit. 194.

A bankrupt who has neglected to surrender, cannot supersede his commission, with the consent of his creditors, without first obtaining leave to surrender. *Ex parte Jones*, 8 Ves. jun. 328.

The rule that a commission shall not be superseded under which the bankrupt has not surrendered was dispensed with, upon application of all the creditors who had proved, the bankrupt being out of the country, and not, according to the belief of the petitioner, having heard of the commission. *Ex parte Hopkins*, 1 Rose, 228.

A bankrupt presented a petition to supersede his commission, and then died before the last meeting of the commissioners, without having surrendered himself; the petition was revived by his personal representative. The commission was ordered to be superseded. *Ex parte Whittington*, Buck, 235.

The petition of a personal representative of a bankrupt, who had died after the last meeting of the commissioners without having surrendered, was dismissed. *Ex parte Gardiner*, Buck, 458.

If a bankrupt die without surrendering, a petition presented by his representative to supersede the commission cannot be heard, unless it make out a case that would induce the court to permit a surrender if the bankrupt were living. *Ex parte Crowther*, Buck, 480.

The Lord Chancellor would supersede a commission to which the bankrupt had been prevented surrendering through ignorance or mistake. In this case a separate commission issued against one of two partners, to which the bankrupt did not surrender, a joint commission was afterwards taken out, to which he had surrendered, and had afterwards been committed to take his trial for not appearing to the first. *Ex parte Lavender*, 1 Rose, 55.

If a bankrupt be unable, in consequence of illness, to attend an adjourned third meeting, and the commissioners, therefore, adjourn the meeting, the court will, upon consent of all the creditors, supersede, without another surrender. *Ex parte Norcott*, 1 Mont. 281.

A commission under the circumstances was superseded, on a petition for that purpose, signed by the solicitors of the bankrupt, and all the creditors who had proved, and upon the certificate of such signature by the commissioners, the bankrupt being abroad and not having surrendered. *Ex parte Carling*, 2 Glyn & J. 35.

*Operation of Discharge out of Custody.*—If a bankrupt obtain his discharge out of custody in an action, by a judge's order, on the ground of his bankruptcy, he is afterwards precluded from contesting the validity of the commission in a court of law. *Goldie v. Gunston*, 4 Camp. 381—Ellenborough.

Although a person, against whom a commission has issued, and who has obtained his discharge out of custody in an action pending

against him on the ground of his bankruptcy, cannot afterwards dispute the validity of the commission in a court of law, he may, if the commission be irregular, apply to the great seal for a supersedeas. *Watson v. Wace*, 7 D. & R. 633; 5 B. & C. 153; 2 C. & P. 171.

Seem, that under the provisions of stat. 6 Geo. 4, c. 16, s. 59, a bankrupt in custody, by insisting on his discharge previous to proof of a debt, does not estop himself from disputing the validity of the commission. *Mott v. Mills*, 3 C. & P. 197—Park.

If a creditor apply to prove his debt, and the bankrupt, upon such application, say to the creditor, "you must give me my discharge before you prove," and he is discharged accordingly, but at the same time saying, that it is his intention to dispute the commission as he is not a trader, it is unsettled whether he can maintain an action to dispute the commission. *Id.*

**Operation of Acquiescence.**—Signing a deed reciting the bankruptcy, &c. is an acquiescence in the validity of the commission. *Ex parte Hall*, 1 Mont. 354. And see *Ex parte Hill*, 1 Mont. 9.

If a trader, against whom a commission has issued, as acquiesced in it so far as to go to the different creditors to solicit them to vote for particular persons as assignees, he cannot afterwards question the commission in an action for money had and received against those persons, whether he is an object of the bankrupt laws or not. *Lake v. Howe*, 6 Esp. 20—Mansfield.

A commission after a considerable acquiescence by the bankrupt, cannot be superseded without a trial at law. *Ex parte Kirk*, 15 Ves. jun. 464.

A petition by a bankrupt to supersede for want of an act of bankruptcy presented two years after the issuing of the commission was dismissed. *Ex parte Abell*, 1 Glyn & J. 199.

Where the bankrupt acquiesces, the Chancellor will, upon petition, restrain him from proceeding at law. *Ex parte Leigh*, 2 Glyn & J. 332.

Injunction granted to restrain an action of ejectment brought by a bankrupt, at the instigation of the petitioning and another creditor, to recover the possession of premises sold under a commission acquiesced in for seven years. *Ex parte Grant*, Buck, 90.

Taking the allowance under a commission does not preclude an application by the bankrupt to supersede. *Ex parte Giles*, 1 Deac. & Chit. 548; 1 Mont. & Bligh, 268.

A trader, who has been declared a bankrupt, does not preclude himself from trying the validity of the commission in an action against the assignees, by having surrendered under the commission, and by having presented a petition to the Chancellor to enlarge the time for his surrender. *Mercer v. Wise*, 3 Esp. 219—Kenyon.

A bankrupt, who had abandoned a petition, presented by him in June, 1821, for a supersedeas, and had joined in a conveyance of part of his property, and solicited and procured the requisite signatures to his certificate, was restrained from proceeding in an action brought by him against

the messenger to impeach the commission. *Ex parte Catten*, 1 Glyn & J. 317.

If a person, against whom a commission issues, acquiesces in it so far as to take a part in the sale of his own effects under the commission, he shall not afterwards be allowed to question it. *Clarke v. Clarke*, 6 Esp. 61—Heath.

But a bankrupt who assists in the sale of his own goods under the commission, for the purpose of protecting his property, and seeing that it is sold to the best advantage, is not thereby estopped from disputing the validity of the commission. *Hearns v. Rogers*, 4 M. & R. 486; 9 B. & C. 577.

Neither is he so estopped by giving notice to his lessors of a farm that he is a bankrupt, and is willing to deliver up the lease, which they accept, his assignees not being parties or privies to the transaction. *Id.*

A bankrupt may petition to supersede his commission on the ground that he was no trader, though he has obtained his certificate under it, if, upon an action by the assignees against a creditor, their title is successfully resisted, and the commission becomes inoperative. *Ex parte Bass*, 4 Madd. 270.

A bankrupt who had never surrendered, was restrained by order from proceeding in actions against the assignees and a purchaser under the commission, to try its validity, after long acquiescence and acts of co-operation in the proceedings consequent upon the commission done by him or under his authority. *Ex parte Hornby*, 1 Mont. & Bligh, 1.

A bankrupt cannot petition to supersede a commission on the ground of insufficiency of the petitioning creditor's debt, when he has lain by two years, without adopting any proceeding for that purpose. *Ex parte Hooper*, 1 Deac. & Chit. 117.

**Mode of Proceeding.**—An injunction was ordered upon an interpleading bill, filed by a debtor against the bankrupt and his assignees, but the court would not suffer a bankrupt by means of such a bill to try the validity of his commission. *Lovndes v. Cornford*, 1 Rose, 180.

To a bill by a bankrupt who had taken the benefit of the Insolvent Debtors' Act, and his assignees under that act, against his assignees under the commission, and others, stating improper conduct and collusion, and that all or most of the creditors under the commission were satisfied, and praying an account; a demurrer on the ground that the mode of proceeding was by petition in bankruptcy was allowed. *Sutton v. Davis*, 1 Rose, 79.

On demurrer, held, that a bankrupt cannot file a bill against a debtor to his estate, on the ground of the invalidity of the commission, and of collusion between his assignees and the debtor; the proper course being an action to try the validity of the commission, or a petition to remove the assignees. *Hammond v. Attwood*, 3 Madd. 158.

#### (b) By other Persons.

**Assignees.**—Assignees may apply to supersede

even for defects appearing on the proceedings, but such applications will be watched with great jealousy, and it is their duty to do all in their power to clear away doubts as to the validity of the commission before they apply. *Ex parte Graces*, 1 Glyn & J. 86.

An assignee who has proved his debt, and against whom, upon petition, an action has been directed to be brought, cannot dispute the validity of the commission; if he does, it is at the hazard of his proof. *Ex parte Jecks*, 1 Rose, 393.

**Petitioning and other Creditors.**—A petitioning creditor cannot dispute the validity of a commission sued out by himself, although in an action brought against him by the assignees, it appearing that, on the balance of accounts, the bankrupt was indebted to him in a less sum than 100*l*. *Harmer v. Davis*, 1 Moore, 300; 7 Taunt. 577.

Though the commission is not opened, the petitioning creditor cannot proceed at law if it is capable of prosecution. *Ex parte Prosser*, 1 Glyn & J. 92.

A commission sealed, but not opened, is not supersedeable at the instance of the petitioning creditor, without notice to the bankrupt. *In re —*, 1 Glyn & J. 23.

Or shewing that he cannot be found. *Ex parte Forth*, 1 Mont. & Mac. 10.

A commission sealed, but not opened, decided to be superseded at the instance of the petitioning creditor, reserving to the bankrupt in the order all his rights, whether by action or petition. *Ex parte Palmer*, 1 Mont. & Mac. 211.

A judgment creditor having been directed to try the validity of the commission, succeeded upon the trial: the petitioning creditor was directed to pay the costs of superseding the commission and of the petition. *Ex parte Heming*, Buck, 350.

Where a commission is superseded at the cost of the petitioning creditors, and some of them pay the whole costs, the court has no jurisdiction in bankruptcy to order the rest of the petitioning creditors to contribute. *Ex parte Wilmhurst and Brooks*, 1 Glyn & J. 4.

A commission of bankruptcy was superseded on consent of the petitioning creditor. *Ex parte Trigwell*, 1 Ves. & B. 348; 2 Rose, 109.

Where the petitioning creditor petitions to supersede, a petition by the bankrupt, except for the assignment of the bond, does not lie. *Ex parte Stycester*, 1 Mont. 125.

A creditor having proved a debt under a commission, is not thereby prevented from impeaching the commission in an action against himself. *Stewart v. Rickman*, 1 Esp. 108—Kenyon. *But see Walker v. Burnell*, 1 Dougl. 305, and *Collins v. Forbes*, 3 T. R. 322.

A creditor who has proved is not thereby precluded from applying to supersede the commission. *Ex parte Bonser*, 2 Rose, 61.

A creditor petitioning to supersede must not only state that he was a creditor at the time of issuing the commission, but also at the time of

presenting his petition. *Ex parte Flight*, 1 Deac. & Chit. 78.

**Other Persons.**—Where a party had presented a petition in bankruptcy, seeking relief and benefit under a commission in respect of a particular transaction, he was restrained by an order of the court from putting in issue the validity of the commission in an action commenced against him by the assignees in respect of the same transaction. *Ex parte Anderton*, 1 Mont. & Mac. 177.

Although an order in council licensing a person to export and import certain goods to and from an enemy's country, does not authorize his residence and trading in the enemy's country, yet if he be there for the fair purposes of his licence, it is not a ground for superseding a commission founded on his petition. *Ex parte Buglehole*, 1 Rose, 271; 10 Ves. jun. 525.

In an action for goods of a bankrupt against the person who sold them, an advertisement of the defendant's describing them as the goods of the bankrupt, precludes him from disputing the bankruptcy. *Malby v. Christie*, 1 Esp. 342—Kenyon.

In an action of trover by the assignees of a bankrupt, the defendant's attorney admitted that the party had been duly declared bankrupt:—Held, that the defendant was thereby precluded from objecting to any of the proceedings under the commission, unless he had given notice to dispute it. *Perring v. Tucker*, 3 M. & P. 557.

An attorney having given an undertaking to put in bail for his client, which he neglected to do, an order was made upon him to put in such bail, and an attachment issued against him. The attorney became a bankrupt. The plaintiff in the action has a sufficient interest under these circumstances to support an application to supersede the commission. *Ex parte Bold*, 1 Cox, 423.

#### 6. Abatement by Death.

**Death of Bankrupt.**—By 6 Geo. 4, c. 16, s. 26, no commission abates by reason of a demise of the crown; or by the death of the bankrupt after adjudication.

But a commission cannot proceed after the death of the party, against whom it issued, before adjudication. *Ex parte Beale*, 2 Ves. & B. 29; 2 Rose, 140.

Where the bankrupt died before adjudication, the commission was held null and void, without any writ of supersedeas. *Ex parte Green*, 1 Deac. & Chit. 230.

Though a bankrupt dies, not having surrendered, the commission may proceed. *Ex parte Dewdney*, 15 Ves. jun. 494.

An assignment of commissioners after the death of the bankrupt was good. *Troughton v. Guley*, Amb. 630.

A separate commission established, though the other partner died before the assignment. *Ex parte Smith*, 5 Ves. jun. 295.

A petition to supersede, presented in the lifetime of the bankrupt, ordered to stand over, on his death, until his personal representatives, or

those entitled to take out administration, were served. *Ex parte Leworthy*, 1 Mont. 54.

**Death of Petitioning Creditor.**—Where a petitioning creditor died after issuing the commission and before adjudication, it was ordered that the commissioner should be at liberty to adjudicate upon the deposition of his executors. *Ex parte Tanner*, 1 Mont. & Mac. 292: *S. P. Ex parte Winwood*, 1 Glyn & J. 252.

A commission having issued on the petition of four partners, one of whom died before the day of fiat and of the commission, it was ordered to be superseded forthwith, with liberty to the surviving partners to lodge new docket papers and issue another commission. *Ex parte Wakefield*, 1 Mont. & Mac. 291.

### 7. Renewed Fiat.

If by reason of the death of the commissioners, or for any other cause, it becomes necessary, a commission might be renewed upon payment of half fees only. 6 Geo. 4, c. 16, s. 26.

A renewed commission was granted on the petition of a creditor, the bankrupt, the commissioners, and the assignees being dead. *Ex parte Hobbes*, Buck, 134.

Where a renewed fiat is prayed by a creditor, by reason of the death of commissioners, the assignees must be served with the petition. *Ex parte Ray*, 1 Deac. & Chit. 341.

If a commission is renewed to a distant place from where the majority of the creditors reside and the original commission was worked, for the convenience of the creditors, the court will renew it back to the original place. *Ex parte Waring*, 1 Mont. 216.

A petitioning creditor being unable to obtain adjudication under the commission sued out by him, he was permitted, under the circumstances, to take another commission directed to another list upon the same docket papers. *Ex parte Stead*, 1 Glyn & J. 301.

A renewal may issue for the bankrupt to surrender previous to superseding. *Ex parte Galpin*, 1 Mont. 207.

Where commissioners take more than the statutable fees, the commission will be renewed to other commissioners. *Ex parte Kirby*, 1 Mont. & Mac. 405.

A renewed commission transfers all the commissioners' authority to the new commissioners. *Ex parte Hill*, 1 Mont. 5.

Upon issuing a renewed country commission, it is the duty of the assignees or their agent (the solicitor) to ascertain whether the commissioners are able and willing to act; otherwise they are liable to the costs of a new fiat, if it be necessary, from inability or unwillingness to act on the part of the commissioners who are named in the renewed fiat. *In re Wilkinson*, 2 Deac. & Chit. 112.

### 8. Auxiliary Commissions.

By 6 Geo. 4, c. 16, s. 20, auxiliary commissions

might issue for proof of debts under 20l. or the examination of witnesses when necessary.

Before that statute, a commission having issued in London against A. & B., bankers at Shrewsbury and Chester, auxiliary commissions were directed to issue to those places, for the purpose of taking the proofs of creditors holding notes under 20l. *Ex parte Perry*, 1 Rose, 12.

Liberty to examine the bankrupt under an auxiliary commission was refused. *Ex parte Scott*, 1 Rose, 12: *S. P. In re* —, Buck, 523.

Parties claiming debts, and summoned to attend in the country, for examination under a commission, are not "witnesses" within the statute, so as to entitle them to an auxiliary commission for their examination. *Ex parte Kirby*, 1 Mont. & Mac. 440.

Where a commission against a distant country bank was executed in London, another commission was ordered, on account of the holders of small notes in the country, to be executed there for the purpose only of receiving proof of debts there; the proofs so taken to be received under the London commission. *Ex parte Upham*, 17 Ves. jun. 212.

An auxiliary commission to receive proof of debts in the country was limited to notes under 20l. *Id.*

### 9. Joint or separate Fiat.

#### (a) Validity.

By 6 Geo. 4, c. 16, s. 16, a commission may be sued out against any one or more partners of a firm, by any creditor who would be entitled to a commission against all. By the same statute, a joint commission may be superseded as to one party; and the validity of the commission is not to be affected as to any person as to whom the commission is not ordered to be superseded.

A joint commission, invalid in its concoction, may be superseded as to one of the bankrupts only. *Ex parte Bygrave*, 2 Glyn & J. 391.

Formerly, if a joint commission were invalid as to one partner, it was bad as to all. *Ex parte Martin*, 15 Ves. jun. 114.

But it is now doubted whether a joint commission, invalid as to one partner, can, after a supersedeas as to that one partner, be rendered valid against the remaining partners. *Ex parte Wray*, 1 Mont. & Mac. 195.

And whether a commission can be superseded as to one of two bankrupts, to give validity to a subsequent commission against the other with a third, quære? *Ex parte Burlton*, 2 Glyn & J. 344.

A joint commission against two out of three partners is bad. *Allen v. Hartley*, 4 Dougl. 20.

Even where one partner is an infant or lunatic, there cannot be a joint commission of bankruptcy against the others; separate commissions must be taken out. *Ex parte Layton*, 6 Ves. jun. 440; *S. P. Ex parte Henderson*, 4 Ves. jun. 163.

Where there was a separate commission against one of three partners, and afterwards a commis-

sion against two of the firm, the first commission was ordered to be superseded, and the costs paid out of the joint estate. *Ex parte Smith*, 1 Glyn & J. 256.

Where a joint fiat issues against A. & B., and the debt is separate, it is void, and the subsequent superseding it as to A. cannot make it good as a separate fiat against B. *Ex parte Clarke*, 1 Deac. & Chit. 544.

In such case, a petition praying to supersede against B. need not state the objection that is relied on. *Id.*

(b) *Proceedings when both are issued.*

By 6 Geo. 4, c. 16, s. 17, if a separate commission be issued after a joint commission, it was directed to the same commissioners, who were to convey to the same assignees; after which proceedings under it were to be stayed, and it was to be annexed to the joint commission; provided that the chancellor might direct either a joint or separate procedure.

The former course in bankruptcy was, that a joint and a separate commission stood together; now, the joint commission alone stands. The assignees can at law recover both the joint and separate estate, and the same distribution is made as if both commissions stood. *Ex parte Martin*, 15 Ves. jun. 115; *S. P. Ex parte Brown*, 2 Ves. jun. 69; 4 Bro. C. C. 21. And see stat. 6 Geo. 4, c. 16, s. 17.

Although a second commission, where a former one is in operation against any of the same parties, is void, yet, where the convenience of administering a partnership fund requires it, and it can be done without prejudice to transactions which have taken place under the first commission, the court will so dispose of the first commission as to prevent its being an impediment to the prosecution or validity of the second. *Ex parte Mason & Rawlinson*, 1 Rose, 425; *S. C. nom. Ex parte Rawson*, 1 Ves. & B. 160.

It is a settled rule, in case of different commissions, to support that which will do the most ample justice, superseding all the rest. *Id.*

Either commission is now, however, superseded, as may best answer the ends of justice. *Ex parte Crew*, 16 Ves. jun. 236.

The court will invariably, by superseding the separate commission, give effect to the joint one, unless there be a strong reason against the court's so interfering; and it is not a sufficient reason, that by such interference a separate creditor to a great amount will be divested of his right of voting in the choice of assignees. Where a separate commission is superseded, to give effect to an arrangement of this nature, the petitioning creditor is to be reimbursed his costs out of the joint estate. *Ex parte Pachelor*, 2 Rose, 26.

Joint and separate estates are not consolidated, when it is practicable to keep them separate. *Ex parte Sheppard*, 1 Mont. & Bligh, 415.

A separate commission will not be superseded at the instance of the creditors under a joint commission, if the joint commission cannot be sustained. *Ex parte Roberts*, 1 Madd. 72; 2 Rose, 378.

A separate commission is superseded to give effect to a subsequent joint one, upon the principle of convenience and general advantage to the creditors; and the prior petitioning creditor, unless he has been acting mala fide, receives all the costs of superseding. *Ex parte Brown*, 1 Rose, 433; 1 Ves. & B. 60.

Sales, &c. having taken place under a separate commission, the court, in preference to superseding, yet in order to give a joint effect to a subsequent joint one, directed it to be impounded in the office of the secretary of bankrupts. *Ex parte Rowlandson*, 1 Rose, 416.

A commission against T. C. and three others, superseded as to T. C. on the petition of the assignees, under a commission previously issued against T. C. and another. *In re Coleman*, 1 Mont. & Mac. 15.

Two commissions having issued, and one being superseded, the proofs under that were ordered to be received under the other. *Ex parte Upham*, 17 Ves. jun. 212.

A separate commission having been sued out against A., and a joint commission having also issued against him and B., and the assignees under the separate commission having recovered a verdict in trover against C.; the court ordered the amount of the verdict to be brought in to abide the event of a petition to the Chancellor to supersede such separate commission. *Hodgkinson v. Travers*, 2 D. & R. 409; 1 B. & C. 257.

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the court of Review will refer it to the commissioner, to inquire whether such consolidation is for the general benefit; but will not, upon such a resolution alone, bind the interest of the absent creditors of both classes. *Ex parte Part*, 2 Deac. & Chit. 1.

## IX. DECLARING PARTY A BANKRUPT.

### 1. Adjudication.

By 6 Geo. 4, c. 16, s. 24, the commissioners, upon proof of the petitioning creditor's debt, and of the trading and act of bankruptcy, shall thereupon adjudicate him a bankrupt.

This power is now given to any one or more of the six commissioners of the court of bankruptcy. 1 & 2 Will. 4, c. 56, s. 7.

Upon the reversal of any adjudication, the chancellor may order a fiat to be rescinded or annulled; and such order will have the force of a supersedeas of a commission. 1 & 2 Will. 4, c. 56, s. 19.

Adjudication stayed, on affidavit that the party owed no debt to the petitioning creditor, and had not committed an act of bankruptcy. *Ex parte Fletcher*, 2 Deac. & Chit. 90.

In one case, the lord chancellor refused to stay proceedings under a commission not opened, upon an allegation that there was no petitioning creditor's debt, the commission and adjudication being a matter of right under the statute. *Ex parte Lancaster*, 1 Rose, 220; 17 Ves. jun. 512.

The lord chancellor had not authority to compel the commissioners to declare a party against whom a commission had issued a bankrupt: his authority was limited to ordering them to proceed in their judgment. *Ex parte Perrin*, Buck, 510.

Upon every application for an appointment for opening any fiat, the registrar shall, in the presence of the solicitor applying for the same, allot such fiat by ballot to one of the commissioners of the court, according to the regulations to be from time to time presented by the Court of Review, except in cases of second or renewed fiats, which shall go to the same commissioner before whom the former commission or fiat was prosecuted. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxv.*

## 2. Advertisement in Gazette.

By 6 Geo. 4, c. 16, s. 25, after adjudication, the commissioners are to publish notice thereof in the Gazette, and thereby appoint three public meetings for surrender, the last of which is to be on the forty-second day.

Altered to two or more public meetings, the last to be on the forty-second day after publication of the bankruptcy in the Gazette. 1 & 2 Will. 4, c. 56, s. 20.

In lieu of attaching a copy of the Gazette to the proceedings in each bankruptcy, the deputy registrar shall make a memorandum of the appearance of the advertisement in the Gazette, and of the date thereof, with proper reference to the file, to facilitate search. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvi.*

An order was made, under circumstances, restraining the insertion in the Gazette of the declaration of bankruptcy, until the proceedings should be laid before the lord chancellor. *Ex parte Fletcher*, 1 Ves. & B. 350.

The insertion of adjudication in the Gazette was suspended by the lord chancellor, where, upon inspection of the proceedings, it appeared that the act of bankruptcy had not been proved. *Ex parte Lankester*, 17 Ves. jun. 512; 1 Rose, 220.

The insertion was suspended, only where, on inspection of the proceedings, no bankruptcy was found; or, under a country commission, to give the opportunity of producing the evidence. *Ex parte Turlington*, 19 Ves. jun. 464.

The advertisement will not be stayed if the requisites are sufficient. *Ex parte Edwards*, 1 Mont. & Bligh, 255.

An application to suspend was refused, where there was no apparent defect. *Ex parte Ainsworth*, 2 Glyn & J. 69.

The advertisement will be suspended upon an affidavit denying the bankrupt's insolvency, and his having committed an act of bankruptcy. *Ex parte Preston*, 1 Rose, 259; *S. P. Ex parte Foster*, 17 Ves. jun. 414; 1 Rose, 49.

But the operation of the commission in other respects is continued. *Ex parte Fletcher*, 1 Rose, 336.

The publication of the advertisement will not be postponed, although a large majority of the

creditors consent. *Ex parte Raffenstein*, 1 Mont. & Bligh, 84.

An advertisement was suspended on the petition of a creditor until the next Gazette day, when, upon the consent of all the creditors, the commission was superseded. *Ex parte Ogilby*, 1 Glyn & J. 250.

The advertisement will not be postponed to give effect to a compromise, where the commission is not disputed. *In re Hambden*, 2 D. & C. 219.

If there be a bona fide intention to prosecute a commission, an advertisement in the Gazette of the adjudication may be dispensed with, as where notice of the adjudication in a country commission was given at the bankrupt office on the 28th day, in order to obtain a certificate for the purpose of inserting the adjudication in the Gazette; it was held to be sufficient to support the commission. *Ex parte Soppi*, Buck, 81.

## 3. Disputing Adjudication.

By 1 & 2 Will. 4, c. 56, s. 17, if the bankrupt shall be minded to dispute the adjudication, and present a petition, praying the reversal thereof, to the Court of Review, within two calendar months, if he shall be within the United Kingdom, or within three months if in Europe, or within one year if elsewhere, or within such time as the court shall allow, not exceeding one year from the date of the adjudication: the court shall hear and decide upon the petition, or, if wished by the bankrupt, at his costs, direct an issue, to be tried by a jury, before one of the judges of the court; and the determination on the petition, or on the verdict, is to be conclusive: provided that an appeal is given to the Chancellor.

By sect. 18, after any such issue tried, the chancellor, on petition, may order another fiat to issue.

Upon a petition by the bankrupt under s. 18, to reverse the adjudication, he is entitled to have copies of the depositions upon which the commissioner adjudicated, he undertaking to prosecute the commission. *Ex parte Jackson*, 1 Mont. & Bligh, 394.

If assignees are chosen before the petition is heard, they may adduce further evidence of the act of bankruptcy; but, if the question was only between the bankrupt and the petitioning creditor, quere? *Id.*

A bankrupt is not prevented by the 17th sect. from applying to supersede, although two months have elapsed from the date of the adjudication. *Ex parte Palmer*, 1 Deac. & Chit. 341.

## PROOF OF DEBTS.

### 1. Generally.

By 6 Geo. 4, c. 16, s. 46, at the meetings appointed by the commissioners, creditors may prove their debts on their own oaths, or if they live remote from the place of meeting, they may prove by affidavit, sworn, if in England, before a judge or commissioner of the bankruptcy court; 1 & 2 Will.

4, c. 56, s. 34.] master in ordinary or extraordinary in Chancery, or, if abroad, before a magistrate, and attested by a notary public, British Minister, or consul: provided, that the commissioners may examine upon oath, either by word of mouth or by interrogatories, persons claiming to prove, and require such further proof and examination of other persons as they may think fit.

By sect. 47, *bona fide creditors may prove, notwithstanding a secret act of bankruptcy.*

The 1 & 2 Will. 4, c. 56, s. 30, authorizes the commissioners of the bankruptcy court to adjourn the proof of a debt to be heard before a subdivision court, and to direct issues to try disputed debts if desirable.

All debts which may be proved are discharged by the certificate but such debts which are not provable are not discharged. *Bamford v. Burrell*, 2 B. & P. 1.

The proof of a debt, which must at all events be due, is not to be rejected because there is a question to be tried between the bankrupt's estate and the creditor, although it is proper that no dividend should be paid on that proof until the question be determined. *Es parte Ackroyd*, 1 Glyn & J. 391.

Proof cannot be mounted on proof. *Es parte Smith, Buck*, 492.

## 2. Nature of Debt.

### (a) Must be liquidated.

Though unliquidated damages cannot be proved, yet if the demand be partly of that nature, and partly liquidated, the creditor, having a security, may apply it first to the former, then to the latter, and may prove for the residue. *Pulzeley v. Warren*, 6 Ves. jun. 94.

Where a creditor has a debt which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved under the commission. *Uterson v. Vernon*, 3 T. R. 539.

Proof was allowed on promissory notes given for liquidated damages by compromise of an action for seduction per quod servitium amisit. *Es parte Mumford*, 15 Ves. jun. 389.

Bankruptcy is no bar to an action of trover, though the conversion happened before the bankruptcy; and where a plaintiff has an election to bring trover or assumpsit, he may bring the former, though the bankruptcy would be a bar to the latter. *Parker v. Norton*, 6 T. R. 695.

In a case of fraud by a bankrupt, a party is not bound to prove his debt under the commission, but he may waive the contract, and sue for the tort. *Parker v. Crole*, 2 M. & P. 150; 5 Bing. 63.

Bankruptcy and certificate are no bar to an action in tort against a broker for selling out plaintiff's stock contrary to orders. *Id.*

If the owner of bank stock give to a stock-broker a power of attorney to sell, with orders not to sell without directions, and the broker sells the stock without the knowledge of the owner, and

conceals the sale till a commission issue against him, his certificate is not a bar to an action in tort. *Id.*

If a person undertake with A., to settle with certain bankers, a balance due to them on an acceptance of A.'s, but he neglect to take up the bill, and he give to A. a new undertaking to deliver up to him his acceptance within a month, or give him a bond of indemnity, but does not perform either, and the bankers sue A., and pending a rule for a new trial, the person becomes a bankrupt, the certificate is not a bar to an action by A. *Yallop v. Ebers*, 1 B. & Adol. 700.

A bankrupt is liable to the judgment on a bail-bond. *Cockerill v. Owston*, 1 Burr. 436.

### (b) Must have accrued before Act of Bankruptcy.

A debt accrued subsequent to an act of bankruptcy, and previous to the issuing of the commission, is not provable. *Bamford v. Burrell*, 2 B. & P. 1.

The stat. 46 Geo. 3, c. 135, s. 2, does not restrain a creditor from proving a debt contracted before the act of bankruptcy, on which the commission issued, but after notice of a prior act of bankruptcy. *Es parte Booness*, 2 M. & S. 479; 2 Rose, 266.

School money for the education of defendant's son, payable half yearly, is not a debt due until the end of the half year, so as to be provable under a commission against the parent who becomes bankrupt a few days before the end of the half year, though he had, just before his bankruptcy, taken his son home for the holidays, the contract not being thereby put an end to; and consequently the bankrupt's certificate under the statute is no bar to an action for the half year's education, &c. *Parsons v. Dearlove*, 4 East, 438; 1 Smith, 281; 3 Esp. 78.

Where, by agreement between the plaintiffs, bankers at Carlisle, and the defendants, bankers at Newcastle, plaintiffs were weekly to send to the defendants all their own notes, and the notes of certain other banking houses; and the defendants were in exchange to return to the plaintiffs their own notes, and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs, at a certain date:—Held, that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement, but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was provable by the plaintiffs under a commission issued against the defendants on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due; and that the plaintiffs could not maintain an action, to recover damages as for a breach of contract against the defendants, who had obtained their certificates. *Forster v. Surtees*, 12 East, 605.

If a trader agree to purchase goods, to be de-

livered on a future day, which has not arrived when the commission issues: the difference between the value of the goods and the purchase money is not provable. *Boorman v. Nash*, 9 B. & C. 145.

Where a person, who had contracted for a certain quantity of oil to be delivered to him at a future day at a certain price, became bankrupt before that day arrived, and obtained his certificate:—Held, that he was nevertheless liable to an action for not accepting and paying for the oil, and that the proper measure of damages was the difference between the price which he had contracted to pay for the oil, and the market price at the time when the contract was broken. *Id.*

Upon a bankruptcy, proof of a debt under bonds securing an annuity was rejected, on the ground that a bill accepted for the arrear not being dishonoured till after the bankruptcy, the bonds were not forfeited at the bankruptcy. *Ex parte James*, 5 Ves. jun. 709.

A father, being tenant for life of an estate, with remainder to his son in tail, the father and son join in mortgaging the estate for the debt of the father. The father becomes bankrupt, and the mortgaged estate is sold under the commission. The son cannot prove any debt under the commission in respect of his interest in the estate, not being damaged until after the bankruptcy. *Kittier v. Raynes*, 1 Cox, 105.

A broker acting under a commission del credere paid money to the principal on a loss which happened before the bankruptcy of the underwriter, but the payment was not made until after the bankruptcy. Quære, whether this debt can be proved by the broker under the commission against the underwriter? *Ex parte Dubois*, 1 Cox, 310.

If a surety become bankrupt the creditor cannot, under the 49 Geo. 3, c. 121, s. 8, prove the debt if it became due before the bankruptcy. *Ex parte McMillan*, Buck, 287.

A bankrupt sued by his surety, or person who was liable for his debt, at the time of the commission issued against him (though the surety became such after the act of bankruptcy, and paid the debt after the issuing of the commission), cannot, without specially pleading it in like manner as after the stat. 5 Geo. 2, c. 30, s. 7, avail himself of his certificate under the stat. 49 Geo. 3, c. 121, s. 8, which discharges the bankrupt, having his certificate, from all such demands at the suit of every such person, in like manner to all intents and purposes as if such person had been a creditor before the bankruptcy. *Stedman v. Martinant*, 12 East, 664; 1 Rose, 106. *And see S. C.* 13 East, 427.

#### (c) When discharged.

After a commission has issued, the statute of limitations does not affect debts not previously barred. *Ex parte Ross*, 2 Glyn & J. 46, 330.

If a debt which is barred under a commission, be revived prior to a second, it is provable un-

der the latter. *Roberts v. Morgan*, 2 Esp. 736—Byre.

A debt due on a bill from which the drawer has been discharged by want of notice is not provable under a commission issued against him. *Ex parte Rohde*, 1 Mont. & Mac. 431: *S. C.* nom. *Rohdor v. Proctor*, 6 D. & R. 510; 4 B. & C. 517.

Proof under the bankruptcy of one joint debtor, after receiving a composition from the other, was expunged, the release to one being a release to both. *Ex parte Slater*, 6 Ves. jun. 146.

#### (d) Illegal.

Where a lender, having taken out execution on a warrant of attorney, gave up the proceeds received from the sheriff, under an agreement with the assignees of the borrower (who gave him a release), that he should come in with the other creditors for the balance due to him: such agreement held to mean a provable balance, and would not let in the debt if affected with usury. *Ex parte Banglay*, 1 Rose, 168.

A. being agent of, and also partner in the Leith Banking Company, opened an office at Carlisle, and circulated there promissory notes, drawn by the Company's cashier in Scotland, and made payable to the bearer on demand at the company's office in Leith:—Held, this was in violation of the statutes passed for the protection of the Bank of England, and that a debt formed of notes so issued could not be proved under a commission of bankruptcy. *Ex parte Randleson*, 1 Mont. & Mac. 86.

A seller abroad of contraband goods is entitled to prove, unless he be a participant in smuggling them. *Ex parte Cavalierie*, 2 Glyn & J. 227.

A debt arising out of a contract to convey British goods to a market in an enemy's country, cannot be proved under a commission of bankruptcy after peace has been established between that country and Great Britain. *Ex parte Schmalding*, Buck, 93.

A proof may be made of a debt to a broker of the city of London, arising out of a transaction in which he acted as a merchant, although in contravention of his duty in his office and the bond given by him. *Ex parte Dyster*, 2 Rose, 349.

A bill was indorsed to a broker in consideration of the money paid by him in effecting insurances, one of which was illegal; the acceptor becoming bankrupt, the petition of the indorsee to prove was dismissed, as to what arose upon the illegal insurance, and the bankruptcy being some years ago, an inquiry was directed as to the rest. *Ex parte Mather*, 3 Ves. jun. 373.

If one of three partners obtain by forgery a sum from the sale of stock, which he, in fraud of his partners, pays into the banking-house, and withdraws it, it is provable against the joint estate by the stock proprietor, although he has not prosecuted or given evidence against the convicted felon. *Ex parte Bolland*, 1 Mont. & Mac. 315.



An order for an inquiry before commissioners, or an issue, to try whether a debt proved was usurious, merely on a deposition of the bankrupt as to the usury, was refused. *Ex parte Burt*, 1 Madd. 46.

### (c) Proof against Bankrupt Assignees.

If an assignee who has received effects become bankrupt, a creditor under the commission in which he was assignee, but who proved his debt after the bankruptcy of the assignee, is not entitled to any proof under the assignee's commission. *Ex parte Stonehouse*, Buck, 531.

Two of three assignees become bankrupt, the solvent assignee pays a debt due from the three to the estate:—Held, that he is entitled to prove a third of the debt against each of the other assignee's estates. *Ex parte Hunter*, Buck, 552.

If either of the estates should prove deficient, quare, whether he can prove a moiety of the deficiency against the estate of the other assignee? *Id.*

Two assignees, one solvent, the other a bankrupt with a partnership to which he had advanced money which he had as assignee, the solvent assignee cannot prove this under the joint commission, there being no contract with him. *Ex parte Apey*, 3 Bro. C. C. 265.

An assignee, having purchased goods at a sale under the commission, becomes bankrupt:—ordered, that such of the goods as remained in specie should be redelivered, and that what he had resold should be proved as a debt. *Ex parte Speng*, 1 Rose, 133.

At a dividend meeting under a commission against A., a claim was entered on behalf of B., and a sum ordered to be appropriated in the hands of C., the sole assignee, to answer eventually the amount of the several sums proved and claimed; but before the claim of B. was perfected into a proof, C. misapplied the money so placed in his hands, and became bankrupt:—Held, that B. was not entitled to recover from the estate of A. his proportion of the sum appropriated in the hands of C., and misapplied by him. *Ex parte Grant*, 1 Mont. & Mac. 77.

### 3. Annuities.

#### (a) Proof for.

*Statute.*—By 6 Geo. 4, c. 16, s. 54, annuity creditors, by whatever assurance the same be secured, and whether there be arrears or not, may prove for the value of the annuity.

*What Annuities are provable.*—The giving up of a business on consideration of an annuity is not such a consideration as can be valued under the statute, it being confined to money considerations. *Ex parte Saxe*, 2 Desc. & Chit. 172; *S. C. contra*, 1 Mont. & Bligh, 134.

The bankruptcy and certificate of one of several joint grantors of an annuity and covenants for payment, discharges the bankrupt, but not his co-defendants. *Baxter v. Nicholls*, 4 Taunt. 90; 2 Rose, 111.

Where an annuity has been granted for a sum paid as a consideration for it, that is money had and received from the time of the grant; if the annuity is at any subsequent time set aside, and the grantor become bankrupt after the grant, but subsequent to its being set aside, it is barred by his certificate. *Walker v. Liscarray*, 6 Esp. 98—Ellenborough.

If the penalty in a bond for securing an annuity have once become forfeited, before a bankruptcy, the value of the annuity may be proved. *Wyllie v. Wilkes*, 2 Dougl. 519; *S. P. Ex parte Rowlatt*, 2 Rose, 416.

If the bond be not forfeited till after, it cannot be proved, and the obligor may be taken in execution on a judgment thereon. *Perkins v. Kempsland*, 2 W. Black. 1106.

Where there is a bond and covenant to secure an annuity, though the bond be barred by the certificate, the penalty being forfeited by a breach, the annuitant may proceed upon the covenant for subsequent breaches, which could not be proved. *Ex parte Fell*, 10 Ves. jun. 351.

Where bonds were void under the annuity act, a petition to be admitted a creditor for the sums advanced was dismissed, on the ground that the petitioner having insisted on his securities at the date of the commission, it was not the same debt. *Ex parte James*, 5 Ves. jun. 709.

A. purchases an annuity of B., secured upon lands in fee simple, falsely represented to be of equal value with the annuity, and under that representation not inrolled. Upon a petition to prove for the value of the annuity, the Chancellor gave liberty to prove, without prejudice to a bill reserving dividends. *Ex parte Wright*, 1 Rose, 308.

Where B. purchased an annuity from C., through the agency of the bankrupts, and the consideration money was received by the bankrupts as agents for C., and placed by them to C.'s account, and they afterwards became bankrupts:—Held, that B. could not prove the consideration paid for the annuities under their commission, unless it were established that the grant of the annuities was merely a colourable contrivance for the purpose of obtaining B.'s money in payment of the debt due from C. to the bankrupts. *Ex parte Shaw*, 2 Glyn & J. 106.

An annuity granted by A. to B. was secured by a covenant by C., a surety, to pay the annuity in case A. made default, and by a judgment entered up against A. and C.; the annuity remained unpaid from January, 1823, and A. having left the country, in February, 1824, C. became bankrupt, and afterwards obtained his certificate; C. having died, B. filed a bill to have the arrears of the annuity paid out of his real and personal estates:—Held, that neither the value of the annuity, nor the sum due on the former judgment was provable under C.'s commission; and, therefore, that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*, 4 Sim. 37.

*Sale of Security.*—The commissioners are not authorized to order a sale of an estate on which

an annuity is charged, for payment of the value of the annuity. *In re Deloea*, 1 Mont. 492. And see *Ex parte Slack*, 1 Glyn & J. 346.

An annuity creditor who has a policy of insurance cannot prove without a sale of the policy. *Ex parte Tierney*, 1 Mont. 78.

Where the grantor of an annuity secured by real property becomes a bankrupt, and arrears of the annuity become due after the bankruptcy, the real security will, on the petition of the grantee, be ordered to be sold, and the produce applied in satisfaction of so much of the arrears and value of the annuity, as the same would extend to satisfy, and the grantee be allowed to prove the residue under the commission. *Ex parte Key*, 1 Madd. 426.

#### (b) Mode of Valuation.

By 6 Geo. 4, c. 16, s. 54, the commissioners in ascertaining the value are to have regard to the original price given, deducting therefrom such diminution in the value as shall have been caused by lapse of time since the grant to the date of the commission.

In valuing an annuity for proof under a commission, the commissioners since the 6 Geo. 4, c. 16, s. 54, cannot enter into the consideration of the altered state of the health of the annuitant. *Ex parte Fisher*, 2 Glyn & J. 102.

Where the consideration is not money, but property, the price paid by the grantee for that property is not the criterion of value, provided such value be altered by accidental circumstances, whether general or local, or by improvement of the property. *Id.*

The state of the money market is not a circumstance which can affect the rule. *Ex parte Webb*, 2 Glyn & J. 29.

If an annuity be granted in consideration of the relinquishment of a business, the creditor is entitled to prove for the market value, without reference to the original consideration given, or the lapse of time since the grant. *Ex parte Saxe*, 1 Mont. & Bligh, 134; *S. C. contra*, 2 Deac. & Chit. 172.

The same principle was held on the 49 Geo. 3, c. 121, s. 17, which required a valuation of annuities, but contained no directions as to the mode of doing it; under that statute, the commissioners were to ascertain the value by the price paid, and the time of enjoyment, and not by the stipulated price for redemption, nor the original price simply. *Ex parte Whitehead*, 19 Ves. jun. 557; 2 Rose, 358; 1 Mer. 127.

Yet, where the purchase might have turned out to the disadvantage of the grantee, he ought to be allowed the benefit of circumstances which have caused it to operate in his favour. *Ex parte Thistlewood*, 1 Rose, 290; 19 Ves. jun. 236.

Where it was agreed between a mother and a son, that she should join in conveying her life interest in an estate to a purchaser, the son undertaking, in consideration thereof, to secure to her an annuity; but after the execution of the conveyance, and before the annuity was secured, the son

became bankrupt:—Held, that the mother was not entitled to prove for the value of her life estate, but only for the value of the annuity, and the arrears at the date of the bankruptcy. *Ex parte Brockless*, Buck, 406.

#### (c) Annuity Sureties.

By 6 Geo. 4, c. 16, s. 55, persons entitled to annuities granted by bankrupts cannot sue persons who are collateral sureties for payment, until they shall have proved against the bankrupt's estate for the value and arrears; and if the surety after proof pay the amount, he may be discharged, but if not, he may be sued for accruing payments until the annuitant shall have been satisfied the amount proved with 4 per cent. interest; and after payment, the surety is to stand in the place of the annuitant; and the certificate of the bankrupt is a discharge from the claims of both annuitant and surety, in respect of the annuity, provided that the surety shall be entitled to credit in account with the annuitant, for dividends received by the annuitant, before the surety shall have paid the amount proved.

The grantor of an annuity having become bankrupt before the passing for the 6 Geo. 4, c. 16, the grantee sued the surety for arrears subsequently accruing after that statute came into operation:—Held, that he could not maintain the action until after proof of the annuity under the commission, in pursuance of ss. 54 & 55. *Bell v. Bilton*, 1 M. & P. 574; 4 Bing. 615.

So, where judgment was entered up on a warrant of attorney against the grantor and his surety before 1st April, 1825, after which day the former became bankrupt:—Held, that no execution could issue against the surety until the value had been ascertained by the commissioners under s. 54. *Hone v. Morgan*, 4 M. & R. 559.

If a surety covenant to pay the annuity in case default is made by the grantor, and the surety become bankrupt before default, the value of the annuity is not provable. *Ex parte Thompson*, 1 Mont. & Bligh, 219; 2 Deac. & Chit. 126.

A surety, who is compelled by the annuity creditor after the bankruptcy and allowance of the certificate of the principal, to pay several sums of arrears due after the issuing of the commission, is not within stat. 49 Geo. 3, c. 121, s. 8, and therefore may have an action against the principal for such sums, and hold him to bail. *Welsh v. Welsh*, 4 M. & S. 333.

The surety, who pays arrears of the annuity after the bankruptcy of his co-surety, cannot prove under the commission the value of the annuity, by s. 17, of 49 Geo. 3, c. 121, and therefore the certificate is not a bar to the action for contribution. *Browne v. Lee*, 6 B. & C. 689; 7 D. & R. 701.

A surety, redeeming the annuity after the bankruptcy and certificate of the grantor, is entitled to the benefit of the grantee's proof, under the grantor's commission, and to proceed by action against the grantor for the arrears of the annuity subsequent to the commission. *Watkins v. Flanagan*, 3 Russ. 421; 1 Glyn & J. 199.

So, he may maintain an action against him for

the value of the redemption of the annuity. *Watkins v. Flanagan* (in error), 8 Moore, 480; 1 Bing. 413; 13 Price, 24; 3 B. & A. 186.

And the court of Chancery will not restrain him by injunction from issuing execution for the arrears: *quære*, as to the price of redemption? *Watkins v. Flanagan*, 6 Madd. 280.

#### 4. Apprentices Fees.

By 6 Geo. 4, c. 16, s. 49, where a bankrupt shall have apprentices at the time of the issuing of the commission, it shall be a discharge of their indentures; and if any sum shall have been paid as an apprentice fee, the commissioners may order such part of it as they may think reasonable to be returned.

Where the agreement of apprenticeship is concluded, and the apprentice fee is paid, and the apprentice is actually serving under the concluded agreement, and the execution of the indentures has not taken place from mere inattention, the father is entitled to a return of part of the fee under that section. *Ex parte Haynes*, 2 Glyn & J. 122.

#### 5. Attachments, and Orders for Payment of Money.

An attorney in custody when a commission issues against him, upon an attachment for non-payment of money, is discharged by his certificate. *Rez v. Edwards*, 9 B. & C. 652.

A certificate discharges a debt arising from the receipt of money by the bankrupt, in his character of an attorney. *Ex parte Cullisford*, 8 B. & C. 220.

Where an attorney, employed by both vendor and purchaser, receives the purchase money and omits to pay it over, and afterwards becomes bankrupt, and obtains his certificate, the court will not make a rule compelling him to pay the amount, unless fraud be shewn: otherwise if there be fraud. *In re Bonner*, 1 Nev. & M. 555.

An attachment will not lie against an attorney, for non-payment of money pursuant to the master's allocatur after his bankruptcy. *Baron v. Martell*, 9 D. & R. 390.

An order of the court of Chancery for payment of a sum of money may be proved under the commission, and will be barred by the certificate. *Wall v. Atkinson*, 2 Rose, 196; Coop. C. C. 199.

A certificated bankrupt ordered to be discharged out of custody, upon an attachment for disobedience of an order of Chancery for payment of money. The act of the court was an indemnity to the jailor. *Id.*

A party committed under an order in bankruptcy, for disobedience to an order for payment of money and costs, which were taxed, afterwards becoming bankrupt and obtaining his certificate, ordered to be discharged. *Ex parte Eicke*, 1 Glyn & J. 261.

An attachment of the bankrupt after commission has issued, for non-payment of money into court under an order in a suit instituted against him before the commission issued, is not such an

election to proceed against the person of the bankrupt as will satisfy the debt. *Ex parte Benjamin*, Buck, 41.

A defendant compromised an action for libel, by agreeing to apologise, and pay the plaintiff's costs. The apology was made, and a rule of court obtained, ordering the defendant to pay the costs, amounting to 67*l.* On default made, an attachment issued, and the defendant was committed. While in custody he became bankrupt, and obtained his certificate:—Held, that the sum named in the rule of court was a debt which might have been proved under the commission, and that the defendant was entitled to be discharged out of custody. *Riley v. Byrne*, 2 B. & Adol. 779.

#### 6. Bastardy Liabilities.

A defendant's liability as surety in a bastardy bond is not discharged by his bankruptcy and certificate. *St. Martin (Overseers) v. Warren*, 1 B. & A. 491; 2 Stark. 188.

Nor is a bankruptcy a discharge of a promise to allow a weekly sum for the support of an illegitimate child; but if any arrears accrued before the bankruptcy, the certificate will be a discharge as to such arrears. *Millen v. Whittenbury*, 1 Camp. 428—Ellenborough.

#### 7. Bills and Notes.

*Exchange of Paper.*—Where there was cross paper dishonoured on each side, and both parties were bankrupts, the proof, as between the two estates, was confined to the cash balance with regard to the dishonoured bills. *Ex parte Earle*, 5 Ves. jun. 833.

In such case, no proof can be made in respect of the bad paper, or the excess of damage eventually sustained on that account. *Ex parte Walker*, 4 Ves. jun. 373.

A. draws a bill on B, payable to his own order, which B. accepts, and B. draws a bill on A. payable to the order of B., which A. accepts, for their mutual accommodation; both bills are payable at the same time, have the same dates, and contain the same sums: one is a good consideration for the other, and neither is an indemnity; so that, if either party become a bankrupt, the bill accepted by him may be proved under his commission, and consequently, to an action brought on it, his bankruptcy may be pleaded. *Rolfe v. Caslon*, 2 H. Black. 570. *And see Storey v. Barnes*, 7 East, 435; 3 Smith, 441.

The defendants gave the plaintiff their own bills, accepted by third persons, in exchange for acceptances of other bills drawn by them upon him, the different sets of which tallied in the gross amount, (except as mentioned, &c.) but no stress was laid at the time on these trifling differences:—Held, that the transaction being that of an absolute exchange of securities, each party was confined to his remedy on those securities; and that the law would not raise an implied promise in the defendants, who had become bankrupts, to repay to the plaintiff the amount on the

balance of his acceptances, paid after such bankruptcy. *Buckler v. Buttivant*, 3 East, 72.

A. and B. interchangeably accept accommodation bills; B.'s bills are discounted with C., who, upon their becoming due, agrees to renew them; but A. having fallen into discredit, C. does not take his name to the bills, but draws for the amount on B. only: before these new bills became due, A. becomes bankrupt: Semble, B. might have proved, under A.'s commission, for the former accommodation bills, this being a payment, as it were, of those bills. B. having arrested A. for the amount of the bills paid to C., after A. obtained his certificate, the court discharged A. upon filing common bail. *Frances v. Dubeis*, 2 Smith, 36.

Where A. and B. were bankrupts, proof was allowed in respect of a cash balance due from A. to B., but the dividends were retained to re-imburse the estate of A. what it should overpay upon a distinct transaction on an advance of bills from A. to B., some of which were dishonoured. *Ex parte Metcalfe*, 11 Ves. jun. 404.

Six persons were in partnership as bankers, under two firms, and J. and W. J., two of them, carried on a distinct trade; and G. accepted a bill for J. and W. J., and, in exchange, they delivered to him, at the same time, a bill to the same amount, drawn and accepted by the six, but not indorsed by J. and W. J.:—Held, that it was a purchase by G., and that, having paid his acceptance, and the bill he received being dishonoured, he was entitled to prove the amount against J. and W. J. *Ex parte Hustler*, Buck, 171; 1 Glyn & J. 9; 3 Madd. 117.

**Pledge of Bills and Notes.**—The pledgee of a bill or note, (though for part only), may prove the whole amount. *Ex parte Crossley*, 3 Bro. C. C. 237.

Where A., at request of B., and upon the security of a bill from him for the amount, delivered goods to C., and such goods were afterwards partly paid for by C., and then B. became bankrupt:—Held, that A. could only prove, as against the estate of B., the sum remaining due for the goods, and not the full amount of the bill. *Ex parte Reader*, Buck, 381.

**Transferred without Indorsement.**—A person giving cash for a bill or note without the indorsement of the person from whom he takes it, cannot prove it under his bankruptcy. *Ex parte Shuttleworth*, 3 Ves. jun. 368; *S. P. Ex parte Harrison*, 2 Bro. C. C. 615.

Unindorsed bills, given by the bankrupt, must be sold, and the holder may prove for the residue. *Ex parte Smith*, 2 Cox, 209.

**Payment after Bankruptcy.**—Where A. lent his acceptances to the defendant before his bankruptcy, but which were not paid till afterwards, A. may maintain an action against the defendant, for money paid to his use, notwithstanding his bankruptcy and certificate, and notwithstanding the defendant, before his bankruptcy, gave his receipt to A., acknowledging the receipt of so much

money as the acceptances amounted to. *Sesail v. Gale*, 7 T. R. 364.

Defendant draws a bill upon the plaintiffs, payable to defendant's own order; plaintiffs, at his request and on his promise to indemnify them, accept the bill, which becoming due after defendant becomes bankrupt, they pay it to prevent being sued: plaintiffs cannot prove this as a debt under the commission: so the defendant cannot plead his certificate in bar of this action, on the promise to indemnify, &c. *Young v. Hockley*, 3 Wils. 346; 2 W. Black. 839.

Where the plaintiff lent his indorsement upon a bill at the desire of the drawer; but without any privity with the defendant (the acceptor), who had himself no consideration at the time for such acceptance; and the day before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of the indorsee:—Held, that the bill was provable as a debt under the defendant's commission. *Houle v. Baxter*, 3 East, 177. *And see Forster v. Surtess*, 12 East, 605.

A. draws a bill on B., in favour of C., who indorses it to D., who discounts it: before the bill is due, A. becomes a bankrupt and obtains his certificate; when the bill is due, payment is refused; upon which C. refunds the money to D., which was advanced in discount, and takes back the bill. To an action brought by B. against A. on the bill, A. cannot plead his bankruptcy. *Brooks v. Rogers*, 1 H. Black. 640.

The defendant drew a bill on the plaintiff, but promised to pay it himself when due, and afterwards became a bankrupt; upon the plaintiff being afterwards sued, and obliged to pay the bill:—Held, that he could not prove any debt under the commission. *Vanderheyden v. De Pei-ber*, 3 Wils. 528; *S. P. Chilton v. Whiffen*, 3 Wils. 13.

A., the payer of a bill, indorses it in blank, and delivers it to B.; B. writes above the blank indorsement, "Pay C. or order." B. takes up the bill after a commission of bankruptcy had issued against the acceptor. Petition that he may be at liberty to prove it under the commission dismissed with an offer of a case. *Ex parte Iscater*, 1 Rose, 20.

If the payee of a note pay the amount of it to an indorsee after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate. *Howie v. Wiggins*, 4 T. R. 714.

But if A. give a note to a trader, and also an ordnance debenture as a collateral security; and the trader pledge the debenture, and the note, being indorsed by him, is paid by A. when due, and afterwards the trader becomes a bankrupt, then A. redeems the debenture, and brings an action against the bankrupt for what he pays for such redemption, the bankrupt's certificate may be pleaded in bar to the action. *Johnson v. Spiller*, 1 Doug. 167, n.

If A., at the instance of a trader, accept a bill payable to his order, not having any effects of the trader in his hands, and the trader becomes a

bankrupt before the bill becomes due; and A. pays it when due to an indorsee, it is not a debt against the trader till actually paid, and therefore is not discharged by his certificate. *Heskuyson v. Woodbridge*, 1 Dougl. 166, n.

If the acceptor of a bill, not due, become bankrupt, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission; and if the acceptor afterwards obtain his certificate, he will be discharged from the debt, and the court will enter an exoneration on the bill piece, in an action against him at the suit of the indorser. *Joseph v. Orme*, 2 N. R. 180. And see *Stedman v. Martinant*, 13 East, 437; and *Cowley v. Dunlop*, 7 T. R. 565.

The drawer of a bill, which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate, inasmuch as such debt is made provable under his commission, by the statute 7 Geo. 1, c. 31. *Starey v. Barnes*, 7 East, 435; 3 Smith, 441.

**Acquired after Bankruptcy.**—A bill or note having been indorsed after the bankruptcy of the acceptor, the indorsee can only prove such debt, as the indorser could have proved at the time of the bankruptcy. *Ex parte Deey*, 2 Cox, 423.

Notes bought up after the bankruptcy of the maker cannot be proved unless it be shewn that the persons from whom they were purchased were individually entitled to a proof, in respect of the notes. *Ex parte Rogers*, Buck, 490.

**Other Cases.**—The holder of notes payable in cash or Bank of England notes, who did not receive them immediately from the maker, was held not entitled to prove the amount as for money had and received against the estate of the maker. *Ex parte Davison*, Buck, 31; S. P. *Ex parte Imeson*, 2 Rose, 225.

Where a note, payable with interest twelve months after notice, was expressed to be "for value received," and the maker became bankrupt before any notice was given:—Held, that the payee might prove it under the commission. *Clayton v. Gosling*, 5 B. & C. 360; 8 D. & R. 110.

Where part of the account between two mercantile houses, which became bankrupt, consists of bills that may be proved against both estates, there can be no proof in respect of bills as between the two houses, unless there is a surplus after satisfying the holders of the bills. *Ex parte Rowson*, Jacob, 374.

Proof was allowed under a commission, in respect of a bill alleged to be lost, but the most extensive indemnity was ordered to be given, and to be settled by the commissioners. *Ex parte Greenmosy*, 6 Ves. jun. 812.

The costs arising from the protest of bills shall be proved under a commission, only when incurred antecedent to the act of bankruptcy, not to the issuing of the commission. *Ex parte Moore*, 2 Bro. C. C. 597.

## 8. Bonds.

**Voluntary Bonds.**—Voluntary bonds, though given under a strong moral obligation, as a marriage contracted, and property received as husband, or by a man having a wife living at the time, are not provable, being void as against creditors. *Gilham v. Locke*, 9 Ves. jun. 613.

A voluntary bond, though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design, as by an insolvent to substitute a valid for an invalid security against creditors; and therefore such substituted bond may be proved. *Ex parte Berry*, 19 Ves. jun. 218.

**Bonds of Indemnity.**—A bond of indemnity to a surety for payment of instalments, the first of which was not due till after the bankruptcy of the principal, cannot be proved, though payable before the bankruptcy. *Ex parte Walker*, 4 Ves. jun. 385.

Where there is a bond of indemnity, and the petitioners have paid part before bankruptcy, and part after, they may prove the whole. *Ex parte Cockshot*, 3 Bro. C. C. 502.

Where the bankrupt had given an indemnity bond, and the amount of damage was not ascertained, the court of Review directed a claim to be entered. *Ex parte Marshall*, 1 Mont. & Bligh, 242.

**Other Bonds.**—A bond payable by instalments, given in consideration that the obligee would marry and settle a small estate upon a servant woman, and also maintain a bastard of the obligor, is within the 7 Geo. 1, c. 31, and may be proved under a commission of bankrupt against the obligor. *Ex parte Cotterell*, Cowp. 742. And see *Brooks v. Lloyd*, 1 T. R. 17.

A bond for the payment of an annuity for a term of years, is within the statute 7 Geo. 1, c. 31, s. 1. *Patterson v. Banks*, Cowp. 543.

A bond, conditioned for the payment of a sum to the executors of the obligee, and interest in the mean time to him, on certain days or within twenty days after demand, is not provable under a commission against the obligor, though no interest has been paid, and there has been no demand, for, until neglect to pay after demand only, the bond was forfeited. *Winter v. Mousely*, 2 B. & A. 802. And see *Parker v. Ramsbotham*, 5 D. & R. 138; 3 B. & C. 257.

If a bond by a principal and surety has not been forfeited before the bankruptcy of the surety, the debt is not barred by the certificate. *Alsop v. Price*, 1 Dougl. 160.

Where a bond was given under the statute 4 Geo. 3, c. 33, s. 1, by a trading member of parliament, and judgment was obtained in the suit in which the bond was given after the bankruptcy, but before the certificate:—Held, that the bankruptcy and certificate were no discharge to the bond. *Campbell v. Jameson*, (in error), 8 Moore, 281; 1 Bing. 320; 5 B. & A. 250; S. P. *Hunter v. Campbell*, 1 Chit. 731; 3 B. & A. 273.

Where a commission issued against one of the bail of the sheriff, after the quarto die post, but within the four days, it was held, that the penalty of the bond was provable under the commission, and therefore barred by the certificate. *Coulson v. Hammond*, 4 D. & R. 160; 2 B. & C. 636.

Where the defendant was arrested on the 27th March, on a writ returnable on the 16th April, and gave a bail-bond to the sheriff, and became bankrupt on the third of that month, and obtained his certificate on the 26th June following:—Held, that as the bankruptcy took place before the bail-bond was forfeited, the debt was barred by the certificate, and provable under the commission. *Littlewood v. Crouther*, 3 D. & R. 533.

A., B., & C. being bankers in co-partnership, were appointed treasurers of a corporate body, and executed a joint and several bond in a penalty of 20,000*l.*, conditioned for the performance by them of various duties as treasurers, and especially that they would, "when thereunto required by the said company," &c., pay all balances in their hands, &c. A commission issued against A., B., & C., who had at the time a large balance in their hands as treasurers, but no demand under the bond having been made by the company before the bankruptcy:—Held, that there was not a sufficient breach of the condition to constitute a debt provable against the separate estates of the bankrupts. *Ex parte Lancaster Canal Company*, 1 Mont. 27.

#### 9. Contingent Debts, and Debts payable at a future Time.

##### (a) Statute.

By 6 Geo. 4, c. 16, s. 56, debts payable on a contingency which has not happened before the issuing of the commission may be proved, the amount of the value being ascertained by the commissioners; or if the value had not been ascertained before the happening of the contingency, the creditor may after the contingency has happened prove in respect of the debt, and receive dividends with the other creditors, not disturbing former dividends, provided he had no notice of an act of bankruptcy when the debt was contracted.

By s. 51, where credit has been given to the bankrupt upon valuable consideration, for money, or other matter or thing whatsoever, which shall not have become payable at the time of the act of bankruptcy, whether upon any bill, bond, note, or other negotiable security or not, the creditor may prove such debt, bill, bond, note, or other security, as if the same were payable, and receive dividends, deducting a rebate of interest at 5 per cent.

By s. 53, obligees in bottomry or respondentia bonds, and assured in policies of insurance, may claim, and after the loss or contingency has happened may prove and receive dividends; and persons effecting policies with underwriters may prove for losses, though not beneficially interested, if the persons are not within the realm.

##### (b) Contingent Debts.

There must be an actual debt to constitute a

contingent debt. *Ex parte Lancaster Canal Company*, 1 Mont. 44.

Contingent debts, when the contingency is remote, are not provable. *Ex parte Davis*, 1 Mont. 121.

A demand for goods bargained and sold, to be delivered at a future day, which is after the commission, is not provable as a contingent debt. *Boorman v. Nash*, 9 B. & C. 145. And see *Ex parte Barker*, 9 Ves. jun. 110.

A debt on a guarantee, which did not become absolute before the bankruptcy, is provable as a contingent debt. *Ex parte Myers*, 1 Mont. & Bligh, 229; 2 Deac. & Chit. 251.

Under a guarantee, the debt is contingent only; therefore a debt accrued by default, after the bankruptcy of the surety, cannot be proved under the commission. *Ex parte Gardom*, 15 Ves. jun. 286.

Held otherwise, where a man had guaranteed the payment of the debt of another on a day certain, which had not elapsed. *Alsop v. Price*, 1 Dougl. 160. And see *Hoffman v. Foudrinier*, 5 M. & S. 21.

Where the contingency depends upon the separation of husband and wife, and of a widow's not marrying, it is not within 6 Geo. 4, c. 16, s. 56. *Ex parte Davis*, 1 Mont. 297.

S., by his marriage settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80*l.* for himself for life, then to his wife for life, and after her death to any issue of the marriage; and that his heirs, executors, or administrators, should within twelve calendar months after his death, pay to the petitioners the sum of 4000*l.* on various trusts. S. became bankrupt:—Held, that the 4000*l.* was not capable of valuation by the commissioners, and that the trustees were entitled to prove against the separate estate of S. within the meaning of the 6 Geo. 4, c. 16, s. 56. *Ex parte Eagle*, 1 Mont. & Mac. 422.

A. advanced 2000*l.* to B., to be repaid on a day certain, and secured by the bond of C., conditioned that if B. made default in payment on the day named, C. should pay within one week. C. became bankrupt; and B. afterwards made default:—Held, that the debt was provable under the commission against C. *Ex parte Lewis*, 1 Mont. & Mac. 426.

If a demand be payable at all events, though at a future day, it may be proved under a commission against the debtor, or set off in an action brought by his assignees; but if it rest in contingency whether it will be paid or not, it cannot be so proved or set off, unless it be secured by a penalty which is forfeited at law. *Hancock v. Entwisle*, 3 T. R. 435. And see *Browne v. Lee*, 6 B. & C. 689; 9 D. & R. 700.

If A. give a warrant of attorney to B. to confess a judgment immediately, with a defeasance that judgment shall not be entered up until a subsequent day on a contingency, and A. become bankrupt before that day, though B. afterwards enter up judgment on the happening of the contingency, he cannot prove this debt under A.'s

commission. *Staines v. Planch*, 8 T. R. 386. *And see Utterson v. Vernon*, 4 T. R. 570; 3 T. R. 539; *and Winter v. Mousely*, 2 B. & A. 802.

For legal debts at the time of the bankruptcy only are provable. *Id.*

A debt payable at a future uncertain period—as within three months after the decease of two obligors in a bond, or the survivor—cannot be proved. *Ex parte Barker*, 9 Ves. jun. 110.

(c) *Debts payable at a future Day.*

Where it was agreed, upon a loan to the bankrupt, bearing interest, that six months' notice should be given before repayment was required, the debt is provable, though no notice were given before the bankruptcy. *Ex parte Downman*, 2 Glyn & J. 241; *S. P. contra Ex parte Downman*, 2 Glyn & J. 85; *Ex parte Minet*, 14 Ves. jun. 189.

Monies were advanced by the petitioner to the bankrupt, secured by a note, whereby the bankrupt promised to pay, after three months' notice, the monies advanced, with interest at 5 per cent. Two years' interest had been paid before the commission, but no notice had been given:—Held, that the petitioner was entitled to prove the principal monies, and interest up to the commission. *Ex parte Elgar*, 2 Glyn & J. 1.

The defendant, on certain considerations, undertook to pay the balance due on a bill of which the plaintiff was acceptor; and he afterwards, by a new undertaking, engaged to deliver up the acceptance to plaintiff within a month, or to indemnify him against it. Defendant became bankrupt, and did not pay or give any indemnity; and plaintiff was obliged to take up the bill, the bankrupt having then obtained his certificate. An action being brought by the plaintiff for the breach of promise:—Held, that he could not have proved in respect of it under the defendant's commission, either for a debt not payable at the time of the bankruptcy, or for a contingent debt, or in the character of surety; and, therefore, that the bankruptcy was no defence. *Yallop v. Ebers*, 1 B. & Adol. 698.

The stat. 7 Geo. 1, c. 31, s. 1, which enabled debts payable at a future day to be proved under the commission, was confined to written securities. *Parsons v. Dearlove*, 4 East, 438; 1 Smith, 281; 5 Esp. 78. *And see Hoskins v. Duprey*, 9 East, 498; 6 Esp. 58.

Therefore, school-money for the education, &c. of defendant's son, payable half-yearly, was not a debt due till the end of the half-year, so as to be provable under a commission against the parent, who became bankrupt a few days before the end of the half-year; though he had just before his bankruptcy taken his son home for the holidays. *Id.*

That statute extended to all personal securities for a valuable consideration, where the time of payment was certain though future. *Patterson v. Banks*, Cowp. 543.

(d) *Policies of Insurance.*

An insurance upon a life within the statute

19 Geo. 2, c. 32, s. 2, and therefore provable under a commission of bankrupt, though the loss happened after the bankruptcy. *Cox v. Listard*, 1 Dougl. 166, n.

Debts upon the insurance of ships are only provable against the separate estate of the partner who signs the policy, the insurance by a partnership being against the 6 Geo. 1, c. 18. *Ex parte Angerstein*, 1 Bro. C. C. 399.

The defendant covenanted with the plaintiffs for the due payment by H. of the annual premium on a policy effected on the life of R., and given by R. to the plaintiffs by way of security for a debt due from him to them. The defendant became bankrupt before, and obtained his certificate after a default by R.:—Held, that the defendant was not discharged from liability for the premium which the plaintiffs had been obliged to pay, to keep the policy on foot. *Attwood v. Partridge*, 12 Moore, 431; 4 Bing. 209.

10. *Covenants.*

A collateral independent and express covenant, by the assignee of a lease to indemnify the lessor, is not discharged by the assignee's becoming bankrupt. *Mayor v. Steward*, 4 Burr. 2439.

Where A. sold a ship to B., with a covenant that he had a good title, though in fact he had none, and B. afterwards became a bankrupt, and A. sustained damage by paying the value of the ship to the true owner:—Held, in an action on the covenant by A. against B., stating the special damage, that B.'s certificate was no bar. *Hammond v. Toulmin*, 7 T. R. 612.

A sum covenanted by the husband to be paid when demanded by the trustees on the request of the wife, is, if demanded before the bankruptcy, provable. *Ex parte Brencchley*, 2 Glyn & J. 174.

Proof allowed in bankruptcy under a covenant by the bankrupt in consideration of marriage, immediately after the marriage, or whenever afterwards requested by the trustees, to transfer 200*l.* stock alleged to be standing in his name, though not the fact; but the specific time of the request must be ascertained. *Ex parte Campbell*, 10 Ves. jun. 244.

A covenant, within seven years, or when requested, to convey lands of a given value in particular counties, under a bankruptcy, after the expiration of the seven years, and no request made, proof was not admitted upon the covenant, unless secured by a penalty. *Ex parte Mars*, 8 Ves. jun. 335.

11. *Debts compounded for.*

Where a composition was made between a debtor and his creditors, to pay them 9*s.* in the pound, by four instalments, with a proviso, that, in case the composition should not be duly paid them, the release should be null and void; and the debtor paid three instalments, and became bankrupt before the time for payment of the fourth:—Held, that the creditors were not remitted to their original debt, but entitled to a proof only for the amount of the remaining instalment. *Ex parte Peole*, 1 Rose, 435.

A., being in embarrassed circumstances, a deed of composition was executed between him and his creditors, by which they agreed to take 10s. in the pound on their respective debts, by instalments, to be secured by his promissory notes; and it was provided, that if they should not be paid then, the covenants on the part of the creditors whose debts should be so unsatisfied should be null and void. The first instalment was paid, and the second not:—Held, that the creditors were entitled to retain the first payment, and to prove under the commission for the residue of the original debt. *Ex parte Vere*, 1 Rose, 281.

Where there is an assignment in trust to pay the creditors who should execute the deed, with a covenant by the debtor, that if the creditors should not, out of that fund, be paid in full within two years, to pay the deficiency within a month afterwards. In the event of a bankruptcy before the end of two years, the creditors under the deed are entitled to prove the deficiency, after application of the trust fund, subject to a rebate. *Ex parte Richardson*, 14 Ves. jun. 184.

A testator, uncle to the bankrupt, forgave him a debt of 600*l.*, on condition that he paid his sister 60*l.* a year; if he failed in punctual payment, his executrix to call in the money: this is a debt provable under the commission. *Ex parte English*, 2 Bro. C. C. 610.

### 12. Interest.

By 6 Geo. 4, c. 16, s. 57, *the holders of bills or notes whereon interest is not reserved, and due at the issuing of the commission, may prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at the rate allowed in K. B.*

Before the statute, a debt for interest was not provable on a bill of exchange, unless such interest was expressed in the body of the bill. *In re Burgess*, 2 Moore, 745; 8 Taunt. 660.

No interest on the balance of a stated account was provable under a commission, unless by express contract. *Ex parte Furneaux*, 2 Cox, 219.

If, upon the sale of an estate, the vendor covenant that on payment of the purchase-money he will grant, sell, &c., and the vendee covenant to pay the purchase-money on or before a day certain, or whenever a good title should be tendered to him; and it is agreed that the vendee, on or before the day named for payment, may require the purchase-money to remain a charge upon the premises, so that, upon the completion of the conveyance by the vendor, the vendee should execute to him a proper mortgage, for securing the purchase-money, with interest; but if the interest should be in arrear for thirty days, the vendee should be considered as a tenant to the vendor, from the date thereof, at a yearly rent, with power to the vendor to distrain as for rent reserved by lease, to the end that the interest and costs should be fully satisfied; and the vendee requires the purchase-money to remain a charge, and he is let into possession, and receives the rents; and the vendee becomes bankrupt, and half a year's interest being in arrear for more

than thirty days, the vendor distrains on the tenants, and the assignees satisfy the distress; and the vendee obtains his certificate, and the vendor brings an action against the bankrupt, to recover interest accrued subsequent to the certificate; the certificate is a bar, as the claim for interest was provable. *Hope v. Booth*, 1 B. & Adol. 498.

### 13. Marriage Contracts.

*What a provable Debt.*—Sums secured under a marriage settlement are provable under a commission of bankruptcy, so far as they are certain. *Ex parte Mitford*, 1 Bro. C. C. 398.

A voluntary settlement by a bankrupt, though void against his creditor, subsists for all other purposes. *Ex parte Bell*, 1 Glyn & J. 282.

If a sum on bond is due to the wife of a trader, and settled in trust by a post nuptial settlement upon the wife, the settlement is, by the old bankrupt statute, void as against the assignees, under a commission against the husband. *Wombwell v. Laver*, 2 Sim. 360.

A covenant in a marriage settlement to transfer stock into the names of the trustees, to forbear giving the notice during the life of the covenantee, is a contingent debt, not provable under his bankruptcy, not being equivalent to or superseding the necessity of notice. *Ex parte Alcock*, 1 Rose, 323; 1 Ves. & B. 176.

A trader, upon his marriage, having given to trustees a bond for 3000*l.* to be settled upon himself for life, remainder to his wife and children, the trustees, upon his bankruptcy, are entitled to prove for the whole sum secured, and to retain the dividends during the life of the bankrupt, until the whole is made up. *Ex parte Turpin*, 1 Mont. 443; 1 Deac. & Chit. 120.

On the marriage of W. W., then in good circumstances, he gave a bond to trustees for 4000*l.*, conditioned to pay them 2000*l.* within one month after demand, and for payment to them, in the mean time, of interest upon the 2000*l.*, by half-yearly payments, upon such trusts as were contained in an indenture of settlement. By the settlement, it was provided that the trustees should not call in or demand payment of the 2000*l.*, or any part thereof, during the life of W. W. The interest of the 2000*l.* was several years in arrear. W. W. afterwards became bankrupt, never having consented to a demand upon him for the 2000*l.*:—Held, that the 2000*l.* was provable against the separate estate of W. W. *Ex parte Elder*, 2 Madd. 282.

A covenant in marriage articles, that, in case the wife should survive the husband, or he should leave any issue by her, his heirs, executors, and administrators should raise 500*l.*, &c.:—Held, upon a petition by the trustees to be admitted his creditors under a commission of bankruptcy against the husband, that the debt was contingent, and not provable, though a warrant of attorney to confess judgment had been granted previous to the bankruptcy, and judgment entered up. *Ex parte Jacob*, 1 Eden, 174.

Where trustees under a marriage settlement



lend the wife's money to the husband with her consent, and the husband becomes bankrupt, they cannot, on behalf of the wife, prove for interest of money, but only for the principal; she having been supported by her husband since the marriage, upon the principle applicable to wife's pin-money. *Ex parte Green*, 2 Deac. & Chit. 113.

Semble, otherwise if they prove to save themselves from the consequences of their own act, her consent not having been given. *Id.*

A settlement after marriage of stock standing in the name of the wife, the husband being insolvent, and soon after a bankrupt, was set aside upon the bill of the assignees after the death of the husband: the stock did not survive, but was decreed to the assignees, subject to a provision for the widow. *Pringle v. Hodgson*, 3 Ves. jun. 617.

Goods, the property of a widow and children, were, upon her second marriage, assigned to trustees, in trust to suffer the husband to enjoy them, on condition that he should pay to the trustees, for the use of the children, 800*l.* by yearly instalments of 100*l.* from July, 1783: he continued in possession of them till 1797, having paid only 250*l.*; the day before his bankruptcy the trustees repossessed themselves of the goods:—Held, that this was fraudulent, as against creditors, and that the assignees of the bankrupt was entitled to the goods, under the 21 Jac. 1, c. 19. *Derby v. Smith*, 8 T. R. 82. *And see Jarman v. Woolston*, 3 T. R. 618; *S. P. Haselinton v. Gill*, 3 T. R. 630, n.

Where, by a marriage settlement, the trustees covenanted to permit the husband to receive, during his life, the dividends arising from bank stock vested in their names; if the husband become bankrupt, and the trustees authorize a third person to receive the dividends, and pay them over to the bankrupt's wife, they are liable to his assignees in an action for money had and received. *Allen v. Impett*, 2 Moore, 240.

By marriage settlement, S. covenanted to cause 4000*l.* to be paid to his wife's trustees within twelve months after his own decease, in trust to pay her the interest for her life in case she survived him, and afterwards the principal to their children; but, if they had no children, to the survivor of them, S. and his wife, his or her executors or administrators:—Held, that this was a debt on a contingency, provable under a commission against S. within the meaning of the statute 6 Geo. 4, c. 16, s. 56, and that the valuation should be the present worth of 4000*l.* payable twelve months after the death of the bankrupt. *Ex parte Tindal*, 1 M. & Scott, 607; 8 Bing. 402; 1 Mont. 462; 1 Mont. & Mac. 415; 1 Deac. & Chit. 291.

Upon a contract by a trader to pay, when required, to the trustees of his marriage settlement, a sum, the interest to himself for life or till his bankruptcy, and then to his wife, and having received upon the marriage 150*l.* from the wife, and after payment has been requested by the trustee he becomes bankrupt, without having made any payment, the whole debt is provable, and the dividend applicable first to raise the 150*l.*, the interest of which to be applied to the wife; and, after 150*l.* be raised, the inter-

est on any further sum to be paid to the assignees for the life of the bankrupt, and afterwards according to the trusts of the settlement. *Ex parte Shute*, 1 Mont. & Bligh, 385.

Under a marriage settlement, the personal estate of the wife was vested in trustees, upon trust to assign 1000*l.* stock to the husband, and in case the wife should die during the life of the husband without issue, to transfer one moiety of the remainder to the husband, and the other to the nearest and next of kin to the wife in equal shares, and the husband covenanted that if the wife should die in his life-time without leaving issue to survive her thirty days, he would within three months after her decease transfer 500*l.* stock to the trustees, for the sole use and property of her nearest and next of kin. On the death of the wife without issue during her husband's life, her brother was declared entitled to a moiety of the trust fund in exclusion of the nephews and nieces; and the husband having become bankrupt before the death of the wife, his assignees are entitled to his moiety of the trust fund without deduction of the sum due by virtue of his covenant, which did not create a debt provable under his commission. *Brandon v. Brandon*, 3 Swans. 312; 2 Wils. C. C. 14.

Though a bond by a husband to pay a sum in the event of his bankruptcy or insolvency to trustees for the purpose of settlement, cannot stand against the creditors, the property of the wife may be limited to the husband until he becomes bankrupt, &c., and from that event for his wife and children; and, where in articles for such a settlement, the husband covenanted to give a bond for 5000*l.* upon the same trusts, and had received all her fortune without making any settlement, proof was admitted under his bankruptcy, not only for the amount of her property agreed to be settled, but the 5000*l.*, or so much as the value of the property of the wife would extend to beyond the sum agreed to be settled. *Ex parte James*, 8 Ves. jun. 353.

A settlement, previous to marriage, of money, the property of the wife, upon the event of the husband's bankruptcy, is valid; and part being lent to the husband upon his bond under a power for that purpose, was proved under the commission. *Ex parte Hinton*, 14 Ves. jun. 598.

If, in a marriage settlement, the bankruptcy of the husband be made the event upon which the sum agreed to be settled upon him shall become payable to the trustees, the proof of the trustees under his commission will be limited to the amount of the wife's fortune which he has received. *Ex parte Young*, Buck, 179; 3 Madd. 124.

By settlement previous to the marriage of the bankrupt, 6000*l.* stock, 3000*l.* of which was the fortune of the wife, was assigned to trustees in trust, to pay the dividends thereof to the bankrupt for life, or until he should become bankrupt, and from and after his decease, or from the time of his becoming bankrupt, if the wife should be then alive, to pay the same to her for her support, and on her receipt, notwithstanding her coverture, the same, after the death of the

bankrupt, to be in the nature of her jointure and in bar of dower; and the trustees were thereby directed to stand possessed of a bond for 2000*l.* given by the bankrupt to the trustees in trust if there should be no issue of the marriage, or being such, all should die in the life-time of the bankrupt as therein mentioned: after the death of the bankrupt, if the wife should survive, to raise the sum of 2000*l.*, and pay the interest thereof to the wife for life by way of increase to the provision thereinbefore made for her in the nature of jointure, in the events thereinbefore mentioned; and in case of issue of the marriage living at the death of the bankrupt, the bond was to be delivered up to be cancelled:—Held, the wife living and no issue, that the bond was not provable. *Ex parte Taaffe*, 1 Glyn & J. 110.

**Sufficiency of Contract.**—A debt in consideration of marriage is not provable without a memorandum in writing. *Ex parte Barter*, 1 Mont. 135.

A debt on letters in the nature of a marriage settlement is provable. *Ex parte Siger*, 1 Mont. 100.

Proof was allowed by the widow of a bankrupt under an engagement by the settlement to settle money which he falsely represented himself to possess. *Ex parte Gardener*, 11 Ves. jun. 40.

A trader, before marriage, agrees by parol to settle all his stock on his intended wife, which stock it appeared afterwards amounted then to 450*l.* 3 per cents.; but in the marriage articles it was stated to be 340*l.* stock; and the deed executed after marriage settled the same sum; this mistake (proved and accounted for by the witness who prepared the deed and the bankrupt) was admitted and agreed by the bankrupt, after his bankruptcy and absconding, to be rectified by the alteration of the sum as it stood in the articles and the deed from 340*l.* to 450*l.* stock; which was accordingly done, and the instrument re-executed, with the consent of the bankrupt and his wife, and the trustees; and the old stock having been sold out by the bankrupt before his bankruptcy, and the amount paid into the hands of the trustees before such alteration, who, before the bankruptcy purchased other stock with the money:—Held, that, however such an alteration might avoid the instrument, if done with the consent of the parties interested, yet inasmuch as one of the parties (the female covert, to whom no fraud was imputed,) was incapable, by such consent, of exonerating the trustees, the trustees who had received such money under the instrument when it existed in a valid form, held it subject to the purposes of the trust, and not for the benefit of the bankrupt's estate; and that the assignees could not recover in assumpsit from the trustees the value of the stock originally included in the marriage articles and deed, but only the surplus, which they were entitled to recover at law under the circumstances. *Shaw v. Jakeman*, 4 East, 201; 1 Smith, 14. And see *Montefiori v. Montefiori*, 1 W. Black. 363.

An agreement on marriage by the husband as speedily as may be to settle 40*l.* a year upon his

wife, to be paid upon his decease; a sum of money to be invested in stock for the purpose of raising that annual sum; the dividends for the husband for life; the capital for the issue, &c.: under the husband's bankruptcy, proof was allowed by the wife and children for 800*l.*, amounting to a covenant to pay that sum upon the marriage and upon the principle of arrears of an annuity due before the bankruptcy. *Ex parte Granger*, 10 Ves. jun. 349.

#### 14. Overseers.

A specific sum of money received by an overseer of the poor, is not such a debt as can be proved under a commission against him, before his accounts are delivered in. *Res v. Egginton*, 1 T. R. 369.

Proof under a commission of bankruptcy against an overseer of the poor, in respect of money in his hands at the time of his bankruptcy, before the period of accounting. *Ex parte Leigh*, 6 Ves. jun. 811.

An overseer who has been committed for not delivering his account, and paying over the balance due, may be discharged out of custody, if he has become bankrupt and obtained his certificate, although he became so before the expiration of the year for which he acted. *Res v. Tucker*, 2 Chit. 286; 5 M. & S. 508.

#### 15. Rent.

By 6 Geo. 4, c. 16, s. 74, no distress for rent made and levied before an act of bankruptcy upon the goods of the bankrupt, whether before or after the issuing of the commission, shall be available for more than one year's rent accrued prior to the date of the commission; but the landlord must come in as a creditor for the overplus.

By s. 75, if the assignees accept the bankrupt's leases, he shall not be liable to pay any rent accruing after the date of the commission; and if they decline, he is not liable if he deliver up the lease to the lessor within fourteen days after he shall have had notice of their having declined.

Before the statute, it was held that a certificate discharges a bankrupt from an action of debt on the reddendum in a lease, whether the rent accrued due before or after the bankruptcy. *Wadham v. Marlowe*, 2 Chit. 600; 4 Dougl. 54; 1 H. Black. 437, n.; 1 T. R. 91. And see *Gill v. Scriveners*, 7 T. R. 27.

But that the bankruptcy of the defendant could not be pleaded in bar of an action of covenant for rent. *Mills v. Asriol*, 1 H. Black. 433; 4 T. R. 94.

A petition by the lessor of a bankrupt lessee for payment of rent due after the bankruptcy, and for a compensation for hay and straw sold and carried off the premises by the assignees, was dismissed on the ground that the court had not jurisdiction except in cases under the statute 49 Geo. 3, c. 12, s. 19, or where the petition made out a case for an injunction. *Ex parte Werwick*, Buck, 326.

A landlord may distrain for rent after an act of bankruptcy; therefore, money paid to him by

a bankrupt tenant to avoid a threatened distress, is a protected payment; and the money cannot be recovered back by the assignees. *Stevenson v. Wood*, 5 Esp. 200—Ellenborough. And see *Mavor v. Croome*, 8 Moore, 171; 2 Bing. 261.

If goods are distrained for rent, and replevied by the tenant, and afterwards (the tenant becoming a bankrupt) they are sold by the assignees, the landlord succeeding in the action of replevin, and obtaining a *retorno habendo*, cannot recover the amount of the rent against the assignees in an action for money had and received. *Baddyll v. Jones*, 4 Dougl. 52.

The assignees of a bankrupt having entered into the possession of land in the middle of a quarter, which the bankrupt had agreed to take upon a building lease, upon the terms of paying the rent half yearly:—Held, that an action for use and occupation would lie against them for the whole year, though they had not occupied during all the time. *Gibson v. Courthorpe*, 1 D. & R. 205.

When a bankrupt holds under a lease, rendering rent, the assignees are not liable for rent becoming due after the bankruptcy, if they have never taken possession of the premises occupied by the bankrupt. *Bourdillon v. Dalton*, 1 Esp. 223; *Peake*, 238—Kenyon.

Assignees may assign a lease, of which the bankrupt was lessee, to an insolvent person, to exonerate themselves from future claims for rent. *Oswley v. Corrie*, 2 Madd. 330.

Covenant for rent. Plea, that, before the rent became due, the defendants, by deed, assigned all their interest in the demised premises to A. B., subject to the payment of the rent, and performance of the covenants contained in the lease; and that A. B., by the assignment, covenanted to pay the rent, and perform the covenants contained in the lease; that the defendants delivered the lease to him, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then stated, that A. B. became bankrupt, and that the arrears of rent accrued after the date of the commission; that the assignee of his estate declined the lease, and that the bankrupt, within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, devisees of the reversion:—Held, upon demurrer, that the plea was bad, inasmuch as the statute 6 Geo. 4, c. 16, s. 75, did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants. *Manning v. Flight*, 3 B. & Adol. 211.

Assignees assigning the bankrupt's lease, are not entitled to a covenant of indemnity, either for themselves or the bankrupt, against the covenants with the lessor. *Wilkins v. Fry*, 2 Rose, 371.

#### 16. Stock Contracts.

A bond upon a loan of stock to secure a re-transfer and dividends in the mean time, is provable. *Ex parte Day*, 7 Ves. jun. 301.

The sum to be proved is the amount of arrears, and the value of the stock. *Id.*

The value calculated according to the price at the date of the commission, if the condition be to replace generally. *Id.*

Or if a time be fixed, according to the price at that time. *Id.*

No proof under a bond to replace stock and pay the dividends, unless forfeited, either as to the capital or dividends, before the bankruptcy. *Ex parte King*, 8 Ves. jun. 334.

Upon an agreement to replace stock upon demand, if demand be made before the bankruptcy, the price may be proved. *Ex parte Mare*, 8 Ves. jun. 337.

But if A. lend stock to B., to be replaced as stock, without naming any particular day, and B. become a bankrupt before any request by A. to replace the stock, A. cannot come in under B.'s commission. *Utterson v. Vernon*, 4 T. R. 570.

Upon a loan upon a parol engagement to give security to replace stock by a given day, the positive contract failing by an intervening bankruptcy, proof may be made in respect of the contract implied by law from the loan. *Ex parte Coming*, 9 Ves. jun. 115.

A bankrupt, before his bankruptcy, on a loan of stock gave a bond to re-transfer the principal within three years, and pay the amount of the dividends in the mean time, and also agreed to convey a real estate as a security. No re-transfer made, nor any dividends paid:—Held, that, on his bankruptcy, the security should be sold, the dividends paid out of the produce, and that stock should be purchased; and, if not sufficient to re-purchase the whole principal stock, that proof should be made under the separate estate for the remainder; and that the assignees were not entitled to have three years to re-transfer the stock. *Ex parte Fisher*, 3 Madd. 159; *Buck*, 188.

#### 17. Proof by Sureties.

##### (a) Statute.

By 6 Geo. 4, c. 16, s. 52, *sureties, or persons liable for debts of the bankrupt, or bail for the bankrupt either to the sheriff or to the action, if they have paid the debt, or any part thereof in discharge of the whole (although after the commission issued), if the creditor shall have proved, shall be entitled to stand in the place of such creditor as to the dividends, and all other rights under the commission; or if the creditor shall not have proved, shall be entitled to prove the demand in respect of such payment as a debt, not disturbing former dividends; and may receive dividends with the other creditors, although they may have become surety, liable, or bail, after an act of bankruptcy, provided they had no notice of it.*

A surety for a bankrupt is not discharged by the creditor's signing the bankrupt's certificate, even after notice from the surety not to do so. *Browne v. Carr*, 7 Bing. 508; 5 M. & P. 497.

##### (b) Who are Sureties.

The 49 Geo. 3, c. 121, s. 8, contained a similar

enactment; under that statute it has been held, that the words "person liable" will comprehend all persons rendering themselves responsible for the debt of another; or an acceptor of a bill for the accommodation of the drawer. *Ex parte Yonge*, 2 Rose, 40; 3 Ves. & B. 31.

The drawer of a bill, though not strictly a surety for the acceptor, who is generally primarily liable, may be in the nature of a surety; but the drawer, if first liable by the real nature of the transaction, with reference to the distinction whether the acceptor had effects or not, is liable to have relief as a "person liable" within the stat. 49 Geo. 3, c. 121, s. 8. *Id.*

The drawer of a bill payable to his own order, but drawn by him for the accommodation of the first indorsee, is not "surety for or liable for the debt" of that indorsee, within 49 Geo. 3, c. 21, s. 8. *Mayer v. Meakin*, Gow, 183—Holroyd.

The acceptor of an accommodation bill is a surety within the 49 Geo. 3, c. 121, s. 8, and must prove his debt under a commission against the drawers. *Van Sandau v. Corsbie*, 2 Moore, 602; 3 B. & A. 13; 1 Chit. 16.

The certificate is a bar, not only to any action at the suit of the surety for the recovery of the money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment by the bankrupt of such debt when due: therefore, where the acceptor of an accommodation bill brought an action against the drawer after he had become bankrupt and obtained his certificate, for not providing him with funds, whereby he had incurred the costs of an action, and been obliged to sell an estate in order to raise money to pay the bills:—Held, that the certificate was a good bar to the action. *Id.*

The plaintiff having accepted a bill payable at a future day for the accommodation of the defendant, the latter afterwards, and before the bill became due, committed an act of bankruptcy, followed by a commission, which was afterwards superseded, and time was given to the bankrupt by his creditors; and the plaintiff thereupon accepted another bill for the same debt, with the addition of the interest and stamp:—Held, that this was a continuation of the same suretyship by the plaintiff for the defendant, which existed before the act of bankruptcy and the first commission: and a second effectual commission having afterwards issued upon the same act of bankruptcy, before the plaintiff's second acceptance became due, which was paid when due:—Held, that the amount was provable as a debt under such commission, by virtue of the stat. 49 Geo. 3, c. 121, s. 8. *Stedman v. Martinant*, 13 East, 427. *And see* S. C. 12 East, 664; 1 Rose, 106.

A., in consideration of 11. 10s. 7d. received of B., undertook, in writing, to make himself liable for the due payment of a note upon which H. was then indebted to B., and B. thereupon consented to furnish H. with more goods; and then A., before the note was due, became bankrupt:—Held, that A.'s undertaking was intended as a collateral engagement only, in case H. should

not pay the note when due; consequently, as it rested on a contingency whether it would ever become a debt or not, it could not be proved as such under A.'s commission. *Ex parte Adney*, Cowp. 460.

A bill, after proof under a commission against the acceptor, was paid by the drawer, who, after a dividend, having arrested the bankrupt for the balance, and being also a surety for him on another bill, he was ordered to discharge him, and restrained from lodging any detainer under the stat. 49 Geo. 3, c. 121, ss. 8 & 14. *Ex parte Lobbon*, 17 Ves. jun. 334; 1 Rose, 219.

Under the 6 Geo. 4, c. 16, s. 52, it has been held that an accommodation indorser is a person liable to pay the bill for the party accommodated; against whom, therefore, if he become bankrupt, such indorser, though not called on to pay the bill till after the bankruptcy, may prove the amount. *Bassett v. Dodgin*, 9 Bing. 653; 2 M. & Scott, 777.

Where the plaintiff, who was surety for the defendant for the payment of an annual rent, sued the defendant for money paid, and stated in the replication that he had paid it for rent due by the defendant after the bankruptcy:—Held, that he could recover, as he was not a surety within that statute. *McDougal v. Paton*, 2 Moore, 644; 8 Taunt. 580.

A surety by bond for general advances, under a limited penalty, paying that sum, is entitled to a proportion of the dividends under the proof by the creditor to a greater amount under the bankruptcy of the principal debtor. *Ex parte Rushforth*, 10 Ves. jun. 409.

A surety in a bond may compel the creditor to prove under the bankruptcy of the principal debtor; and the creditor will be a trustee of the dividends for the surety, paying the whole. *Id.*

A covenant in an indenture made between A. and B., (assigning to A. 4350*l.*, payable under articles of agreement by J. S. to B. by instalments,) that, in case the said sum, or any instalment thereof, should not be paid to A. at the times and in the manner provided for by the articles, B. would, upon demand, pay to A. the said sum, or so much thereof as should not be paid at the times, &c., was held not to be a matter provable under the commission either by s. 9 or s. 17 of 49 Geo. 3, c. 121. *Hoffham v. Foudrimer*, 5 M. & S. 21.

Where A., B., and C. entered into a bond to the king, the condition of which was, that A., as sub-distributor of stamps, should truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for the same, and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches; and A., being indebted to the king in a certain sum, became bankrupt, and afterwards obtained his certificate; and a scire facias having afterwards issued on the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same:—Held, in an action brought by the surety to recover these sums from the

bankrupt, that B. was a person "surety for, or liable for a debt" of the bankrupt, within the meaning of the 49 Geo. 3. c. 121, s. 8, and consequently that the latter was protected by his certificate, and that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, 5 B. & A. 12.

Where A. became surety for B. for a debt due to C., and, after a commission of bankruptcy issued against B., paid part of the debt to C., and obtained from him an indemnity against personal liability for the remainder, the whole of the debt having been proved under the commission by C.:—Held, that A. might maintain an action of *indebitatus assumpsit* against B. for the money so paid, as having been paid to his use, notwithstanding the statute 49 Geo. 3. c. 121, s. 8. *Soutten v. Soutten*, 1 D. & R. 521; 5 B. & A. 852.

Where A. wrote orders to B. for the delivery of goods to C., which were accordingly delivered to the latter upon the credit of the former; and the usual credit of the trade was four months, and the bills of parcels were made out in the name of C., and the period of credit was enlarged from time to time without the knowledge of A.; and, C. becoming bankrupt, B. proved the amount of the goods under the commission, which exceeded more than two-fifths of C.'s debts, and signed his certificate without any communication with A., who at the time of the bankruptcy was abroad, and did not return to this country till eight years afterwards:—Held, that A. was still liable as surety for C. to B. *Langdale v. Parry*, 2 D. & R. 337.

A surety is within the meaning of the statute 7 Geo. 1, c. 31; therefore, a plaintiff to whom he was bound must prove the debt under a commission against the surety; and a *fieri facias*, which had been issued, was set aside. *Brookes v. Lloyd*, 1 T. R. 17.

A. & Co. guaranteed to B. & Co. payment for any goods which they might supply to C. within a certain period, at a credit of two and two months. C. becomes indebted to B. & Co. for goods, and gives them three bills of exchange in payment, indorsed by A. & Co., who shortly afterwards became bankrupts: one of these bills was dishonoured before, and the other two bills after their bankruptcy. C. was likewise indebted to B. & Co., before the bankruptcy of A. & Co., for some goods, for which they had a right only to call on C. to give them a bill at two months at the time of A. & Co.'s commission:—Held, that in an action brought upon the guarantee against A. & Co., their certificate was a good defence, by virtue of the statute 49 Geo. 3, c. 121, s. 9. *Gaskell v. Lindsay*, Holt, 212—*Le Blanc*.

#### (c) Bail.

Bail above were not sureties within the statute 49 Geo. 3, c. 121. *Newington v. Reys*, 4 B. & A. 493; *S. P. Hewes v. Mott*, 2 Marsh. 192; 6 Taunt. 329; 2 Rose, 455.

Bail could not prove as a creditor under a com-

mission till he had actually paid the debt; and, if the act of bankruptcy were prior to the bail's paying the debt, he could not prove it under the commission at all. *Goddard v. Vanderheyden*, 3 Wils. 263; 2 W. Black. 794; 2 B. & P. 8, n.

But bail are within the statute 6 Geo. 4, c. 16, s. 52, whether they are bail to the sheriff or to the action.

#### (d) Surety must have satisfied Debt.

If a surety do not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, the debt cannot be proved under the commission. *Paul v. Jones*, 1 T. R. 599.

So, a surety in a bond who pays the debt after a commission of bankruptcy issued against his principal, is not barred by the certificate, though the penalty of the bond was forfeited before. *Taylor v. Mills*, Cowp. 525.

Where one of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants, both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy:—Held, that the lessee could not prove for the damages which had accrued previous to the bankruptcy, not having paid them to the lessor. *Taylor v. Young* (in error), 3 B. & A. 521; 2 Moore, 326; 8 Taunt. 315.

If A. be bound with B. as a surety for the payment of a sum certain, and take an absolute bond from B. payable the day before the original bond will become due, and B. becomes a bankrupt before the day of payment, A. may prove this debt under the commission, and B.'s certificate will be a bar to an action by A. on the counter bond, though A. does not pay the original bond till after B. has committed an act of bankruptcy. *Martin v. Court*, 2 T. R. 640. And see *Toussaint v. Martinnant*, 2 T. R. 100.

X. became bound as a surety in a bond with Y. to A. on the 10th of August, 1778, conditioned for payment in six months; on the 1st of March, 1780, he became bound with Y. to B. conditioned for payment in six months; on the 4th of March, 1780, Y. became bound to X. also in a bond conditioned for payment of the two former bonds, and likewise to indemnify X. against those two bonds: the money secured by the second bond not being paid on the day when it became due, it was held that the last bond was thereby forfeited, though X. was not called on to pay the money in the second bond until afterwards, and that X. might prove it as a debt under the commission of bankrupt that issued against Y. after the forfeiture, and before payment. *Hodgson v. Bell*, 7 T. R. 97.

A surety in a bond for the bankrupts, after the bankrupts are certificated, joins with them and a new surety in a new bond to the representatives of the creditor, and the old bond is delivered up

to the surety:—Held, that it was not a payment by the surety within the 49 Geo. 3, c. 121, so as to enable the surety to prove under the commission. *Ex parte Sergeant*, 2 Glyn & J. 23; 1 Glyn & J. 183.

A surety paying a debt after the act of bankruptcy, but before the commission taken out against the principal, cannot prove this debt under the commission; nor can he stand in the place of the creditor, if the debt be paid by the surety before any proof made by the creditor under the commission. *Ex parte Badger*, 1 Cox, 28.

A surety paying the debt after proof by the creditor under the commission, is entitled to stand in the place of the creditor for the debt paid, not only in respect of dividends, but of the certificate. *Ex parte Gee*, 1 Glyn & J. 330.

The surety is not entitled to the benefit of proof against other estates upon a distinct security. *Paley v. Field*, 12 Ves. jun. 405.

#### 18. Proof against Trustees.

H. W. assigned to R. S. 600*l.* in trust to invest, to pay the interest or dividends thereof to H. W. for life, and after her death in trust that R. S. should pay all interest or dividends, except of the principal sum of 100*l.*, part of the 600*l.*, which it was declared R. S. might deduct and retain for his care and pains during one year next after the death of H. W., for the benefit of the children which H. W. might leave; and if H. W. should die without issue, then in trust as to the remaining stock, and the dividends or interest due thereon unto A. W. and M. W., the sisters of H. W., or their children, in case of the death of either of them, in equal proportions; and H. W. thereby agreed that R. S. should retain, out of the trust monies, all costs and charges in respect of his trust, and the clear yearly sum of 20*l.* for his care and trouble, and also the said sum of 100*l.* for one year's allowance for such care and trouble which he should have from the death of H. W., and then the said annual sum of 20*l.* from the end of such year until the trusts should be completed. R. S. applied the 600*l.* to his own use, paying the interest to H. W. during his life. H. W. died in July, 1819, and, in January, 1822, R. S. became bankrupt. Upon a petition by the parties entitled upon the death of H. W.:—Held, that the proof should be only for the 500*l.* *Ex parte Kettlewell*, 1 Glyn & J. 321.

Bequest of stock to A. and B., in trust to pay the dividends to testator's brother for life, and after his death to testator's sister, and upon the death of the survivor, to A. absolutely. A., the surviving trustee, sold out the stock, applied the proceeds to his own use, and became bankrupt. Upon a petition by testator's sister and her husband, to prove the value of the stock sold, it was ordered that the commissioners should compute the value of the stock so bequeathed at the date of the commission, and that the husband should be at liberty to prove the amount of such value, the dividends to be paid into the Bank, subject to the further order of the court. *Ex parte Fairchild*, 1 Glyn & J. 221.

Where two are trustees of money in the funds, and sell it for the benefit of one of them who becomes bankrupt, the persons interested may prove against his estate. *Ex parte Shakeshafte*, 3 Bro. C. C. 197.

Proof was allowed in respect of trust property of infants continued by the administratrix in the trade in which the testator was engaged, carried on by the bankrupt's constituting a new firm of which the administratrix was a member; and the infants might prove either against the separate estate of the administratrix, or the joint estate, as might be most advantageous for them. *Ex parte Watson*, 2 Rose, 259; 2 Ves. & B. 414.

Bequest to J. B. and J. T., in trust for the wife of J. B. for life, and after her death for the children of the wife of J. B. in such shares as J. B. and his wife, or the survivor, should appoint, and in default of appointment for all the children, equally to be divided at twenty-one. There were five children. J. B. sold out and advanced part of the trust funds to J. B. the younger, and G. F. B., two of the children, who became bankrupts:—Held, that M. B. the younger, one of the five children who had each a vested interest in one fifth part of the trust funds after the death of their mother, subject to the power of appointment, was entitled to prove one fifth part of the trust funds so misapplied against the estate of J. B., the dividends to be paid into the bank, subject to the further order of the court. *Ex parte Beilby*, 1 Glyn & J. 167.

Where some of the members of a firm are trustees of funds which they misapply by making use of them for partnership purposes, if such misapplication be with the knowledge of the other members of the firm, the cestui que trusts may prove against the joint estate. *Ex parte Henton*, Buck, 386.

#### 19. Wages.

By 6 Geo. 4, c. 16, s. 48, where a bankrupt is indebted to any servant or clerk for wages or salary, the commissioners may order so much of what is due, not exceeding six months' wages or salary, to be paid out of the estate; and the servant or clerk may prove for the residue.

The provision as to servants is not confined to trade clerks. *Ex parte Gough*, 1 Mont. & Bligh, 417.

The proviso as to servants extends only to yearly servants. *Ex parte Skinner*, 1 Mont. & Bligh, 417.

If a clerk and foreman is engaged at a weekly salary, and to have two suits of clothes per annum, it is a yearly hiring within the section. *Ex parte Humphreys*, 1 Mont. & Bligh, 413.

The words "six months" in that section, mean "six lunar months." *Id.*

Weekly labourers, and workmen employed as excavators and bricklayers, are not servants. *Ex parte Crawfoot*, 1 Mont. 270.

The workmen of a coachmaker, who worked by the piece, and received a specific sum for each job, under separate and distinct contracts, and where there was no hiring for a specific time, are

not servants within the act. *Ex parte Creller*, 1 Mont. 264; *S. C. contra*, 1 Mont. & Mac. 95.

A person engaged as traveller at an annual salary, is a servant or clerk within the act. *Ex parte Neale*, 1 Mont. & Mac. 194.

## 20. Creditors holding Securities.

### (a) Statute.

By 6 Geo. 4, c. 16, s. 108, no creditor having security for his debt, or having made any attachment in London or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served, and levied by seizure upon, or any mortgage of, or lien upon, any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors.

A security for a separate demand does not extend to a joint demand. *Ex parte Freen and Morrice*, 2 Glyn & J. 246.

### (b) Mortgage Debts.

**Legal Mortgages.**—A creditor who proves his whole debt, and exhibits a mortgage for part, and receives a dividend, forfeits the mortgage. *Ex parte Eggington*, 1 Mont. 72.

A mortgagee having given up his mortgage, and proved under a commission against the mortgagor, is not allowed to retract. *Ex parte Downes*, 18 Ves. jun. 290; 1 Rose, 96.

The directors of a company assigned their salaries and shares to the company to secure debts due from them on their private accounts, and empowered the company to direct the treasurer to retain their salaries and dividends, and to sell their shares for payment of their debts. One of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name:—Held, that they passed to his assignees as being in his order and disposition, but that the company had a right to set off against the bankrupt's debts the dividends and salary due to him at his bankruptcy. *Nelson v. London Assurance Company*, 2 Sim. & Stu. 292.

**Sale of Premises.**—A mortgagee with a power of sale may apply to the court to have the premises sold; and the assignees are not permitted to bid in their private character. *Ex parte Hodgson*, 1 Glyn & J. 12.

It is necessary for a mortgagee of premises sold under a commission, who wishes to bid for them at the sale, to obtain the leave of the court for that purpose. *Ex parte Hammond*, Buck, 464.

A mortgagee who was the sole assignee and principal creditor, there being only one other creditor to a small amount, was permitted to bid for

the estate, subject to the approbation of the master, the mortgagee undertaking to make good the deficiency between the sum bid and the price to be fixed by the master in case he should not approve of the bidding. *Ex parte* —, Buck, 245.

Costs of the application of a mortgagee to bid at the sale ordered to be paid out of the proceeds of such sale. *Ex parte Say*, 1 Deac. & Chit. 39; 1 Mont. 364; *S. P. Ex parte Brown*, 1 Deac. & Chit. 34.

The lord chancellor had no authority in bankruptcy to compel a second mortgagee not complaining under the commission, but resting upon his security, to join in a sale obtained by a prior mortgagee under the general order, 8 May, 1794. *Ex parte Jackson*, 5 Ves. jun. 357.

The court of review has jurisdiction to order the sale of an estate legally mortgaged, on the application of the mortgagee, giving him leave to bid. *Ex parte Bacon*, 2 Deac. & Chit. 181.

The commissioners have jurisdiction under the general order March, 1794, to take an account of the expenses attending the sale of the mortgaged premises, and to tax the costs of all parties attending the sale. *Ex parte Mathew*, 1 Glyn & J. 342.

Where the mortgagee of a bankrupt's estate called on the commissioners to direct a sale, under Lord Loughborough's order of March, 1794, and became the purchaser at such sale:—Held, in an action for money paid, brought by the solicitors to the assignees, that he was liable to reimburse them the expenses of advertisements, and the commissioners' fees for their attendance to perfect such sale, although the estate sold was insufficient to cover the sum originally advanced by such mortgagee. *Boules v. Perring*, 5 Moore, 290; 2 B. & B. 457.

Where it is merely a question of convenience, it will be left to the assignee to choose whether mortgage accounts should be taken before the commissioners or a master. *Ex parte Ansley*, Buck, 292.

If a petitioning creditor is assignee and equitable mortgagee, the petition for a sale must be served on the bankrupt and a creditor. *In re Parker*, 1 Mont. & Bligh, 394.

**Equitable Mortgages.**—An equitable mortgage may be proved in bankruptcy, though it cannot be the foundation of the commission, as the petitioning creditor's debt. *Ex parte Yonge*, 3 Ves. & B. 31; 2 Rose, 40.

Under the 6 Geo. 4, c. 16, s. 65, the equitable mortgagee of a bankrupt tenant in tail is entitled to have his lien made good, as against the fee-simple of the premises of which the bankrupt was seized as tenant in tail. *Ex parte Rose*, 1 Mont. & Mac. 65.

An equitable mortgagee is not entitled to the rents and profits of the mortgaged estate previous to the sale. *Ex parte Alexander*, 2 Glyn & J. 275. *But see contra*, *Ex parte Bignold*, 2 Glyn & J. 273.

The court will not, in general, refer it to the commissioners to ascertain the existence of an

equitable mortgage, but will themselves decide the question. *Ex parte Smith*, 1 Deac. & Chit. 441.

The court in bankruptcy will decide itself on the validity of an equitable mortgage, without a reference to the commissioners; but when the equitable mortgage is established, a reference is made to the commissioners to take an account of what is due upon it. *Ex parte Jennings*, 1 Madd. 334; 2 Swans. 360.

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that partner, and retain his security against the first. *Ex parte Rogers*, 1 Deac. & Chit. 38.

A joint creditor took an equitable mortgage from one of two partners, as a security for his debt; after which that partner died, and the other became bankrupt:—Held, that the creditor might prove the amount of his debt, without the previous sale of his security. *Ex parte Bowden*, 1 Deac. & Chit. 135.

If a trader, before his bankruptcy, deposit a lease as a security for money, but no mortgage or assignment of it then takes place, the assignees may recover it; it confers no legal title on the party to whom it is delivered. *Dee d. Maslin v. Roe*, 5 Esp. 105—Ellenborough.

Where the mortgagor in possession was by express contract tenant at will to the mortgagee:—Held, that the mortgagee was not entitled to the crops upon the mortgaged premises at the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners. *Ex parte Temple*, 1 Glyn & J. 216.

Though assignees consent to abandon property under equitable mortgage, yet the court requires an affidavit to shew that such abandonment will be for the benefit of the creditors. *Ex parte Wright*, 1 Deac. & Chit. 573.

A. borrows 4000*l.* from B., and deposits title deeds as a security for that sum. He afterwards obtains further advances, and after an act of bankruptcy signs an agreement subjecting the deposit to such further advances:—B. declared to be entitled to a lien for the whole amount. *Ex parte Langton*, 1 Rose, 26.

In April, 1826, A. having contracted to purchase an estate from B., and having had the title deeds delivered to him, agreed to deposit the same with C. as a security for the loan of 5000*l.*, and to give him the mortgage as soon as the legal estate was conveyed to him. B. afterwards conveyed the estate to A.; but before such conveyance was made, and after the title deeds had been deposited with C., the latter refused to complete the mortgage, unless A. would agree to pay usurious interest upon the sum of 5000*l.* A. having so agreed, delivered to C. the deed of conveyance of the estate from B. to A. A. afterwards became bankrupt, and in an action of trover brought to recover the deeds, it was held that the original possession of the title deeds being perfectly good, gave C. a right to the estate whenever B. should have conveyed that estate to A.; and that he, and not A.'s assignees had a

right, therefore, to the deed of conveyance from B. to A. *Wood v. Grimwood*, 10 B. & C. 679.

*Sale of Premises.*—An order was made, on petition, for the sale of premises, subject to an equitable mortgage, the general order 8th March, 1794, applying only to legal mortgages. *Ex parte Payler*, 16 Ves. jun. 434.

Mode of proceeding where the assignees apply as mortgagees for a sale. *Ex parte Coadry and Pitt*, 2 Glyn & J. 272.

There is no authority on the petition of an equitable mortgagee by deposit of deeds, to order a sale of the estate, where there is a subsequent mortgagee of the equity of redemption who objects, and has not proved under the commission; the proper remedy being by bill. *Ex parte Topham*, 1 Madd. 38; 2 Rose, 446.

A bankrupt, while in partnership with K., deposits a lease with the creditor, and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the insolvent partner:—Held, that no subsequent arrangements of the kind will affect the rights of the creditor under the original deposit, and that he is entitled to the usual order for the sale of the property. *Ex parte Booth*, 2 Deac. & Chit. 59.

Where deeds relating to freehold and leasehold property were, deposited with an equitable mortgagee, but the memorandum accompanying the deposit merely related to the leasehold property:—Held, that the mortgagee might nevertheless pray a sale of the freehold as well as the leasehold property, subject, however, to the payment of the costs of the sale. *Ex parte Robinson*, 1 Deac. & Chit. 119.

A lease, containing a proviso against an assignment, having been deposited by the lessee to secure a debt, it was ordered on the petition of the depository to be sold under the lessee's commission. *Ex parte Sherman*, Buck, 462.

On an application for a sale of an equitable mortgage, and liberty to bid, one mortgagee being also an assignee, a separate solicitor must be appointed for the sale, and the assignee is not to have the conduct of it. *Ex parte Greenwood*, 1 Deac. & Chit. 542.

A petition for the sale of property in respect of which the creditor holds a legal security, will be dismissed with costs. *Ex parte Moore*, 2 Deac. & Chit. 7.

Although an equitable mortgagee may waive his privilege to bid, the assignees must still have the conduct of the sale. *Ex parte Smith*, 2 Deac. & Chit. 60.

Where an equitable mortgagee, with a power of sale, had executed the power by putting up the estate to sale, when it was sold to him for 300*l.*, and he applied afterwards for the usual order:—Held, that the estate must be put up at that sum. *Ex parte Francis*, 1 Deac. & Chit. 274.

*Costs of Sale.*—In all cases where there is



an equitable mortgage, by a written instrument specifying the terms of the agreement, the mortgagee, upon the usual petition for the sale of the premises, is entitled to his costs. *Ex parte Sikes*, Buck, 349.

Upon an application for the sale of an equitable mortgage, the costs of the assignees are to be paid out of the proceeds of the estate. *Ex parte Garbutt*, 2 Rose, 78.

Costs of the application were given to a mortgagee by deposit, upon a petition for the usual order, there being a written instrument specifying the agreement for the deposit. *Ex parte Brightwen*, Buck, 148.

An equitable mortgagee, who applies for a sale, will not be allowed the costs of an action at law brought for the mortgage money. *Ex parte Fletcher*, 1 Mont. 454.

Quere, whether a third mortgagee is entitled to his costs of petition to sell, &c., or whether he ought not to apply to the commissioners under the general order. *Ex parte Robinson*, 2 Deac. & Chit. 110.

The clerk of a creditor, claiming an equitable mortgage, drew up and signed a memorandum accompanying the deposit of a lease by the bankrupt; but it was not signed by the bankrupt himself, nor was it alleged that the clerk was authorized by the bankrupt to draw up such memorandum, or that it was ever shewn to the bankrupt:—Held, under these circumstances, that the equitable mortgagee was not entitled to the costs of the sale. *Ex parte Reid*, 1 Deac. & Chit. 250.

Where an equitable mortgagee applies to bid at the sale of the mortgaged premises, the ordinary and proper practice is that he should pay the costs of the order. *Ex parte Robinson*, 1 Mont. & Mac. 261.

A mortgagee applying for leave to bid must always pay the costs of the petition, unless by consent it is otherwise. *Ex parte Williams*, 1 Deac. & Chit. 489.

Where an equitable deposit is made, accompanied with a memorandum for a debt subsequently discharged; and on a fresh debt contracted, it is verbally agreed that the deposit shall continue as security for the latter debt, the mortgagee is not entitled to the costs out of the produce of the sale. *Ex parte Pigeon*, 2 Deac. & Chit. 118.

The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which 950*l.* were bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the commissioners for another sale, but the order they made being unsatisfactory to him as to the time of sale, he refused to accept it, and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the bidding at the first and second sales; but that he was entitled to be indemnified from the ground rent, and all expense incurred since

the first sale. *Ex parte Baldock*, 2 Deac. & Chit. 60.

### (c) Property Pledged.

A bankrupt's property pledged must be sold, and the excess proved as a debt. *Ex parte Two-good*, 19 Ves. jun. 231.

The proof of a creditor who claims to retain property against, or has interests inimical to the general creditors, ought not to be rejected (for the amount of his debt beyond the value of his securities) on the ground that he will by his proof be enabled to elect himself an assignee. *Ex parte De Tastet*, 1 Rose, 324; 1 Ves. & B. 281.

There is a difference between bills deposited as a security, and property which cannot be properly ascertained till a sale: if the creditor is willing to take the bills of exchange at their amount, as they cannot produce more, the estate cannot be damaged, and his proof should be admitted for the difference. *Id.*

A creditor who has a bond may apply it to part of the debt, and prove for the residue. *Ex parte Amphlett*, 1 Mont. 77.

A creditor who holds a security, and is desirous of voting in the choice of assignees, is entitled to have the security taken at its value, and to prove for the difference. *Ex parte Nunn*, 1 Rose, 322.

Where debts were secured by a deposit of hops, the court directed a value to be set upon them according to the market price at the day of the choice of assignees, and permitted the creditors to prove for the difference between the price so fixed and the debts secured, and to vote in the choice of assignees. *Ex parte Greenwood*, Buck, 323.

A creditor having joint property of the bankrupts in pledge, and selling the same after the bankruptcy, may, notwithstanding, prove the remainder of his debt under the separate estates of the bankrupts, if there is no other joint property. *Ex parte Geller*, 2 Madd. 262.

The discretion of the court to order proof upon a valuation, instead of a sale of securities, is regulated by circumstances; and not too readily exercised. *Ex parte Smith*, 1 Ves. & B. 518; 2 Rose, 63.

Under special circumstances, the court refused to order the sale of a bond which was pledged as a security for a debt, permitting the creditor to prove his whole debt under the commission. *Ex parte Smith & Strickland*, 2 Glyn & J. 105.

An application by a creditor holding property of the bankrupt, the title to retain which was disputed, to take it at a fixed value, and prove for the difference, and vote in the choice of assignees, was allowed. *Ex parte Barclay*, 1 Glyn & J. 272.

A depository has a right to avail himself of his pledge to its utmost extent in point of proof, and to his fullest and most complete indemnity at the time of proving. Thus, a creditor with whom a bill of exchange had been deposited as a security, first proves his debt against the estate of the drawee, his principal debtor, and thereby and by

other means reduces his debt to 1*l*. Subsequent to that, the acceptor becomes bankrupt; under his commission he was entitled to prove, not only the 1*l*., but all the interest upon his debt at the time of making that proof to the complete liquidation of the account in respect of which he held the bill as a security. *Ex parte Martin*, 1 Rose, 87.

#### (d) Lien.

An application by a vendor, who had not conveyed, for a sale of the premises, in discharge of his lien for the unpaid purchase-money, and to prove for any deficiency granted. *Ex parte Glyde*, 1 Glyn & J. 323.

Upon the bankruptcy of a purchaser, *quære*, whether the vendor has a lien for timber felled, and may prove for the deficiency? *Ex parte Gwynne*, 12 Ves. jun. 379.

#### (e) Foreign Attachment.

Property attached in Jersey, being by the laws of that island vested in the creditor attaching, upon confirmation by the court of the island, in case of a bankruptcy, it was held, that the creditors attaching were entitled to hold the property attached, and to prove for the residue, where the act of bankruptcy was subsequent to the completion of the judicial act, whether on the same or any other day; but, where the act of bankruptcy was previous, they could not hold against the assignee. *Ex parte D'Oree*, 8 Ves. jun. 82.

A creditor in England, and subject to the bankrupt laws, having attached the bankrupt's estate abroad, must restore it. *Benfield v. Solomons*, 9 Ves. jun. 80.

An injunction was granted against proceeding under a foreign attachment by a joint creditor, upon a separate commission overreaching the attachment by relation of the act of bankruptcy. *Barker v. Goodair*, 11 Ves. jun. 78.

#### (f) Securities of Bankrupt and Others.

A creditor has a right to prove, and avail himself of all collateral securities from third persons, to the extent of 20*s*. in the pound: therefore, where bills are drawn and accepted by the same persons as constituting distinct firms, proof may be made against the acceptor, without deducting the value of a security from the drawer. *Ex parte Parr*, 18 Ves. jun. 65; 1 Rose, 76.

A bankrupt, previous to the commission against him, procured persons to assign an interest in copyhold premises, as a security to a creditor of his. The creditor may prove under the commission, without delivering up such security. *Ex parte Goodman*, 3 Madd. 373.

The obligee of a bond given by a principal and surety for payment by instalments, who has proved against the principal the whole debt, and received a dividend of 2*s*. 7*d*. in the pound, may recover against the surety an instalment due, making a deduction of 2*s*. 7*d*. on the amount of such instalment; and the surety is not entitled to have the whole dividend applied in discharge, but

only rateably in part payment of each instalment as it becomes due. *Martin v. Bucknell*, 2 Rose, 156; 2 M. & S. 39.

The holder of a bill may be compelled to prove against the acceptor, for the benefit of the drawer. *Wright v. Simpson*, 6 Ves. jun. 734.

The deduction of a security is never made in bankruptcy, except when it is the property of the bankrupt. *Ex parte Parr*, 1 Rose, 76; 18 Ves. jun. 65.

#### (g) Securities of Others only.

Creditors having securities of third persons to a greater amount than the debt, may prove, and receive dividends upon the full amount of the securities, to the extent of 20*s*. in the pound upon the actual debt. *Ex parte Blaxham*, 6 Ves. jun. 449, 800.

A joint creditor, having separate security from one of his co-debtors, was admitted to prove his debt against the joint estate, without surrender or sale of his security. *Ex parte Peacock*, 2 Glyn & J. 27.

#### 21. By whom Proof may be made.

##### (a) Particular Creditors.

By 1 & 2 Will. 4, c. 56, s. 34, creditors may prove their debts by affidavit, sworn before a judge or commissioner, or a master in Chancery, ordinary or extraordinary, if in England; or a magistrate, attested by a notary public, British minister, or consul, if abroad.

An affidavit to prove a foreign debt must be attested by a notary. *Ex parte Moens*, 1 Mont. 15.

A creditor in Scotland was within the meaning of stat. 5 Geo. 2, as to the mode of proving debts under a commission by creditors in foreign parts. *Ex parte Macdougall*, 2 Cox, 8.

Where a creditor is disabled by age or imbecility of mind, from proving by his own oath, a debt against the estate of a bankrupt, the commissioners will be directed to admit proof upon such evidence as shall be satisfactory to them, though the debt be of considerable amount. *Ex parte Clark*, 2 Russ. 575.

The commissioners under the 51 Geo. 3, c. 16, for issuing Exchequer bills to manufacturers, &c. admitted, under the s. 48 of the act, to prove, (by their secretary) the full amount of their principal, with interest up to the complete payment of the principal, in preference to all other creditors of the bankrupt. *Ex parte Holden*, 1 Rose, 173.

A proof cannot be made by one person on behalf of several creditors entitled to prove, unless from necessity, or by consent. *Ex parte Bank of England*, 2 Glyn & J. 363.

One partner may act for all in proving debts. *Ex parte Hodgkinson*, 19 Ves. jun. 293; 2 Rose, 172; S. P. *Ex parte Mitchell*, 14 Ves. jun. 597.

A trustee cannot prove a debt alone; the cestui que trust must join in the proof. *Ex parte Debois*, 1 Cox, 310.

One of three executors becoming bankrupt,

the two others may prove against his estate. *Ex parte Brown*, 1 Deac. & Chit. 119.

(b) *Agents for Creditors.*

By 6 Geo. 4, c. 16, s. 46, all bodies politic and public companies, incorporated or authorized to sue or bring actions, either by charter or act of parliament, may prove by an agent, provided that such agent shall swear, in his deposition, that he is such agent, and that he is authorized to make the proof.

Corporations may prove debts under commissions of bankruptcy, by the affidavit of a person authorized by a general power of attorney; and vote in the choice of assignees, by a person authorized by a special power of attorney, under their common seal. *Ex parte Bank of England*, 1 Swans. 10; 1 Rose, 142.

The Bank of England was admitted to prove, by their clerk, without a power of attorney. *Id.* Overruling *S. C.* *Ex parte Bank of England*, 18 Ves. jun. 229.

An agent for a public company abroad may, to the prejudice of the bankrupt, prove, with the consent of the assignees, on behalf of the company, on bills of exchange. *Ex parte Cotesworth*, 1 Mont. & Bligh, 92; 1 Deac. & Chit. 281.

On a petition by the assignees, ordered, that the respective agents of several societies be allowed to tender their respective proofs of their debts before the commissioner, but not to have any power over the certificate, or choice of assignees. *Ex parte Ellis*, 1 Deac. & Chit. 463.

(c) *Bankrupt himself.*

If an executor, who is directed to carry on his testator's partnership trade, exceed his authority, by employing the assets in his trade to an extent not warranted by the will, and the surviving partner and the executor become bankrupt, the excess of the assets so employed may be proved by the executor under their commission. *Ex parte Richardson*, Buck, 202, 421; 3 Madd. 138.

An executor and trustee having committed a devastavit, is precluded from proving under his bankruptcy; liberty to prove was given, in the first instance, and without previous application to the commissioners, to a legatee on behalf of himself and others, with a direction that the dividend should be paid into the Bank in trust in the matter. *Ex parte Moody*, 2 Rose, 413.

An executor, bankrupt, cannot, without an order of the court, prove under his own commission, in respect of a debt due from him to the testator's estate. *Ex parte Shaw*, 1 Glyn & J. 127.

Where the bankrupt and another are executors of a creditor of the bankrupt, the court will permit the other executor to prove the debt, though there be a suit depending in the ecclesiastical court as to the executorship. *Ex parte Shakeshaft*, 3 Bro. C. C. 198.

Proof in bankruptcy, in respect of trust property of infants continued by the administratrix in the trade in which the testator was engaged, carried on by the bankrupt, constituting a firm

of which the administratrix was a member. *Ex parte Watson*, 2 Ves. & B. 414; 2 Rose, 259.

Where a bankrupt is executor, and money of his testator comes to the hands of his assignees, he shall be admitted a creditor for that money; but the dividends shall be paid into the Bank, for the use of the creditors of the deceased. *Ex parte Leeks*, 2 Bro. C. C. 596.

22. *When Proof may be made.*

The petitioning creditor under a commission of bankruptcy must prove his debt at a public meeting. *List's case*, 2 Ves. & B. 273; 2 Rose, 24.

If a creditor, through accident, omits to prove at the final dividend, he may be permitted to prove, without disturbing any payment made by the assignees, and placing the creditors not paid in the same situation as if he had originally proved. *Ex parte Day*, 1 Mont. 212.

On petition to expunge a proof, founded on an affidavit of a creditor, who died before the proof was made, the commissioners were directed to review the proof, although two dividends had been paid. *Ex parte Bridges*, 4 Madd. 269.

23. *Proceedings to claim Proof.*

*Course of Proceedings.*—An application to the chancellor before the decision of the commissioners to receive or reject a proof, with the view to the choice of assignees, is improper. *Ex parte De Tustet*, 1 Ves. & B. 280; 1 Rose, 324.

A petition to prove a debt in bankruptcy is irregular, because the creditor did not go before the commissioners till after it was presented, and because brought to hearing without stating what passed before them. *Ex parte Wright*, 2 Ves. jun. 41.

Proof was refused, where the party claiming the debt being charged by the examination of the bankrupt with the receipt of money, refused a disclosure as to the receipt and application, on the ground that it might tend to criminate him. *Ex parte Symes*, 11 Ves. jun. 521.

If, at a dividend, a proof is rejected from the creditor's inability through accident to produce the security, the dividend may be opened on immediate notice to the assignees to suspend payment. *Ex parte Barclay*, 1 Mont. 126.

Assignees, applying to prove, are not bound by the same laches as might bind a mere individual creditor. *Ex parte Smith*, 1 Deac. & Chit. 267.

The court of review will make no order for proof of a debt, in anticipation of a probable objection that may be made to such proof by the commissioner. *Ex parte Beaumont*, 1 Deac. & Chit. 360.

When any application of this nature is made previous to the choice of assignees, the petitioning creditor should be served with the petition. *Id.*

Where the commissioners have once rejected the proof of a debt, the creditor may petition to prove, notwithstanding the commissioners re-

ferred him to a subsequent meeting, at which he declined to attend. *Ex parte Skipp*, 2 Deac. & Chit. 88.

By 1 & 2 Will. 4, c. 56, s. 30, any one of the commissioners may, if he think fit, adjourn the examination of a proof of a debt to be heard before a subdivision court; which court shall proceed, and finally, and without appeal, except upon matter of law or equity, or of the refusal or the admission of evidence, determine on the proof: provided that, by consent, the validity of the debt may be tried by a jury on an issue to be prepared by the commissioner, to be tried before a judge of the court of review.

**Petition.**—A petition by many creditors to prove is not multifarious if they have a common object. *Ex parte Bougfield*, 1 Mont. 128.

Nor is a petition to prove and remove assignees. *Ex parte Howell*, 1 Mont. 129.

The petition of three creditors for an order to prove three distinct debts, held to be multifarious. The court will not permit the claims of different persons to be united in the same petition. *Ex parte Saer*, 1 Mont. & Mac. 280.

A petition to be admitted to prove a debt which the commissioners had rejected, should state the ground of their rejection. *Ex parte Curtis*, 1 Rose, 274; *Ex parte Schmalding*, Buck, 93; *Ex parte Wilson*, 1 Cox, 308.

A petition to prove a debt and stay certificate should state the grounds on which the commissioners rejected the proof; and the court refused leave to amend. *Ex parte Pearce*, 1 Mont. & Bligh, 262; *S. P. Ex parte Worth*, 2 Deac. & Chit. 4; 1 Deac. & Chit. 574.

A petition to prove a debt and stay the certificate must state that the proof will turn the certificate. *Ex parte Skipp*, 1 Mont. & Bligh, 262; 1 Deac. & Chit. 497.

**Costs.**—When a petition to prove under a commission is unnecessary, the petitioner is liable to costs. *Ex parte Rogers*, 1 Deac. & Chit. 38.

Where a creditor petitions to prove a debt which is not in its nature provable, the petition will be dismissed with costs, notwithstanding the commissioners rejected the proof for an insufficient reason. *Ex parte Worthington*, 1 Deac. & Chit. 288.

No costs given upon petition by joint creditors to prove against the separate estate, there being no joint effects or solvent partner. *Ex parte Bradshaw*, 1 Glyn & J. 99.

An order was made by the vice chancellor, and confirmed on appeal to the lord chancellor, that the petitioner should be admitted to prove a debt which the commissioners had rejected from an error in judgment:—Held, that the costs of all parties should be paid out of the estate. *Ex parte Fiske*, 1 Mont. & Mac. 93.

#### 24. Amount to be proved.

Upon a sale of goods to be paid for at the end of the year in which they were purchased, but if paid

for before the end of the year, 20l. per cent. discount to be allowed, which were not paid for within the year:—Held, on the bankruptcy of the purchaser, that proof could not be made of the whole debt, without deduction for discount. *Ex parte Pigou*, 3 Madd. 136.

A creditor who borrows money, which he afterwards pays with interest, after a secret act of bankruptcy, is considered as having never borrowed, and he shall prove his whole debt. *Ex parte Congalton*, 3 Bro. C. C. 47.

M. & S., being trustees of money in the funds, sell it for the benefit of S., who dies insolvent. K. becomes bankrupt. The person interested in the funds may prove against the estate of K. the value of the funds at the bankruptcy, though S.'s estate be first liable. *Ex parte Shakeshafte*, 2 Bro. C. C. 197.

A., being an indorsee of B., C., & Co.'s acceptances for 1364l., sues out a separate commission against B. At the time of suing out the commission, D., the person for whom A. had discounted the acceptances, had, by payments on account, reduced the debt to 420l. A. is entitled to prove for the whole amount, and for all that is received above 420l. will be a trustee for D. *Ex parte De Tastet*, 1 Rose, 10.

Upon a consignment with authority to sell to reimburse advances on the consignment, the deficiency to be made good, and the surplus, if any, restored, where part of the goods were sold to the consignee, proof under their bankruptcy was limited to the balance of the original advance. *Ex parte Thompson*, 18 Ves. jun. 134; 1 Rose, 165.

A contingent interest was assigned to secure in part a debt exceeding the value of the interest, the assignee insured against the contingency, and upon its taking effect received the sum insured:—Held, upon the bankruptcy of his debtor, that the sum so recovered, minus the premium and expenses, must be deducted from his proof. *Ex parte Andrews*, 2 Rose, 410; 1 Madd. 573.

A creditor on a bill of exchange made affidavit of a debt due of 2500l., which proof was admitted for only 1200l.; the residue was claimed. It appeared afterwards that the creditor was entitled to prove the whole against the bankrupt, but in the meantime he had received 500l. from some other party to the bill. The former affidavit cannot now be received as a proof of the remainder of the debt, but a new proof must be made; and 500l. having been actually paid to the creditor, he can only prove the residue after deducting the 500l. *Ex parte Worrall*, 1 Cox, 309.

#### 25. Effect of Proof.

##### (a) Abandonment of Suit.

By 6 Geo. 4, c. 16, s. 59, no creditor who has brought any action or suit against the bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved, shall prove or enter a claim without relinquishing the action or suit; and the proving or claiming shall be an election to take the benefit of the commission with respect to the debt proved or claimed: provided that the creditor shall not be liable for the costs; and that, when

the action or suit is joint, relinquishing as regards the bankrupt shall not affect the other parties.

A creditor who has proved, will, upon petition by the assignees, be restrained from issuing execution against the property of the bankrupt in the possession of the assignees. *Ex parte Bernasconi*, 2 Glyn & J. 381.

If a creditor has both proved his debt under a commission of bankrupt, and commenced an action against the bankrupt, before the passing of the statute 49 Geo. 3, c. 121, s. 14, that act does not compel him to relinquish his action. *Atherstone v. Huddleston*, 2 Taunt. 181. And see *Linging v. Comyn*, 2 Taunt. 246.

The 49 Geo. 3, c. 121, s. 14, which enacts, that creditors who shall have brought an action against the bankrupt, shall not be at liberty to prove under the commission without relinquishing such action, extended to prevent a creditor who was suing two partners from proving his debt under a separate commission issued against one. *Blansin v. Taylor*, Gow, 199—Holroyd.

A creditor who is suing the bankrupt at law is not entitled to benefit under the commission, and has no resource to the great seal, unless he gives up his legal proceedings. *Ex parte Joseph*, 1 Rose, 184.

In another case previous to the statute, the court of C. P. refused to order a common appearance to be entered, on the ground that the plaintiff had proved his debt, and been chosen assignee under a commission against the defendant. *Hill v. Reeves*, 1 B. & P. 424. And see *Oliver Ames*, 8 T. R. 364.

A creditor is not compelled to elect in bankruptcy if the debts are of a different nature, as a note and a bond. *Ex parte Grosvenor*, 14 Ves. jun. 588.

Where the proof of the petitioner's debt was refused under the commission, and he brought an action against the bankrupt, obtained a verdict, entered up judgment, and took out a *capias ad satisfaciendum* in order to fix the bail; and the bankrupt surrendered himself in discharge of them: the petitioner was admitted to prove his debt, and the certificate was stayed. *Ex parte Arundel*, 1 Rose, 143; 18 Ves. jun. 231.

A creditor having the bankrupt in execution before the bankruptcy, was not bound to elect until a dividend. *Ex parte Warwick*, 14 Ves. jun. 136.

A creditor was not bound to elect to proceed at law, or under a commission of bankruptcy before a dividend; therefore, a creditor having the bankrupt in custody on mesne process, was permitted to vote in the choice of assignees. *Ex parte Sharpe*, 11 Ves. jun. 203.

Exception to the general rule, that election to come in under a commission of bankruptcy or proceed at law cannot be compelled before dividend, the creditor having, for the purpose of taking both remedies, split an entire demand, and, being the assignee, delayed a dividend. *Ex parte Grosvenor*, 14 Ves. jun. 587.

Proof or claim by a creditor for any debt operates under the 49 Geo. 3, c. 121, s. 14, as a relinquishment of an action previously brought for

a distinct demand, but not as it seems of an action subsequently brought for a distinct demand. *Ex parte Glover*, 1 Glyn & J. 270.

A creditor accepting an assignment of a debt proved, is substantially a creditor proving a debt within the 49 Geo. 3, c. 121, s. 14, and thereby relinquishes an action brought by him against the bankrupt. *Ex parte Taylor*, 1 Glyn & J. 399.

A party tendering the proof or claim of a debt under a commission, is entitled to the judgment of the commissioners upon his right to prove or claim, before he discharges the bankrupt, or relinquishes the action; but the bankrupt must be discharged, and the action and all benefit from it relinquished, before the proof or claim is admitted upon the proceedings. *Ex parte Frith*, 1 Glyn & J. 165.

A verdict creditor having proved his debt, and otherwise acted under the commission, has made his election, and shall not afterwards resort to the bankrupt's bail. *Aylett v. Harford*, 2 W. Black. 1317.

Where the plaintiff, in an action against a bankrupt, makes his election to proceed under the commission, the defendant is entitled to have some entry or suggestion, recording the election, put on the record. *Kemp v. Potter*, 6 Taunt. 549.

A creditor having the bankrupt in execution at the time the commission issues, may elect. *Ex parte Knowell*, 13 Ves. jun. 193.

If a bankrupt be taken in execution after the commission issued, the effect is an election without regard to the particular motive. *Id.*

If a bankrupt, surrendered in discharge of his bail, be discharged by the creditor, having never been charged in execution, this is no election, and the creditor may be permitted to prove. *Ex parte Cundall*, 6 Ves. jun. 446.

A creditor proceeding at law obtains an order for inquiry before the commissioners, and afterwards takes out an execution. Ordered to withdraw that execution, with costs. *Ex parte Boszannet*, 1 Rose, 181.

#### (b) Relinquishment of Right to sue.

By the 49 Geo. 3, c. 121, s. 14, it was enacted that the proving a debt should be deemed an election by the creditor to take the benefit of the commission. The plaintiff proved a debt under a commission sued out against the defendant by virtue of that act, and, after the passing of the 6 Geo. 4, c. 16, (which repealed the 49 Geo. 3, c. 121,) arrested the defendant for the same debt. The court directed the defendant to be discharged from custody; holding that the plaintiff's election to prove under the commission operated as a final abandonment of his claim against the person of his debtor. *Adams v. Bridger*, 1 M. & Scott, 438; 8 Bing. 314.

The proof of a debt, though, by the 49 Geo. 3, c. 121, s. 14, a conclusive election to adopt the commission, does not affect the remedies of the party proving for the recovery of his debt unpaid. *Ex parte Buckle*, 1 Glyn & J. 32.

In cases within the 5 Geo. 2, c. 30, s. 9, cre-

ditors who had obtained an order to prove under a second commission, in which 15s. in the pound was not paid:—Held, to be entitled to prove their debts unpaid under a third commission. *Id.*

It seems that the proving a debt under a commission, is an election by the creditor within that statute, which deprives him of his remedy by action against the bankrupt in the cases excepted in statute 5 Geo. 2, c. 30, s. 9. *Read v. Sowerby*, 3 M. & S. 78; 2 Rose, 288.

Proof under a commission is equivalent to payment. *Ex parte Horseby*, Buck, 351.

Where A. having proved a debt under a commission against B., brought an action and obtained judgment against B. for the amount so proved, a sum attempted to be proved, and other sums advanced after the bankruptcy; and upon this judgment sued out execution, and caused property of B. in possession of his assignees, to be taken in execution: the court ordered the execution to be withdrawn altogether. Quære, whether the court would have so interfered if the judgment and writ of execution had not included the sum proved under the commission. *Ex parte Chambers*, 1 Mont. & Mac. 130.

A bill, after proof under a commission against the acceptor, was paid by the drawer, who, after a dividend, having arrested the bankrupt for the balance, and being also surety for him on another bill, was ordered to discharge him, and restrained from lodging any detainer, under 49 Geo. 3, c. 121, ss. 8 & 14. *Ex parte Lobbon*, 1 Rose, 219.

Though a creditor having received a dividend under a bankruptcy may refund and proceed at law, he cannot, if he has signed the certificate. *Ex parte Freeman*, 4 Ves. jun. 836.

**Several Debts.**—Where a party has clear separate demands on a bankrupt, he may sue for one, and come under the commission for the other, but not if they are only different securities for the same debt. *Ex parte Crinoz*, 1 Bro. C. C. 270.

If a creditor prove one debt under a commission of bankruptcy, he is not thereby precluded from suing upon another, although it was due at the time of his proving the first. *Bridget v. Mills*, 12 Moore, 92; 4 Bing. 18.

By the 49 Geo. 3, c. 121, s. 14, a person having two debts cannot come in under the commission for the one, and proceed at law for the other. *Ex parte Hardenburgh*, 1 Rose, 204.

Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved under the commission for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding, was afterwards dishonoured:—Held, that the vendors were not precluded by the statute 49 Geo. 3, c. 121, s. 14, from suing the bankrupt for the amount of the last parcel of goods. *Watson v. Medex*, 1 B. & A. 121.

So held on the 6 Geo. 4, c. 16, s. 59. *Ex parte Edwards*, 1 Mont. & Mac. 116.

Where a creditor proved one of several bills accepted in payment of the same debt, and afterwards declared against the bankrupt on the others:—Held, that the election of the creditor to take the benefit of the commission was confined by the 49 Geo. 3, c. 121, s. 14, to the debt actually proved, and did not extend to distinct debts ejusdem generis due at the same time. *Harley v. Greenwood*, 5 B. & A. 95.

A creditor cannot proceed at law upon one of two bills for goods sold, which became due and was dishonoured before proof of the other, but returned after the proof. *Ex parte Schlesinger*, 2 Glyn & J. 392.

A creditor for goods sold may prove on a bill for part of the debt, and proceed at law on a bill for the remainder, which he has negotiated before the bankruptcy and taken up after the proof. *Ex parte Sly*, 2 Glyn & J. 163.

A person to whom several debts were due from a bankrupt, arising out of separate sales of goods, proved some of the debts under the commission; another person, who was suggested to be a trustee for him, sued at law upon a note which the bankrupt had given for other part of the goods sold. The court of C. P. refused to interfere in a summary way to stay proceedings on the bail-bond in this action. *Howell v. Gollidge*, 5 Taunt. 175; 2 Rose, 130.

**Different Parties.**—The statute 49 Geo. 3, c. 121, s. 14, which enacts, that creditors proceeding under the commission shall be deemed to have made their election not to sue, does not extend to prevent a creditor who proves a joint debt under a commission against one partner from suing the others. *Young v. Glass*, 16 East, 252; S. P. *Heath v. Hall*, 4 Taunt. 326; 2 Rose, 271.

The proving against the principal, is not an election not to proceed against the surety. *Ex parte Hughes*, 5 B. & A. 482.

Where an attorney, in order to get possession of papers belonging to A., in the hands of A.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. should enter into a reference:—Held, that A. having subsequently become bankrupt for the second time, and without paying fifteen shillings in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 Geo. 3, c. 121, s. 14, so as to dispense with the reference. *Id.*

A. and B. having dissolved partnership, an award was made, by which B. was directed to pay A. a certain sum, and to pay several partnership debts. B. gave a warrant of attorney for securing the money awarded, with a stipulation in the defeazance, that, if A. should be called upon to pay any of the partnership debts, he should be at liberty to enter up judgment. B. became bankrupt, and A. proved his private debt under the commission, and received a dividend thereon. A. was afterwards sued for a partnership debt, and entered into an arrangement with the creditor to pay it by instalments, and then entered up judgment, and took out execution on the warrant of attorney, before B. had obtained his certificate:—

Held, that A. was not deprived of his remedy by 49 Geo. 3, c. 121, ss. 8 & 14. *Daily v. Wolferston*, 3 D. & R. 269.

The drawer of a bill of exchange, who has paid the amount to the holder after a commission of bankruptcy issued against the acceptor, may sue the acceptor before he has obtained his certificate, and arrest him upon the bill, notwithstanding the holder has proved the bill under the commission. *Mead v. Braham*, 3 M. & S. 91; 9 Rose, 289.

Joint creditors having taken out a commission of bankruptcy, proving, and voting in the choice of assignees, may afterwards join the bankrupt in an action as a co-defendant, upon giving a full indemnity, undertaking to take no advantage of the verdict or judgment against him, with costs of petition. *Ex parte Read*, 1 Ves. & B. 346; 1 Rose, 460.

(c) *Relinquishment of Securities.*

A creditor having a lien on property of the bankrupt for his debt, held to be concluded by proving his debt, voting in the choice of assignees, and signing the certificate, and ordered to deliver up the property on which he had a lien. *Ex parte Solomon*, 1 Glyn & J. 25.

If a creditor, who has an additional security for his debt, take the bankrupt's acceptance, it is his duty when he proves the debt, to state that fact to the commissioners; and where a creditor had not done so, the proof was ordered to be expunged, with liberty for him to go again before the commissioners and tender his proof. *Ex parte Hosack*, Buck, 390.

Separate creditors, who had taken a joint security, permitted, on giving it up, to resort under a commission of bankruptcy to their original debts. *Ex parte Lobb*, 7 Ves. jun. 598.

Proof under a commission is equivalent to payment; therefore, where solicitors had obtained an order to have their bill taxed, and to prove for the amount, it was held that they had relinquished their lien upon the papers in their hands belonging to the bankrupt. *Ex parte Hornby*, Buck, 351.

A creditor who has obtained goods of his debtor just before bankruptcy, shall not prove for the residue without accounting for the goods so obtained. *Ex parte Smith*, 3 Bro. C. C. 46.

(d) *Discharge of Bankrupt.*

By 6 Geo. 4, c. 16, s. 59, if a bankrupt be in prison, or in custody at the suit of or detained by a creditor, he shall not prove or claim without giving a discharge in writing for the bankrupt.

Where a creditor who petitions to prove his debt, holds the bankrupt in arrest under mesne process, he is entitled to his discharge instant, upon the order for the proof. *Ex parte Irving*, Buck, 423.

A creditor issued a writ against the bankrupt, and then proved his debt under the commission: the bankrupt was afterwards arrested and several detainers were lodged against him:—Held, that the bankrupt should be discharged, and the ar-

resting creditor to pay all the costs. *Ex parte Moore*, Buck, 521.

Arresting the bankrupt before commission, and keeping him in execution after, is an election not to proceed under the commission. *Ex parte Warder*, 3 Bro. C. C. 191.

Under 6 Geo. 4, c. 16, s. 120, which authorizes the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, the court has incidentally the power of staying, before judgment, proceedings against such a bankrupt for such a debt. *Sadler v. Cleaver*, 7 Bing. 769; 5 M. & P. 706.

But the defendant having created unnecessary expense and delay to the plaintiff, he was required to pay all the costs incurred, from the day the cause might have been tried to the time of the application to stay the proceedings. *Id.*

26. *Reduction and expunging Proof.*

(a) *By Commissioners.*

By 6 Geo. 4, c. 16, s. 60, if it shall appear to the assignees, or to two or more creditors, who have proved to the amount of 20l. or upwards, that any debt proved is not justly due, either in whole or in part, they may make a representation thereof to the commissioners, who may summon and examine on oath the party proving together with other witnesses; and, in their discretion, the commissioners may expunge the same, either wholly or in part: provided, that the persons requiring investigation sign an undertaking for costs, and that either party may apply by petition.

Commissioners cannot expunge a proof as long as it remains upon the proceedings, it must be considered as a debt. *Ex parte Graham*, 1 Rose, 456.

Where a creditor proved in respect of several bills of exchange drawn by the bankrupt and discounted by the creditor, and one of those bills was subsequently wholly paid:—Held, that so much of the proof as related to that bill must be expunged. *Ex parte Barratt*, 1 Glyn & J. 327.

Where a creditor holding bills of exchange proves the amount of his debt, with a statement that he holds the bills as security, and any of the bills are subsequently paid by the other parties to them, the amount so paid must be deducted from the proof and the dividends; or, if the dividends have been paid upon the whole of the proof without such deduction, the assignees are not thereby concluded, for the Lord Chancellor will order them to be refunded; it makes no difference whether the bills have been deposited without indorsement, or have been indorsed by the bankrupt to the creditor. *Ex parte Burn*, 2 Rose, 55.

Where the indorser of a bill of exchange becomes bankrupt, and the holder proves his bill under the commission, and afterwards compounds it, and discharges the acceptor without notice to the assignees of the indorser, he also discharges the indorser's estate, and the proof of his debt must be expunged. *Ex parte Smith*, 3 Bro. C. C. 1.

(b) *By the Court.*

The court of Review will not expunge a proof, morely because the creditor has instituted process in a foreign country for the recovery of his debt, in the absence of all evidence as to the nature of the process abroad. *Ex parte Cotesworth*, 1 Deac. & Chit. 281; 1 Mont. & Bligh, 92.

A petition by creditors to expunge proofs, to admit proofs, and to remove assignees is not multifarious; but the removal of assignees being refused, the petition becomes multifarious. *Ex parte Grazebrook*, 2 Deac. & Chit. 186.

A petition by the bankrupt to expunge the proofs of various creditors, dismissed as being multifarious; costs not given out of the estate, on the ground that it would be hard upon the creditors whose debts were indisputable. *Ex parte Coles*, Buck, 256.

Upon petition to expunge a proof on grounds not taken before the commissioners, the respondent will have his costs out of the estate. *Ex parte Ellis*, 1 Mont. & Bligh, 254.

An examination taken before the commissioners upon an inquiry, is not evidence to expunge a creditor's proof, who was not a party to the inquiry. Nor is it evidence to ground an order for an inquiry as to the validity of the proof. *Ex parte Coles*, Buck, 242.

Whatever it is necessary to decide collaterally to the point of proof, might give jurisdiction in bankruptcy. *Ex parte Rowton*, 1 Rose, 15.

One of two partners, the other being abroad, proves a debt, and dies, service of the petition to expunge the debt upon the attorney appointed to receive the dividends, ordered to be good service upon motion. *Ex parte Peyton*, Buck, 200.

27. *Proof against joint or separate Estate.*(a) *Joint Debt against separate Estate.*

*No joint Estate.*—Joint creditors admitted to prove their debts on the separate estate of one partner, there being no joint estate. *Ex parte Hayden*, 1 Bro. C.C. 454; *S. P. Ex parte Machell*, 2 Ves. & B. 216.

Proof by joint creditors under a separate commission, there being no joint estate or solvent partner. *Ex parte Sadler and Jackson*, 15 Ves. jun. 52.

Joint creditors are not permitted to prove against the separate estate, where there is a joint property, however trifling in amount. *Ex parte Peake*, 2 Rose, 54.

An insolvent, who has applied to take the benefit of the act, is not insolvent within the rule which allows a proof against the separate estate, if there is a solvent partner. *Ex parte Morris*, 1 Mont. 218.

Where a commission of bankrupt had issued against one of two partners, and the other partner was insolvent, but no commission had issued against him:—Held, that the joint creditors could not come in competition with the separate creditors, and receive a dividend out of the separate estate of the bankrupt. *Ex parte Janson*, Buck, 227.

Joint creditors admitted to prove against the separate estate, by consent. *Ex parte Cobham*, 1 Bro. C. C. 576.

Joint creditors may petition to prove against the separate estate, on account of a fraudulent abstraction of joint funds, without a previous application to the commissioners. Where one partner is intrusted with the entire management of the partnership business, and openly without disguise or concealment enters in the partnership books the monies withdrawn by him from the joint stock for his separate use, it is not a fraud which will entitle the joint creditors to prove against the separate estate of that partner. *Ex parte Smith*, 1 Glyn & J. 74; 6 Madd. 2.

Proof by assignees, under a joint commission, against the separate estate of one partner for money taken out without the privity of the other. *Ex parte Harris*, 1 Rose, 129, 437; 2 Ves. & B. 210.

*For what purpose.*—By 6 Geo. 4, c. 16, s. 62, joint creditors may prove under separate commissions against one or more partners, only for the purpose of voting in the choice of assignees, and of assenting to or dissenting from the certificate, but shall not receive any dividend out of such separate estate, until all the separate creditors shall have received in full, unless such joint creditor be petitioning creditor.

The joint creditors permitted to prove for the purpose of voting in the choice of assignees and taking dividends, provided they pay the separate creditors. *Ex parte Chandler*, 9 Ves. jun. 35.

A joint creditor not admitted to prove under a separate commission of bankruptcy, for the purpose of receiving dividends with the separate creditors, though there was no joint property, there being a solvent partner. *Ex parte Kensington*, 14 Ves. jun. 447.

Joint creditor admitted to prove under a separate commission, for the purpose of keeping separate accounts, and assenting to or dissenting from the certificate, but not to receive dividends with the separate creditors. *Ex parte Clay*, 6 Ves. jun. 813.

Joint creditors admitted to prove under a separate commission of bankruptcy, for the purpose of assenting to or dissenting from the certificate &c. not to receive dividends with the separate creditors. *Ex parte Trist*, 16 Ves. jun. 193; *S. P. Dutton v. Morrison*, 17 Ves. jun. 209; 1 Rose, 213.

Upon petition of joint creditors to be admitted to prove under a separate commission, it was ordered that they should be admitted, but not to receive a dividend; and that the dividend should be reserved till an account was taken of what they have or might have received from the partnership effects. *Ex parte Elton*, 3 Ves. jun. 238.

A joint creditor taking out a separate commission of bankruptcy, may prove and receive dividends with the separate creditors, though, as to part, a trustee for another joint creditor, who upon the general rule could have proved only to affect the certificate, not to receive dividends. *Ex parte De Tuetet*, 17 Ves. jun. 247.



*Joint Debt changed to separate.*—Judgment of outlawry against two of three joint debtors, does not make the debt a separate one, as against the third debtor, and it cannot be proved under his separate commission. *Ex parte Dunlop*, Buck, 253.

If a creditor has a joint and several bond, and, as a collateral security, a joint warrant of attorney and judgment, the liability on the bond is merged, and the creditor is not entitled to prove against the separate estate. *Ex parte Christie*, 1 Mont. & Bligh, 352; 2 Deac. & Chit. 155.

A father, member of a bank, transfers a sum of money to the credit of his son with the partnership, for this credit the son is entitled to prove under a commission against the firm. *Ex parte Skerratt*, 2 Rose, 384.

#### (b) Partnership Debts.

*Generally.*—A partnership debt may be proved under a separate commission. *Ex parte Hodgson*, 2 Bro. C. C. 5.

Where a joint creditor sues out a commission against A, as surviving partner of B, he can claim only against the joint estate. *Ex parte Barned and Mosley*, 1 Glyn & J. 309.

Where a firm consists of four persons, the creditors of a firm of three of them who are bankrupts may, under the general order, prove under the commission against the four, and no order is necessary for that purpose. *Ex parte Worthington*, 3 Madd. 26.

By the bankruptcy of one his interest is divested and vested in the assignees, by relation to the act of bankruptcy; therefore, joint creditors under a judgment in foreign attachment of the same date with the commission, but subsequent to the act of bankruptcy, cannot have execution against the joint property, which must be applied amongst all the joint creditors. *Dutton v. Morrison*, 1 Rose, 213; 17 Ves. jun. 193.

A, B, and C. carried on trade in partnership, and A and B. were partners in a distinct trade, and became bankrupt; D, being a creditor of the three for goods sold and delivered, could not prove his debt against the joint estate of the two, but was admitted to prove against the separate estate of each. *Ex parte Clegg*, 2 Cox, 372.

A creditor of one partner, on bond for money which came to the use of the partnership, may prove against the joint or separate fund. *Ex parte Clowes*, 2 Bro. C. C. 595.

*Dormant Partner.*—A creditor without notice of a dormant partner has an option to consider himself a joint or separate creditor. *Ex parte Hodgkinson*, 19 Ves. jun. 294.

A and B. were in partnership, B being a secret partner, and A. on the partnership account drew bills in his own name on B, which were accepted by him:—Held, on the bankruptcy of A. and B., that the holder of these bills who was ignorant of this partnership, was not entitled to prove them against the joint estate of A. and B., and the separate estate of B., but that he was entitled to prove them against the separate estates

of A. and B.; held too, that the holder, having proved against the joint estate, might, after a declaration of dividend on the joint estate, retire from that proof, and prove against the separate estates. *Ex parte Husband*, 2 Glyn & J. 4; 5 Madd. 419.

*Change of Firm and Dissolution.*—The creditors of an old firm, who had notice that a dormant partner had been admitted, are entitled to prove their debts *pari passu* with the other creditors of the old firm. *Ex parte Chuck*, 1 Mont. & Bligh, 457; 8 Bing. 469; 1 M. & Scott, 615.

In July, 1820, W. advanced to S. and S., then carrying on business in partnership as brewers, the sum of 24,000*l.*, and all three executed a deed, by the express terms whereof a partnership stock was created, in which they had all a joint property; W. however was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get 2000*l.* or 2400*l.* a year, as the case might be, out of the clear profits: W.'s name never appeared to the world as a partner:—Held, that W. was a partner; and the new firm having become bankrupts in 1826, held, that the creditors of the old firm, and the creditors of the new firm, were both entitled to prove against the property of the new firm. *Id.*

One of the three partners assigns his interest in the partnership property to the two continuing partners, who covenant to pay the debts of the three, and afterwards becomes bankrupt:—Held, that the joint creditors of the three were not entitled to prove against the estate of the two. *Ex parte Fry*, 1 Glyn & J. 96.

A sole trader indebted by bond, took in a nominal partner, but without fraud, and two years after the partnership failed; a separate debt was not permitted to be proved under the joint commission, unless there was something, as payment of interest by both, to make the partnership liable, for which very little would be sufficient. *Ex parte Jackson*, 1 Ves. jun. 131.

On a dissolution of partnership, the retiring partner sells the concern, with the partnership property, to the other, but some of the partnership property remains in the partnership names, and in the order and disposition of both. They afterwards become bankrupts, and separate commissions issue against them. There being property outstanding in the partnership names, the joint creditors cannot prove under the separate commission against the retiring partner. *Ex parte Harris*, 1 Madd. 583.

C. and D. were in partnership, and the same was dissolved; D. carried on afterwards a trade, and became bankrupt, and C. was insolvent:—Held, that the joint creditors of C. and D. could not prove against the separate estate of D. *Ex parte Janson*, 3 Madd. 229; Buck, 227.

Where separate commissions were issued against three of four partners, to which they conformed, and an order was made for allowing the joint creditors to prove their debts under the commission of one of the three; under which commission the plaintiffs proved their joint debt,

and afterwards sued all the partners for the same debt, and arrested one of the other two, under whose commission they had not proved:—Held, that he was not entitled to be discharged out of custody. *Young v. Hunter*, 16 East, 252; 2 Rose, 120.

Where, upon a dissolution of partnership between three partners, two of the three assigned to the other all their shares in the partnership debts and effects, and the other covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of the same, and from all actions and costs by reason of the non-payment of the same, and afterwards became bankrupt, and a commission issued against him, under which he obtained his certificate, and afterwards the holder of a bill accepted by the three partners, and due before the dissolution of the partnership, sued the two, and they were obliged to pay the bill:—Held, that by stat. 49 Geo. 3, c. 121, s. 8, the certificate might be pleaded in discharge of an action brought by the two against the other upon his covenant. *Wood v. Dodgson*, 2 M. & S. 195; 2 Rose, 47.

By deed, the stock and effects of a partnership are assigned to the continuing partner, who covenants to pay the joint debts. The partners become bankrupts:—Held, that the joint creditors not having, previous to the bankruptcy, accepted the continuing partner as their sole debtor, have not an election to prove against the separate estate of the continuing partner. *Ex parte Freeman*, Buck, 471.

#### (c) Election of Creditors.

*In what Cases.*—A petitioning creditor under a first commission, which was separate against one of three partners, being a joint creditor, was entitled to his election under a second commission, which was joint against two of the firm, to prove against the joint or separate estate. *Ex parte Smith*, 1 Glyn & J. 256.

A joint creditor sues out two separate commissions, under one he proves against the joint estate and receives a dividend, at which time he was ignorant of his right to prove against the separate estate of the other:—Held, that he had not conclusively elected to prove as a joint creditor, but that, refunding the dividend with interest, he might prove as a separate creditor. *Ex parte Bolton*, Buck, 7.

A. employed B. and C. as his stock-brokers, and, for the more convenient transfer, allowed certain stock belonging to him to stand in the name of B. alone; B., without the consent or knowledge of A., sold this stock, and paid the produce into the partnership funds of B. and C., B. and C. afterwards having become bankrupts:—Held, that A. was entitled to prove against the separate estate of B., or against the joint estate, as he should think proper. *Ex parte Turner*, 1 Mont. & Mac. 255.

*When to be made.*—A creditor under a joint and several bond may prove against both the joint and separate estate, but must make his election before a dividend. *Ex parte Bentley*, 2 Cox, 288.

A creditor who has a right to elect between a joint and separate estate, must make his election before a dividend is declared of the estate against which he has proved. His election is gone if he does any act in the character in which he has proved. *Ex parte Husband*, 5 Madd. 419; 2 Glyn & J. 4.

A joint and separate creditor must elect against which estate to go in the first instance; and, electing to go against the joint estate, he has no preference to the other joint creditors upon the surplus of the separate estate beyond the separate debts. *Ex parte Bevan*, 10 Ves. jun. 107.

*Double Security.*—The rule in bankruptcy, that a joint and several creditor must elect, does not apply to a contract for double security against distinct firms; viz. bills drawn by all the partners upon a distinct firm constituted of some of them: proof therefore is allowed against both estates. *Ex parte Adam*, 1 Ves. & B. 493; 2 Rose, 36.

Where parties are indebted jointly, and enter into a covenant by which they promise on demand, jointly and severally, to pay, no demand is necessary in order to entitle the creditor to proceed severally against the parties; but where it was expressly stipulated by three partners, that, until a demand was made, an existing debt should remain a joint debt, and no demand was made previously to the bankruptcy:—Held, that the debt was provable against the joint estate, but not against the separate estates of the three. *Ex parte Fairlie*, 1 Mont. 17; confirming *Ex parte Horwood*, 1 Mont. & Mac. 169; *Ex parte Hencliffe*, 1 Mont. 24.

Where a debt of 27,620*l.* 1*9s.* 10*d.* was due from the bankrupts at the bankruptcy to their bankers on a balance of account, and such balance was covered by joint promissory notes of the bankrupts to the extent of 18,000*l.*, and also by a mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for the payment of the whole balance; and part of the debt, to the amount of 17,000*l.*, had been permitted to be proved by the bankers against the joint estate, on their petition, for the purpose of their commanding the choice of assignees:—Held, that the bankers were entitled to a proof of the 18,000*l.* against the joint estate, and to prove the residue against the separate estate of one of the bankrupts. *Ex parte Ladbroke*, 2 Glyn & J. 81.

In a bankruptcy, a creditor by a joint and several bond must elect whether he will go against the joint and separate estate; but is not bound by taking a joint security. *Ex parte Hay*, 15 Ves. jun. 4.

A joint note of A. and B. is given for goods sold to A. only, and a receipt given as for money paid. A joint commission issued against A. and B. The seller may still prove his debt for goods sold against the separate estate of A. *Ex parte Seddon*, 3 Cox, 49.

On a separate commission against one of a firm, a joint and separate creditor, who, in respect of his joint debt had taken a warrant of attorney, and sued out a separate execution against

the bankrupt:—Held, entitled to prove his separate debt, without giving up his execution. *Ex parte Stanborough*, 5 Madd. 89.

B. and C., being indebted to A., give a joint and several bond; A. takes (as part of the same security) a joint warrant of attorney, and enters up a joint judgment; B. and C. become bankrupt:—Held, that the bond is merged in the judgment, and that A. can only prove against the joint estate of B. and C. *Ex parte Christie*, 2 Deac. & Chit. 155; 1 Mont. & Bligh, 352.

**Waiver of Proof.**—Creditors having proved under a joint commission of bankrupt, upon a joint and several obligation, but not having received a dividend, are permitted to waive their proof, and to prove against the separate estate, not disturbing any dividend already made. *Ex parte Bielby*, 13 Ves. jun. 70.

A., carrying on business on his separate account, and also in partnership with B., gives a bill of exchange, drawn by himself, to the order of A. and B., and indorsed by them. A separate commission issues against A., B. dies, and the holder of the bill proves it under A.'s commission; having afterwards learnt that distinct accounts were to be kept of the estates of A. and B., he applied to be at liberty to prove against the joint estates of A. and B., in addition to his proof against the separate estate of A.:—Ordered, that he should be at liberty either to retain his present proof, or to withdraw it, and prove against the joint estate. *Ex parte Masson*, 1 Rose, 159.

A joint creditor sues out two separate commissions, under one he proves against the joint estate, and receives a dividend:—Held, that he had not concluded himself to prove as a joint creditor, but that refunding the dividend, with interest, he might prove as a separate creditor. *Ex parte Bolton*, 2 Rose, 389.

## 28. Proof on several Estates.

### (a) Bills and Notes.

A creditor by bill or note may prove against all the parties to his security; but if, previously to his proof against A., dividends have been declared upon his proof against B. or C., &c., such dividends must be deducted from his proof against A. Nor does it vary this rule, that the creditor, not being then prepared to substantiate his proof against A., had been permitted to entertain a claim against his estate previously to the declaration of the dividend under the other commissions, and had also, previously to such declaration, made his own affidavit of his debt to be laid before A.'s commissioners at their next meeting. *Ex parte Bank of Scotland*, 2 Rose, 197; 19 Ves. jun. 310.

A holder of a bill of exchange drawn by a firm upon some of their members, constituting a distinct firm, has a right to prove it against all the parties according to their liabilities upon the bill, provided he was ignorant of their partnership. *Ex parte Adam*, 2 Rose, 36; 1 Ves. & B. 493.

Such proof is not, however, to be admitted where the holder was aware of the identity of the parties. *Ex parte Bigg*, 2 Rose, 7. And see *Ex parte Walker*, 1 Rose, 440.

Proof is allowed against each person liable upon a bill or bond, if nothing be received before the bankruptcy, until 20s. in the pound is received, without distinction, whether principals or sureties. *Ex parte Rushforth*, 10 Ves. jun. 416.

A., holding the acceptance of B., which he had taken in ignorance that B. was a member of the firm of C. & Co., the drawers, and of which firm one of the members who was an infant proves a debt against the joint estates under separate commissions against B. and C., (the infancy of the other partner excluding a joint commission) making his proof, not as against the liability of the parties arising from the contract on the bill, but upon his right to include or exclude the resort to a dormant partner:—Held, that such mode of proof was a conclusive election to resort to the joint funds alone, and discharged the separate estate of the acceptor from the liability, which would otherwise have arisen out of the ignorance of the holder that the acceptor was a member of the firm of the drawers. *Ex parte Liddell*, 2 Rose, 34.

W., carrying on a separate trade, is also in partnership with G., under the firm of G. & Co.; W., in his separate character, being indebted to G. & Co. gives that firm a bill of exchange, drawn by O. & Co., and accepted by him; G. & Co., being largely indebted on a drawing account to F. & Co., pay the bill to them, who indorse it to D. & Co.; O. & Co. compound with their creditors; W., G. & Co., and F. & Co. become bankrupts; D. & Co., by the composition, and by proving under the commission of W. and F. & Co., receive 20s. in the pound upon the bill:—Held, that although G. & Co. were only indebted to F. & Co. in respect of their acceptances not taken up when they became bankrupts, yet that the assignees of F. & Co. were entitled to stand in the place of D. & Co. in respect of the proof made by them under W.'s commission, to the extent of the dividends paid to D. & Co. under F. & Co.'s commission. *Ex parte Greenwood*, Buck, 237.

If bills amounting to 1320l. be delivered by the drawer to a creditor as collateral security for a debt of 4000l., and the drawer and acceptor became bankrupt, but the estate of the acceptor prove solvent, the creditor is entitled to receive 20s. in the pound on the bills against the estate of the acceptor, and also prove the debt of 4000l., and receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer. *Ex parte Sammon*, 1 Deac. & Chit. 564.

The holder of a bill, without notice that the indorser and acceptors were members of the same firm, is not entitled to a double proof. *Ex parte Moult*, 1 Mont. & Bligh, 28.

In bankruptcy among partners concerned also in other trades, the paper of one firm being given to the creditors of another, proof was allowed upon both estates. *Ex parte Bonbonas*, 8 Ves. jun. 546.

Where joint debts were paid by a bill drawn by one of the debtors, and accepted by another, each carrying on distinct trades, proof was allowed under their separate commissions upon the bill. *Ex parte Wensley*, 2 Ves. & B. 254; 1 Rose, 441.

A. being indebted to B. gives him a check upon his bankers to pay him in a bill at three months. The bankers draw a bill for the amount upon their correspondents in London who accept it, the drawers and acceptors become bankrupt, and B. proves, and receives a dividend under both commissions:—Held, that B. was entitled to prove his debt also under A.'s commission. *Ex parte Rathbone*, Buck, 215.

A creditor, who, knowing the partnership of the parties, takes a bill drawn by all and indorsed by one, is not entitled to double proof, upon the ground that previously to taking the bill he required and had the indorsement of the one, and thereby raised a contract for double security. *Ex parte Bank of England*, 2 Rose, 82.

T. was in partnership with M. & F., he also carried on a separate trade, and being indebted 100*l.* on his separate account to K., he sent him a bill of exchange that wanted two months of becoming due for 300*l.*, indorsed by T., M. & F., but not by T. in his individual character, and requested K. to give him credit for 100*l.*, and to send him a bill for the remainder of the 300*l.*; K. gave him credit for 100*l.*, and sent him a banker's check for 200*l.*, which was duly paid. The bill for 300*l.* was dishonoured; T., M. & F. became bankrupts:—Held, that K. was not entitled to prove for any part of the 300*l.* against the separate estate of T. *Ex parte Kirby*, Buck, 511.

#### (b) Joint Adventures.

Where different firms are engaged in a joint adventure, the creditors of the adventure may prove against the joint estates of the minor partnerships. *Ex parte Nolte*, 2 Glyn & J. 295.

Where several firms are engaged in a joint adventure, the creditors of the adventure, in the event of bankruptcy, and there being no joint property, must prove against the estates of the individuals, not of the firms. *Ex parte Wylie*, 2 Rose, 393.

Dividends declared upon a bill of exchange, though not received, must be deducted from the proof by the indorsee under another commission of bankruptcy. *Ex parte Leers*, 6 Ves. jun. 644.

Where A., a sole trader, B. & C. partners, and D. also a trader, engaged in a joint adventure for a joint purchase of goods by them, and the vendor, with a knowledge of their joint interest, received in payment a bill drawn by A. on and accepted by B. & C., the vendor was entitled to prove the bill against both their estates. *Ex parte Wensley*, 1 Rose, 441; 2 Ves. & B. 254.

A. and B., trading under the firm of A. & Co., agree with C. to purchase coffee on a joint account, A. & Co. to have the management of it; A. & Co. purchase the coffee, and C. pays them for his share; A. & Co., without the consent of C., deposit the coffee with D., who advances money on it, and, ignorant that C. is concerned in it,

debts A. & Co. with the advances. The coffee is sold at a loss, a commission issues against A. and B., and another against C.: D. is entitled to prove his balance beyond the proceeds against the estate of C., as well as against the estate of A. & B. *Ex parte Gellar*, 1 Rose, 297.

#### (c) Adjustment between Estates.

A., B., and C. were in partnership, and A. and B. were also concerned as partners in a distinct house. Commissions issued against both firms. The estates of two cannot claim any thing against the estate of three, until the joint creditors of the three are fully satisfied. *Ex parte Hargreaves*, 1 Cox, 440.

Where part of an account between two mercantile houses consists, on both sides, of bills, which may be proved against both estates, the cash balance as between the houses is provable, excluding the bills outstanding on both sides; but, in the event of a surplus, the bills on both sides are to be included in the amount. *Ex parte Laforest*, 1 Mont. & Bligh, 363; 2 Deac. & Chit. 199.

Contribution decreed between the joint and separate estates, the former having paid beyond the proportion of a debt to the crown under an extent, and the bankrupts being bound jointly and severally. *Rogers v. Mackenzie*, 4 Ves. jun. 752.

Joint creditors, under an order to prove against separate estates, proving against one or more of them exclusively of the rest, the estate so burdened is entitled to reimbursement from the others. *Ex parte Willock*, 2 Rose, 392.

Joint creditors, under a separate commission, are not entitled to have the expenses of a solicitor, employed by them to conduct examinations, &c. before the commissioners, paid out of the funds. *Ex parte Longman*, 1 Rose, 303.

Under a joint commission of bankruptcy, the separate estate of one partner has a lien on the other's share of the surplus of the joint estate, in respect of a debt proved under bills drawn in the name of the firm for a separate debt; and may come in with the other separate creditors for the deficiency. *Ex parte King*, 1 Rose, 219; 17 Ves. jun. 115.

Under a separate commission, the separate estate is entitled to be reimbursed, out of the joint estate, expenses incurred in recovering property for the benefit of the joint creditors. *Ex parte Rutherford*, 1 Rose, 201.

### 29. Proof by Partners.

#### (a) Solvent Partner.

*What Debt provable.*—Under a separate commission, proof was allowed by solvent partners who had paid the joint debts since the bankruptcy, on account of a misapplication by the bankrupt to his own use, not by contract, but by fraud, exceeding his authority, and without the privity of his partners. *Ex parte Yonge*, 3 Ves. & B. 31; 2 Rose, 40.

If a managing partner draws out monies, and conceals the fact, or disguises it in the partner-

ship books, this is fraud, and proof may be made against the separate estate. Otherwise, if the transaction is duly entered in the books. *Ex parte Smith*, 6 Madd. 2; 1 Glyn & J. 74.

A partnership is not entitled to prove against the separate estate of an individual member of it, in respect of funds drawn by such member out of the general stock, unless the same have been drawn out fraudulently, that is, against the articles of partnership, without the knowledge, consent, privity, or subsequent approbation of his co-partners, or to increase his private estate. *Ex parte Harris*, 1 Rose, 129, 437; 2 Ves. & B. 210.

Under a joint commission, proof ordered by the joint against the separate estate of one partner who had appropriated partnership stock, without the privity or sanction of the other partners, and afterwards retained it with their knowledge, but under circumstances from which their subsequent approbation could not be inferred. *Ex parte Watkins*, 1 Mont. & Mac. 57.

A solvent partner is entitled to prove against the estate of a bankrupt co-partner the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying the bankrupt's estate against them. *Ex parte Taylor*, 2 Rose, 175.

If a solvent partner pay all the joint debts, his proof against the separate estates of his partners will be limited to the amount of their respective shares of the joint debts so paid; and if their estates are not sufficient to pay 20s. in the pound, the solvent partner will not be allowed to prove the deficiency of each estate against the estate of the other. *Ex parte Watson*, Buck, 449; 4 Madd. 477.

A, being a dormant partner with B, dissolves partnership, and B. is declared to be indebted to A. on a balance, who receives a cognovit for debt and costs; B. becomes bankrupt:—Held, that A. is entitled to prove his debt against the estate, although some partnership debts are unpaid. *Ex parte Grasebrook*, 2 Deac. & Chit. 186.

Money paid by one partner to another, before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, and not in fact so applied, is provable by the solvent partner as a debt under the commission, although the solvent partner was not called upon to repay the debt until after the bankruptcy. *Wright v. Hunter*, 1 East, 20; 5 Ves. jun. 792.

An agreement to share the profits of a member of a firm constitutes a debt provable against the member for the share. *Ex parte Dodgson*, 1 Mont. & Mac. 445.

A, induced by the fraudulent representations of B. as to the profits of his business, gives him a certain sum of money for a share of it: on the discovery of the fraud, A. files a bill in equity for an account to have the partnership declared void, and for a receiver. The receiver was ordered; B. becomes bankrupt. Petition by A. to be admitted to prove under the commission refused, with liberty to make a claim: although A. as against B. might have an equity to say he never was a partner, it would be difficult to say so as

against third persons. *Ex parte Broome*, 1 Rose, 63.

Where one of two partners, who were country bankers, became bankrupt, and the defendants, being holders of their notes, obtained payment of part of them from the London banker at whose house they were payable, out of the funds in their hands belonging to the country bank; and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to the defendants in payment of the residue of the notes in their hands, and afterwards became bankrupt:—Held, that the assignees could not recover from the defendants the money so paid to them by the London banker, nor the proceeds of the said bill. *Harvey v. Crickett*, 5 M. & S. 336.

A partner, who, after getting his certificate, had taken up the notes of the firm, was permitted to prove against the joint estate. *Ex parte Atkins*, Buck, 479.

*Intertrading.*—Where partners are engaged individually in other concerns, if they are distinct, proof may be made in bankruptcy of debts as between the different estates; not if they are merely branches of the joint concern. *Ex parte St. Barbe*, 11 Ves. jun. 413.

Where one member of a firm, who carries on business on his separate account, supplies goods to the firm, and a commission issues against the firm, the debt is provable; but not so for money advanced. *Ex parte Cook*, 1 Mont. 228.

Where one partner carries on a distinct trade, the other partner may, under his commission, prove a debt for goods sold to him by the firm. *Ex parte Hesham*, 1 Rose, 146.

*When.*—A partner cannot prove or claim until the joint debts are paid. *Ex parte Ellis*, 2 Glyn & J. 312; *S. P. Ex parte Carter*, 2 Glyn & J. 233.

A partner cannot prove against his co-partner upon indemnifying the joint estate. *Ex parte Moore*, 2 Glyn & J. 166.

#### (b) Retired Partner.

A retired partner, with a covenant of indemnity against the debts, in consideration of assigning his share of the property, was admitted, under a commission against the remaining partner, to prove a joint debt paid by him, indemnifying the joint estate. *Ex parte Ogilby*, 3 Ves. & B. 133; 2 Rose, 177.

A partner, continuing the business, took an assignment of all the stock, &c., and covenanted to indemnify the retiring partner from the debts then owing from the partnership. The continuing partner became bankrupt, and obtained his certificate; and subsequently an action was commenced against the retiring partner, upon an acceptance of the partnership. Judgment was obtained against him, and he paid the debt and costs:—Held, that an action would lie against the bankrupt upon the covenant, since, under the 49 Geo. 3, c. 121, s. 8, the retiring partner might,

on his liability, have resorted to and proved his debt under the commission, and was therefore barred by the certificate. *Wood v. Dodgson*, 1 Rose, 47; 2 M. & S. 195.

In December, 1818, A., B., C., and D. dissolved partnership as bankers, by deed, by which it was agreed that A. and B. should retire, and the business be carried on in future by C. and D.; C. and D. covenanted to indemnify A. and B. against all outstanding demands. In October, 1825, C. died, and a commission issued against D., A. having been obliged to pay certain partnership debts which C. and D. had undertaken to indemnify him against:—Held, that he might prove under the commission for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution in 1818. *Ex parte Carpenter*, 1 Mont. & Mac. 1.

(c) *Solvent Joint Adventurer.*

Money advanced to S. by B., one of several partners, out of the partnership funds, on account of payments to be made on policies of assurance underwritten by S., on account of himself and B., in pursuance of a previous agreement between them to become sharers in profit and loss on such policies, was held not provable by the surviving partners of B. under the commission of S., who became bankrupt. *Ex parte Bell*, 1 M. & S. 751; 2 Rose, 136.

(d) *Distinct Firms.*

Where two partners of a large banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of monies procured for the benefit of the aggregate firm, on the credit of the indorsement of the separate firm; the Lord Chancellor held, that no proof could be made on behalf of the firm of the two against the aggregate firm in respect of that debt. *Ex parte Sillico*, 1 Glyn & J. 374.

Where one or more partners of a larger firm carry on a separate trade, proof is admissible on behalf of the separate trade against the aggregate firm only, in respect of dealings between trade and trade. *Id.*

Partners constituting distinct firms may prove against each other: but in a partnership of two, one carrying on business separately, as they are both liable to the same joint debts, the solvent partner is not entitled to prove, under the bankruptcy of his co-partner, a debt for goods sold by his distinct house to the firm, until the joint creditors have been satisfied. *Ex parte Adams*, 1 Rose, 305.

Where two or more partners, but not all, of a larger firm are partners in a distinct trade, and the aggregate firm becomes bankrupt, and one of the firms be indebted to the other, in respect of a dealing arising out of its distinct trade, such debt can be proved by the one firm against the other. *Ex parte Castell*, 2 Glyn & J. 124.

Under a joint commission, there is no proof for either the joint or separate estate against the other, unless the debt arose by fraud, as distinguished from contract; as, by an act against

the expressed or implied contract, and without the express or implied authority of the co-partner; as by over-drawing, to increase the separate estate; or under circumstances implying fraud; as for private purposes, without the knowledge, consent, privity, or subsequent approbation of the other, inferred from his giving the whole control to his partner. *Ex parte Harris*, 2 Ves. & B. 210; 1 Rose, 129, 437.

XI. ASSIGNMENT.

1. *Generally.*

By 6 Geo. 4, c. 16, s. 63, the commissioners were directed to assign to the assignees all the present and future personal estate of the bankrupt, and all property which might revert, descend, be devised or bequeathed, or come to him before he attains his certificate, and all debts due or to be due to him; and after assignment, neither the bankrupt, nor any person claiming through him, shall have power to recover, release, or discharge the same; nor shall any attachment of any debt be available; but the assignees shall recover the same in their own names, as the bankrupt might.

Now, by 1 & 2 Will. 4, c. 56, s. 25, all the personal estate and effects which might be assigned by the commissioners, shall be vested in the assignees by virtue of their appointment merely, without any deed, and, in case of death or removal, in a new assignee, either alone or jointly with others remaining, as the case may be. *Id.*

By 6 Geo. 4, c. 16, s. 64, the commissioners were directed by deed to convey to the assignees all lands, tenements, and hereditaments, except copyholds, or customaryholds, in England, Scotland, Ireland, or any of his majesty's dominions, plantations, or colonies, to which the bankrupt was entitled, and which should descend, be devised, revert to, or come to him before certificate, and all deeds, papers, and writings respecting the same.

So, by s. 65, the commissioners were to make sale of, and convey by deed, all estate of which the bankrupt was seized, in tail, in possession, reversion, or remainder, and whereof no reversion or remainder was in the crown.

So, by s. 68, they were to make sale, by deed, of the bankrupt's copyholds and customaryhold lands, and to authorize any person to make the necessary surrender.

Now, by 1 & 2 Will. 4, c. 56, s. 26, all the bankrupt's real estate, present and future, in the United Kingdom, or his majesty's dominions, plantations, or colonies, as by stat. 6 Geo. 4, c. 16, s. 64, directed to be conveyed to the assignees, shall vest in them by virtue of their appointment, without any deed of conveyance; with similar provisions in case of death or removal.

An assignment in bankruptcy, like any other assignment by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities, &c. *Mitford v. Mitford*, 9 Ves. jun. 100.

The property in a bankrupt's goods is, after

assignment, in the assignee from the time of the act of bankruptcy, by relation. *Cooper v. Chitty*, 1 Burr. 20; 1 W. Black. 65.

The relation to an act of bankruptcy is confined to an act subsequent to the petitioning creditor's debt. *Ex parte Birkett*, 2 Rose, 71.

Under a separate commission, the assignees and the solvent partners are tenants in common, from the date of the act of bankruptcy. *Barker v. Goodwin*, 11 Ves. jun. 83.

Quære, the effect of vacating a bargain and sale in bankruptcy, as to preceding purchasers under the commission? *Ex parte Harris*, 3 Madd. 473.

Where an assignee had absconded, the bargain and sale was ordered to be vacated from the date of the order. *Ex parte Corry*, Buck, 314.

A commission vests in the assignees under it all the property of the bankrupt wherever situate, precluding creditors in Scotland from attaching by sequestration their debtor's property remaining or situate in that country, and from administering it in a course of distribution under such process of sequestration; and although the commission does not in itself operate upon the heritable property of the bankrupt in Scotland, yet it imposes upon him a legal obligation to execute the proper conveyances, and do the necessary acts for transferring it to his assignees. *Scotland (Bank) v. Stein*, 1 Rose, 462. And see *Hunter v. Potts*, 4 T. R. 182.

The assignment under an English commission vests in the assignees, and without the necessity of intimation, the whole of the bankrupt's personal property in Scotland, and all subsequent diligence by any Scotch or other creditor is thereby precluded. *Selkirk v. Davies*, 2 Rose, 97.

The court cannot compel a bankrupt to execute to his assignees an assignment of debts due to him in America, though the American government will not take notice of the rights of the assignees under the bankrupt laws of this country. *Ex parte Blakes*, 1 Cox, 398.

## 2. Provisional Assignment.

By 6 Geo. 4, c. 16, s. 45, the commissioners were empowered to appoint provisional assignees, who might be removed when assignees were chosen, and were to deliver up and assign to them the bankrupt's estate.

The expense of a provisional assignment was not allowed, except where an extent was apprehended. *Ex parte Williams*, 2 Rose, 454; 1 Madd. 141.

The commissioners ought to state in the proceedings their reasons for executing a provisional assignment. *Ex parte Norris*, 1 Glyn & J. 237.

In assumpsit by a provisional assignee, the defendant pleaded the general issue:—Held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the writ and the delivery of the declaration, was no ground of nonsuit on the general issue; and it is doubtful whether it would have been an answer to the

action, if specially pleaded. *Page v. Bauer*, 4 B. & A. 345.

Four persons having been constituted provisional assignees, the creditors chose three of them, together with other persons, to be general assignees. The four then assigned back the bankrupt's estate to the commissioners, to the intent that they might make a valid assignment of the same to the general assignees; and the commissioners immediately assigned the estate to these last, according to the intent specified:—Held, that this was not a good conveyance from the provisional to the general assignees within 6 Geo. 4, c. 16, s. 45, and therefore not effectual to pass choses in action. *Moult v. Massey*, 1 B. & Adol. 636.

The statute imposes a penalty on the provisional assignee, if he does not deliver up the bankrupt's estate to the ultimate assignee. The 67th section enacts, that a suit is not to abate by the death of an assignee, but that it may be prosecuted in the name of the new assignee; and by the 100th section, the sum recovered for a penalty under the act is to be divided among the creditors. An assignee having died, and a suggestion of his death being entered on the record:—Held, that the succeeding assignee was entitled to proceed in a suit which had been commenced by his predecessor against the provisional assignee for a penalty. *Bates v. Sturges*, 5 M. & P. 568; 7 Bing. 585.

In such an action, it was held, that as the assignment to the provisional assignee was recited in the assignment to the second assignee, it was not incumbent on the plaintiff to produce it in evidence. *Id.*

## 3. Freehold Property.

*What Property.*—Under 6 Geo. 4, c. 16, estates of which the bankrupt is seized as a bare trustee, do not pass to his assignees. *Ex parte Gennys*, 1 Mont. & Mac. 258.

A power of revocation, not in possession, but expectant on a contingency, is an interest assignable to the assignees. *Anon. Lofft*, 71.

Tenant in tail mortgaged for years, became bankrupt, and died without suffering a common recovery; his assignee had the estate clear of the mortgage, by the stat. 21 Jac. 1; but if he had suffered a recovery, it would have let in the mortgage and other incumbrances. *Beck d. Hawkins v. Welsh*, 1 Wils. 276.

A joint commission having issued against A., tenant for life, and B., tenant in tail male, remainder in fee to J. S., and his heirs, who were partners in trade:—Held, that the assignees only took an estate in the premises for the life of A. and a base fee, determinable on the death of B. and failure of issue male of his body. *Jervis v. Tyleur*, 3 B. & A. 557. And see *Doe d. Spencer v. Clark*, 5 B. & A. 458; 1 D. & R. 44.

A trader advanced half the money for the renewal of a lease, the lessee giving a note to repay the money, unless she should by will give the estate to one of his children, and then bequeathed the estate to his daughter: the father becoming

a bankrupt, a moiety of the estate vested in the assignee under 1 Jac. 1, c. 15. *Fryer v. Flood*, 1 Bro. C. C. 160.

*At what time Estate passes.*—The bargain and sale to the assignees of the bankrupt's freehold lands did not relate to the act of bankruptcy, so as to vest the title in the assignees from that time. *Doe d. Bedaile v. Mitchell*, 2 M. & S. 446; 2 Rose, 265.

An estate descended after the bargain and sale of the commissioners, and before certificate, was the property of the bankrupt, and did not vest in the assignees, except by a subsequent assignment. *Carleton v. Leighton*, 3 Mer. 667.

A specialty creditor has the same right, under a bankruptcy of the heir of the debtor, as if he had not become bankrupt, and may therefore follow the real assets, or their specific produce, in the hands of the assignees. *Ex parte Morton*, 5 Ves. jun. 449.

*Conveyance.*—By 6 Geo. 4, c. 16, s. 78, the chancellor, upon petition of the assignees or any purchaser from them, if such bankrupt did not dispute the validity of the commission, or if its validity had been established by a verdict at law, might order the bankrupt to join in a conveyance; and if he refused, the order operated as a conveyance as against the bankrupt and all claiming under him.

Before the statute, it was held that a bankrupt was not compellable to join his assignees in conveyances. *Ex parte Crowder*, 2 Rose, 327; *S. P. Waugh v. Land*, Coop. C. C. 134.

A petition that a bankrupt be compelled to convey under that section, refused until he could have an opportunity of trying the validity of the commission. *Ex parte Thomas*, 1 Mont. & Mac. 64; 2 Glyn & J. 278.

A bankrupt who is disputing the commission at law cannot, although nonsuited, be compelled to convey. *Id.*

A bankrupt retaining possession of a cottage and land, which had passed to the assignees by the bargain and sale under the commission, and which the assignees had contracted to sell, was ordered to deliver up possession within fourteen days after personal service of the order. *Ex parte Hargraves and Shaw*, 2 Glyn & J. 59.

The lease of a house, belonging to a bankrupt, having been sold by auction under the usual order, the court directed the assignees to execute an assignment, and the bankrupt to deliver up possession to the purchaser: upon refusing to comply, the bankrupt was ordered to be committed. *Ex parte Hawkins*, 1 Mont. & Mac. 115.

The court will not order the bargain and sale from the commissioners to the assignees to be given by them to a purchaser, upon his allegation, merely, that the bankrupt had no other freehold property than that which was conveyed to the purchaser under the commission. *Ex parte Pocock*, 1 Deac. & Chit. 104.

#### 4. Copyhold Property.

The commissioners might except the copyhold

estates of the bankrupt out of the bargain and sale, and convey them directly to the purchaser. *Ex parte Harvey*, Buck, 493.

Where a copyhold was sold under a commission, a good title was made by a bargain and sale from the commissioners to the purchaser. *Ex parte Holland*, 4 Madd. 483.

A. became entitled to a copyhold estate on the death of his mother, to which she had been admitted by copy of court-roll. Before he could be admitted, he became bankrupt, and shortly afterwards died without admittance. The commissioners and assignees under the commission executed a bargain and sale to B., the defendant, of the said copyhold estate, to which he was duly admitted:—Held, that he took a fee simple conditional at common law; and that the commissioners had power to execute a valid conveyance of his estate by bargain and sale, pursuant to the statutes 13 Eliz. c. 11, s. 7, 1 Jac. 1, c. 15, s. 17, and 21 Jac. 1, c. 19, s. 12, although the bankrupt died before the bargain and sale, and although he never had been admitted tenant of the manor. *Doe d. Spencer v. Clark*, 1 D. & R. 44; 5 B. & A. 458.

#### 5. Leasehold Property.

##### (a) Generally.

*Statute.*—By 6 Geo. 4, c. 16, s. 75, bankrupts entitled to leases or agreements for leases, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable in case they deliver up such leases or agreements to the lessor, or person agreeing to grant the lease, within fourteen days after they shall have had notice that the assignees have declined: and if the assignees shall not, upon being thereto required, elect whether they will accept or decline such lease or agreement, the lessor, or any person entitled under him, may apply by petition to the chancellor, whomay order them so to elect, and deliver up such lease or agreement in case they decline the same, and the possession of the premises, or may make such other order therein as he shall think fit.

This enactment is similar to the previous one in 49 Geo. 3, c. 121, s. 19, which did not extend to a parol agreement for a lease. *Ex parte Sutton*, 2 Rose, 86.

And is confined to cases between lessor and lessee, and does not extend to cases between a lessee and his assignee of a lease. *Young v. Taylor*, 3 B. & A. 531.

It does not apply to a contract, in its nature not a lease, but for a purchase of property. *Hep v. Booth*, 1 B. & Adol. 505.

*What passes.*—If the servant of A. embark his property, and therewith purchase a lease, and afterwards commit an act of bankruptcy, and then assign the lease to A.; A. has not such an equitable lien as to be an answer to a



action of trover by the assignees. *Blezzham v. Graham*, Peake's Add. Cas. 3—Kenyon.

A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring the trust accordingly: a bill was filed on behalf of the creditors of W., under the commission, claiming the lease as part of his estate; and the court directed an issue to try whether W.'s name was used in the lease as a trustee for R.—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, that the declaration of trust was valid, though executed after the bankruptcy, and that the lease did not pass to W.'s assignees. *Gardner v. Rowe*, 5 Russ. 258; 2 Sim. & Stu. 346.

(b) *Covenant not to assign without License.*

The usual covenant, not to let, &c., will not prevent a lease from passing to the assignees. *Doe d. Cheere v. Smith*, 1 Marsh. 359; 5 Taunt. 795; 2 Rose, 280. And see *Doe d. Mitchenson v. Carter*, 8 T. R. 57, 300; and *Lloyd v. Crisp*, 5 Taunt. 249.

A grants a lease to B, which contains a covenant that B, his executors or his administrators, without mentioning assigns, should not underlet without the consent of the lessor: B. becomes bankrupt, and his assignees assign the premises to C.; B. obtains his certificate, and C. re-assigns the premises to him, after which he underlets them to another person:—Held, that B. having been discharged at the time of his bankruptcy from all covenants in the lease, by statute 49 Geo. 3, c. 121, s. 19, the under-letting by him, which was in the character of assignee, was no forfeiture of the lease. *Id.*

A proviso in a lease, that the lessee, his executors or administrators, shall not assign without the lessor's consent in writing, did not prevent the commissioners from assigning the lease to the assignees without such consent. *Doe d. Goodbehers v. Bevan*, 3 M. & S. 353; 2 Rose, 456.

In cases of bankruptcy, the assent of the lessor is presumed in law to have been given to the assignment of the premises by the commissioners. *Wadham v. Marlowe*, 2 Chit. 600; 4 Dougl. 54; 8 East, 314, n.; 1 H. Black. 438, n.

(c) *Proviso to be void in case of Bankruptcy.*

Property may be limited or leased to a man to go over to revert back in the event of his bankruptcy. *Brandon v. Robinson*, 1 Rose, 197; S. C. nom. *Ex parte Brandon*, 18 Ves. jun. 429.

If a lease to a trader contain a proviso that it shall be void if he become bankrupt, the term does not pass to his assignees, but determines altogether upon that event taking place. *Roe d. Hauster v. Galliers*, 2 T. R. 133.

But, to prevent its passing, there must be an express proviso to that effect. *Doe d. Goodbehers v. Bevan*, 3 M. & S. 353; 2 Rose, 456.

If A. let a house to B. with a covenant that the lease shall determine on B. committing an act

of bankruptcy, on which a commission of bankrupt should issue; and by another deed of the same date, A. grants the use of furniture to B. in like manner, and with a similar covenant to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy. If B. become bankrupt, and the jury find that B. was the reputed owner of the furniture, it will pass to the assignees, notwithstanding these covenants. *Hickenbotham v. Groves*, 2 C. & P. 492—Abbott.

If a lease contains a condition that it shall be forfeited if seized in execution, and upon an execution issuing the lessor re-enter, and a commission of bankruptcy issue against the lessee, the lessor is entitled to the emblements. *Davis v. Eyton*, 7 Bing. 154; 4 M. & P. 820.

(d) *Assignees' Election to take.*

*When necessary.*—The general assignment of a bankrupt's personal estate does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate; and, therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy. *Copeland v. Stephens*, 1 B. & A. 593. And see *Doe d. Palmer v. Andrews*, 4 Bing. 348; 12 Moore, 601; 2 C. & P. 598.

Where an equitable mortgage of leasehold property applied for a sale, the court refused to order him to indemnify the assignees against any breach of covenants in the lease; but gave the assignees time to accept or reject the lease. *Ex parte Fletcher*, 1 Deac. & Chit. 318.

A landlord's claim for rent can only be enforced against assignees after a seizure under a *fi. fa.* by distress. *Getkin v. Wilks*, 2 Dowl. P. C. 189.

*Election by using Premises.*—If the assignees intermeddle with and assume the management of a farm, this is a sufficient election to take the term, and make them liable to the landlord, in consideration of their tenancy, for all mismanagement. *Thomas v. Pemberton*, 7 Taunt. 206.

Where the assignees enter upon and take possession of leasehold property, they become chargeable with the covenants in the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold. *Henson v. Stevenson*, 1 B. & A. 303.

Where the assignees of a bankrupt, who was lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises till the 10th, and ordered them to be milked there:—Held, that they thereby became tenants to the lessor; and, the cows being removed on the 10th to avoid a distress for arrears of rent, that he had a right to follow and distrain them, under 11 Geo. 2, c. 19. *Welch v. Myers*, 4 Camp. 368—Ellenborough.

Where the assignees of a bankrupt lessee, chosen on the 15th of November, kept the bank-

rupt on the premises, carrying on the business for the benefit of the creditors, until April following, and himself occasionally superintended; but on the 23d December disclaimed the lease by letter to the landlord:—Held, that notwithstanding such disclaimer, he had elected to accept the lease by using the premises for the benefit of the creditors. *Clarke v. Hume, R. & M. 207—Abbott.*

The assignees of a bankrupt, having allowed his effects to remain on the premises occupied by him, nearly a twelvemonth after the bankruptcy, for the purpose of preventing a distress, paid the arrears of the rent due, at the same time intimating to the landlord that they did not mean to take the lease unless it could be advantageously disposed of; the effects were soon after sold, and removed from the premises; the lease was at the same time put up to sale by order of the assignees, but there were no bidders for it; they omitted to return the key to the landlord for near four months after; however, they were not asked for it; and they no otherwise made use of the premises:—Held, that they were not, under these circumstances, liable to the landlord as assignees of the lease. *Wheeler v. Bramah, 3 Camp. 340; 1 Robt. 363—Ellenborough.*

Where, however, the assignee, on being applied to, replied, that if he could not let it by the next quarter day, he would give up the property, and continued in and paid rent until that time:—Held, that it was an assent. *Broome v. Robinson, 7 East, 339.*

**Election by endeavouring to effect a Sale.]—**Assignees have a right to do reasonable acts to ascertain the value of property. *Hope v. Booth, 1 B. & Adol. 505—Per Lord Tenterden.*

Assignees are not concluded by putting up the premises to sell; they may make an experiment to see if the lease be beneficial; but in a case where they put up the premises to auction, and found a purchaser, and received a deposit, but the contract of sale afterwards went off, without the assignees shewing any reason why they did not enforce the sale:—Held, that they were liable to the payment of rent, as assignees of all the estate and interest, &c. of the bankrupt, in the premises. *Hastings v. Wilson, Holt, 290—Gibbs.*

But the mere fact that the assignees advertised and put the estate up to sale, (without stating themselves to be the owners or possessed thereof), they never having in fact taken possession of the premises, and, there being no bidder, the premises were not sold, is no more than an experiment to ascertain the value of the lease, and not an assent on the part of the assignees. *Turner v. Richardson, 7 East, 335; 3 Smith, 330.*

If a bankrupt have a lease of premises, and also a reversionary interest in them, and his assignees sell his estate and reversionary interest in the premises, it amounts to an acceptance of the lease, by the assignees. *Page v. Godden, 2 Stark. 309—Ellenborough.*

If the assignee hold the lease from December

to May, and put a person into possession with instruction to let the premises, and several applications are made by parties desirous to take them, but they remain unlet, and, on the landlord calling upon the assignee for payment of rent, he says he will pay it if he can make any thing by the house; and the jury find that this is only a conditional acceptance of the lease, and that he has not retained it an unreasonable time: the court will not disturb the verdict. *Lindsay v. Lambert, 12 Moore, 209; 2 C. & P. 526.*

If the assignees so act as to make the property of less value to the landlord, and as if the property were vested in them, it is said to be an election. *Carter v. Warne, 4 C. & P. 191—Tent.*

If a sale take place on the premises, of the stock in trade, and the house and shop fixtures, and the catalogue state that on the same day will be sold the valuable lease of the premises, with commanding shop, held for an unexpired term of 16 years from Lady-day preceeding, at the low rent of 20l. per annum, and the catalogue describes the sale to be made without reserve, and contains a list of fixtures, some of them belonging to the landlord, and some put up by the bankrupt, and the lease is bought in, but all the fixtures are sold, and the premises much injured by their being taken down and carried away, it is a taking possession. *Id.*

**Election by exercising Acts of Ownership.]—**Where the assignees of a bankrupt, who was possessed of a term, part of which he had under-let to another, released such under-tenant, and on being afterwards asked by the lessor to elect, refused to take the original lease:—Held, that this did not amount to an acceptance by them, and that they were not liable as assignees of the term. *Hill v. Dobie, 2 Moore, 342; 8 Taunt. 325.*

If mortgaged property be sold with the bankrupt's goods, but without the sanction of the assignees, their returning a copy of the catalogue to the Excise Office, with a declaration subscribed by them that the goods belonged to the bankrupt, for the purpose of exempting the goods from auction duty, it is not an adoption of the sale by the assignees. *Bleaden v. Hancock, M. & M. 465—Tindal.*

**Proceedings to compel Election.]—**The court was not empowered by the 49 Geo. 3, c. 121, s. 19, to determine the question of election of a lease by the assignees. *Ex parte Quentock, Buck, 190.*

Assignees in possession having elected not to accept the lease, an issue of quantum damnificatus was directed. *Id.*

In one case the assignees were allowed ten days to make their election. *Ex parte Scott, 1 Rose, 446, n.*

From the 10th to the 23d of March is a reasonable time for assignees to elect whether they will accept or reject the bankrupt's lease. *Ex parte Fletcher, 1 Deac. & Chit. 356.*

An order was made upon assignees under 49 Geo. 3, c. 121, s. 19, to deliver up possession, and execute an assignment or surrender of the bankrupt's benefit in a lease, where the lease itself had been deposited in the hands of a third person as a security. *Ex parte Clunes*, 1 Madd. 76; 2 Rose, 452.

On petition by the lessor, to compel assignees to elect whether they will accept or decline the lease, the court has no power under the statute to make the assignees pay the costs, or to give the lessor the costs out of the bankrupt's estate. *Ex parte Bright*, 2 Glyn & J. 79.

(c) *In whom the Term is vested.*

If a lessee become bankrupt, the term remains vested in him, until either the assignees elect to take it, or until he himself delivers it up, under the provisions of 6 Geo. 4, c. 16, s. 75. *Tuck v. Tyson*, 6 Bing. 321; 3 M. & P. 715.

A surety for a lessee is liable in respect of the breaches of covenant which accrue after the date of a commission against the lessee, but before the delivery up of the lease by the bankrupt. *Id.*

If a lease is delivered up by the lessee, in pursuance of the statute, it does not operate, by relation, as a surrender of the lease from the date of the commission. *Id.*

Assignees of a bankrupt lessee, by accepting the lease, discharge the bankrupt from any claim upon him for rent. *Onslow v. Corrie*, 2 Madd. 330.

If a lease is determinable upon notice at the will of the lessor or lessee, and the lessee covenants to leave, on quitting, the hay, straw, &c. on the premises, the bankruptcy of the lessee, and the election of his assignees not to take the lease have the same effect with reference to the covenant, as though the lessee had quit upon notice. *Ex parte Whittington*, Buck, 87; *S. P. Ex parte Nixon*, 1 Rose, 445.

If a lease, containing a covenant, that the lessee, at the expiration, or other sooner determination of the term, shall take the off-going crop, is determined by the order of the Lord Chancellor in bankruptcy, under the 49 Geo. 3, c. 121, s. 19; the assignees are entitled to the off-going crop. *Ex parte Mansdrell*, Buck, 83; 2 Madd. 315.

By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as after-mentioned, it was agreed between the lessor and lessee, and the lessor covenanted, that, on the expiration, or other sooner determination of the term, he, the lessor, should and would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side. The lessee became bankrupt, and his assignee declined the lease (which was delivered up), but he required the fixtures to be repurchased, and brought an action of covenant against the lessor for not appointing an appraiser:—Held, that, as by 6 Geo. 4, c. 16, s. 75, the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question

could not be enforced by the assignee against the lessor. *Kearsey v. Carstairs*, 2 B. & Adol. 716.

A coachmaker, who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair, in pursuance of the bankrupt's contracts; in August, the bankrupt's effects were sold, and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following. In an action by the landlord for a quarter's rent due the Christmas following:—Held, that the assignees were liable. *Ansell v. Robson*, 2 C. & J. 610.

Seemle, that if a bankrupt rely on section 75 as a defence to an action of covenant by his lessor, he must plead specially the facts to bring him within the section. *Hope v. Booth*, 1 B. & Adol. 505—*Parke*. And see *Bayley v. Ballard*, 1 Camp. 416.

6. Powers.

By 6 Geo. 4, c. 16, s. 77, all powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any ecclesiastical benefice), may be executed by the assignees for the benefit of the creditors.

There is no equity to compel a bankrupt to execute a general power of appointment for the benefit of his creditors in their favour, or in the favour of a purchaser from them. *Thorpe v. Goodall*, 1 Rose, 40, 270; 17 Ves. jun. 368.

Therefore, a bankrupt seised for life, with a general power of appointment with remainder in default of appointment to the heirs of his body, cannot be compelled by decree in equity to execute the power for his creditors. *Id.*

A trader, being seised of an estate for life, with a general power of appointment, with remainder in default of appointment, to himself in fee, after having committed an act of bankruptcy upon which he was afterwards declared a bankrupt, executes his appointment in favour of an appointee:—Held, that all his interest having passed to the assignee by the assignment, such appointment was void; and, therefore, that his assignee under the commission had a sufficient legal estate to maintain an ejectment. *Doe d. Coleman v. Brittain*, 2 B. & A. 93.

By marriage settlement, the husband took an estate for life, with power of appointment to children, remainder to trustees to preserve, &c., remainder to children in tail in default of appointment, remainder to husband in fee in default of issue. The husband became bankrupt, conveyed in the usual way all his property by bargain and sale to his assignees, and afterwards executed an appointment to his son in fee, after his own life estate. The assignees sold the life estate to the bankrupt's mother:—Held, that the son took nothing under the appointment, but was entitled to an estate tail under the original settlement. *Bedham v. Mee*, 7 Bing. 695; 1 M. & Scott, 14.

### 7. Offices and Places.

The place of under-marshal of London is saleable under a commission of bankruptcy. *Bulter v. Richardson*, Amb. 73.

The place of a Jew broker is not saleable under a commission. *Ex parte Lyons*, Amb. 89.

### 8. Personal Property.

#### (a) Generally.

The words of the statute are—"All present and future personal estate of the bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate." 6 Geo. 4, c. 16, s. 63.

The commissioners might assign all the bankrupt's property abroad as well as at home. *Hunter v. Potts*, 4 T. R. 182.

So, his after-acquired personal property and debts. *Kitchen v. Bartsch*, 7 East, 53; 3 Smith, 58.

The assignees were not, under the 5 Geo. 2, c. 30, entitled to detain from the bankrupt any part of his wearing apparel, on the ground of its being unnecessary, he himself being the party to determine that at the risk of an indictment. *Ex parte Ross*, 1 Rose, 33; 17 Ves. jun. 374.

#### (b) Ships.

By 6 Geo. 4, c. 16, s. 72, nothing therein provided as to the passing of property to the assignees, in case of reputed ownership, is to invalidate or affect any transfer or assignment of ships or shares thereof, made as a security for debts, either by way of mortgage or assignment duly registered according to 4 Geo. 4, c. 41.

By 3 & 4 Will. 4, c. 55, s. 42, mortgagees, or their trustees, of ships or shares thereof, are not, by reason of the transfer, to be deemed the owners, nor the mortgagors to be deemed to have ceased to be owners, except so far as may be necessary to effect sales thereof.

By s. 43, transfers by way of mortgage duly registered are not affected by any act of bankruptcy of the mortgagor, after the registration, notwithstanding he may have the reputed ownership and possession.

Before these statutes, it was held, that the former Ship Register Acts, 26 Geo. 3, c. 60, and 34 Geo. 3, c. 68, did not tend to repeal or prevent the operation of the statute 21 Jac. 1, c. 19, s. 11, (bankrupt act), on British registered ships: therefore, where the owner of a ship assigned his interest in her to J. S., by deed, who became the registered owner, but by his permission the former owner continued to have the ship in his possession, and exercised all acts of ownership over her, until he became bankrupt:—Held, that the property in the ship passed to the assignees of such owner, although the register was duly indorsed to J. S. before the act of bankruptcy, and the transfer was complete under the above acts. *Monkhouse v. Hay*, 4 Moore, 549; 2 B. & B. 114; 8 Price, 256, affirming *Hay v. Fairbairn*, 2 B. &

A. 193; *S. P. Robinson v. Macdonnell*, 5 M. & B. 228. And see *Ex parte Stadgroom*, 1 Ves. jun. 163.

So, though such requisites were completed after the act of bankruptcy, and before the action brought. *Moss v. Charnock*, 2 East, 399.

A. and B., owners of a ship, executed an absolute bill of sale to C. and D. for a nominal consideration. There was a parol agreement between them, that C. and D. should accept bills for the accommodation of A. and B.; that the ship should be a security to C. and D. for any advances they should make on such acceptances; and that, until default made by A. and B. in providing for the acceptances, the ship should remain in their possession and management. The ship was registered in the names of C. and D., but A. and B. remained in the possession and management of her, appeared to the world as owners, and obtained credit from appearing so. Before default made by A. and B., in providing for the acceptances, C. and D. became bankrupts, and their assignees immediately seized and sold the ship. A. and B. afterwards became bankrupts:—Held, that trover for the ship could not be maintained by their assignees against the assignees of C. and D.; for the parol agreement could not be set up against the bill of sale, and the case did not come within the statute of James, the ship having been seized by the defendants before the bankruptcy of A. and B.; and though the bill of sale, unaccompanied by possession, might be void as against creditors, it was binding upon A. and B. and their assignees. *Robinson v. McDonnell*, 2 B. & A. 134.

A. contracted with B. to build a ship, and furnish her with every requisite for sea, the price to be paid by four instalments; two to be paid in the progress of the work, and the others when the vessel was finished and launched. The two first instalments were paid at the respective times stipulated: when the hull was ready for launching, the ship was measured and surveyed with the privacy of the builder; and the master, who had been previously appointed, entered into the usual bond for the delivery of the register at the custom-house; the ship was then registered in the name of the purchaser, and all the requisites of the register acts were complied with. The builder then received the third instalment. Before the ship was launched the purchaser advertised for freight, chartered her for a voyage, and hired a crew, with the privacy of the builder. The ship was not, in fact, launched, as stated in the register, but remained in the builder's yard; and his men were at work upon her until the 3d July. From the early part of June to the 30th of that month, an apprentice of the master was employed in the ship; and on the 1st July his bedding was put on board. On the 30th June the builder committed an act of bankruptcy, and on the 8th July a commission was issued against him. On the 2d of July, the purchaser took possession of the vessel while she remained on the builder's wharf, and took away a rudder and cordage; and on the 4th she was launched, and afterwards equipped for sea at the purchaser's expense, the fourth instalment remaining unpaid:—Held, that as between the bankrupt

and the purchaser there was such a transfer to, and general ownership in, the latter, as to exclude the operation of the 21 Jac. 1, c. 19, s. 11, and bar an action of trover at the suit of the assignees; but that they were entitled to such portion of the fourth instalment as should remain due after satisfying the expenses of completing the vessel for sea, according to the contract, and for which the bankrupt would have had a lien on the vessel. *Woode v. Russell*, 1 D. & R. 587; 5 B. & A. 942.

The sole owner of a ship secretly mortgaged three-fourth shares in her to a creditor as a security for a debt, and was allowed by the latter to retain the sole possession, management, and control of her until he became bankrupt, and though the requisites of the registry acts had been complied with:—Held, that the whole vessel passed to the assignees under the statute 21 Jac. 1, c. 19, s. 11, and that trover would lie against the mortgagee, who had taken possession of the ship upon the bankruptcy of the mortgagor. *Kirkley v. Hodgson*, 2 D. & R. 848; 1 B. & C. 588.

Where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand; the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival:—Held, that he might maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt on his assignees. *Atkinson v. Maling*, 2 T. R. 462. And see *Richardson v. Campbell*, 5 B. & A. 196.

A transfer of a ship and cargo at sea, conveyed by M. to S. as a security for money borrowed, by executing and delivering to S. a bill of sale of the ship, a policy upon ship and cargo, and indorsing the bills of lading, was held not to pass the property to S., where S. neglected, upon the ship's return, and notice thereof, to take possession, or to do any act to notify the transfer of the property to him; but that the property passed to the assignees of M., who became bankrupt, as being in the possession, order, and disposition of M. at the time when he became bankrupt, within the stat. 21 Jac. 1, c. 19. Also that an agreement between M. and the captain, that the captain should have one-fifth share of the profit or loss of the voyage on ship and cargo, did not prevent S. from taking possession. *Mair v. Glennie*, 4 M. & S. 240.

It was necessary that the bankrupt should have been the registered owner; and therefore it was held, that assignees could not maintain trover for a ship of which the bankrupt was never the registered owner, although defendant claimed under him. *Taylor v. Kinloch*, 1 Stark. 177—Ellenb.

Under a commission of bankruptcy against two partners, ships registered in the name of one of them, but in the order and disposition of both, form part of the joint-estate. *Ex parte Burna*, 1 J. & W. 378.

If the names of two partners in trade appear (among others) on the certificate of registry, as owners of a ship, the registry acts do not prevent the shewing how and in what proportions the several owners are respectively entitled; and though

the partners may derive title under different conveyances, yet if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupt, these shares will be considered as the joint property. *Ex parte Jones*, 4 M. & S. 450.

The owners of a ship are not interested in it as joint tenants, but as tenants in common upon a bankruptcy, therefore the bankrupt's share passes to the creditors under the bankruptcy without being liable specifically to the claims of the other part owners in respect of their disbursements and liabilities for the ship. *Ex parte Harrison*, 2 Rose, 76.

One of three partners in a ship and cargo, the costs and outfit of which were 4568*l.*, pays only 410*l.* in part of his third share, and gives his notes for the remainder, but, before they become due, is declared a bankrupt:—Held, that the other partners cannot, by voluntarily discharging the notes, stand in his place for any share of the profits; but that the assignees are entitled to a full third both of the profits of the adventure and of the value of the ship. *Smith v. De Silva*, Cowp. 469.

The owner of the major part of a vessel then lying in port mortgaged it, and transferred the bill of sale to the mortgagees. The mortgagees did not take possession, but suffered the mortgagor and the other part owners to have the management, and act as the visible owners of the vessel. The mortgagor having become bankrupt, held that his share in the vessel passed to his assignees, under the statute 21 Jac. 1, c. 19. *Hall v. Gurney*, 3 Dougl. 356.

There was no jurisdiction in bankruptcy to compel a bankrupt to perfect a bill of sale of a ship. *Ex parte Stewart*, 1 Glyn & J. 344.

By the register act, 6 Geo. 4, c. 110, s. 39, (also now repealed), the officers of customs were directed not to register bills of sale of ships, which, at the time they are mortgaged, were absent from port, till thirty days had elapsed from their arrival in port. Two ships and 16-64th parts or shares of another were mortgaged while at sea by bill of sale to W. & Co., which bill of sale was registered by the officers of custom of the port to which they belonged before their return to port; one ship afterwards returned, but no indorsement of the bill of sale was made on her certificate of register. After being insured, she sailed again within thirty days on another voyage in which she was lost. By a bill of sale, of a subsequent date (to which W. & Co. were parties), after reciting the prior mortgage to them, the same mortgagor assigned to J. & Co. the same ship and shares, and with the policies effected on two of them, and the sum payable by certain charterers for the hire of the third, with all equity of redemption of the said ships, freight, monies, and premiums, subject to the prior mortgage to W. & Co., and to their power of sale. This bill of sale was also registered before the return of any of the ships to port. The mortgagor became bankrupt. Two of the ships returned, and their certificates of registry were duly indorsed within thirty days, with the two bills of sale in the order of their

dates:—Held, that the second bill of sale was valid, under 6 Geo. 4, c. 110, ss. 31 & 37, against the assignees of the bankrupt, as to the interest in the ships, which it purported to assign to mortgagees; notwithstanding the mortgagor's bankruptcy occurred before the lapse of thirty days after the ship arrived in port. *Ex parte Jones*, 2 Tyr. 671.

So also as to the policies of insurance and monies due on the charter-party. *Id.*

### (c) Patent Rights.

A patent right, for the exclusive exercise of an invention, obtained from the crown, by an uncertificated bankrupt, is affected by the previous assignment of the commissioners, and vests in the assignees. *Hesse v. Stevenson*, 3 B. & P. 565.

If the assignees of an uncertificated bankrupt in their own names execute a deed with other creditors, whereby they, and all the creditors who may sign the said deed, release the bankrupt from all actions, suits, claims, and demands against him or his estate, and such deed be not signed by all the creditors of the bankrupt, the assignees are not barred from claiming, as assignees, the benefit of a patent right afterwards obtained by the bankrupt. *Id.*

If, by a private act of parliament, the sole making of a newly invented machine be vested in certain persons, with a proviso that it shall be forfeited in case it shall become "vested in, or in trust for, more than five persons or their representatives otherwise than by devise or succession, (reckoning executors and administrators only as the single persons they represent):"—Held, that if one of the persons become bankrupt, the right passes to his assignees; and that though there are more than five creditors, yet the assignees do not hold it in trust for "more than five persons, otherwise than by devise or succession," within the meaning of the act. *Bloxam v. Elsee*, 1 C. & P. 558; *R. & M.* 187—*Abbott*.

## 9. Choses in Action.

### (a) Contracts.

By 6 Geo. 4, c. 16, s. 63, the assignment vests the property, right, and interest in all debts due or to be due to the bankrupt, whosoever found or known, in the assignees, as fully as if the assurance whereby they are secured had been made to them; and afterwards, neither the bankrupt, nor any person claiming under him, shall recover, release, or discharge the same; but the assignees only are to sue.

Choses in action pass by a provisional assignment. *Moult v. Massey*, 1 B. & Adol. 636.

So all contracts made with the bankrupt pass to the assignees. *Splidt v. Bosoles*, 10 East, 279.

The bankruptcy of a person who has agreed to purchase, does not discharge the contract. *Brooke v. Hewitt*, 3 Ves. jun. 255.

A deposited policies of insurance belonging to him as a security for a debt of 800*l.* at his bankers, who were in advance to him; B. (a creditor) knowing the circumstance, afterwards, at the re-

quest of A., expressly undertook to take the policies and settle with the underwriters, and pay in the amount which he might receive, at A.'s bankers, to his account. On this undertaking, the policies were given up to him, and he received the sum of 949*l.* on them. A. becoming a bankrupt, and being indebted to B. in a larger sum than that received, he refused to pay over the money, and claimed to set off his own debt against the proceeds of the policies:—Held, that the assignees of A. could not (even with the assent of the bankers) maintain an action against B. for the breach of his undertaking. *Chalmers v. Page*, 3 B. & A. 697.

A bankrupt, after an act of bankruptcy, contracts with a factor to whom he had delivered goods for sale, and who has accepted a bill upon the strength of the goods, to return the bill if he will return the goods, and does return the bill. The assignees may adopt this contract, and recover against the factor for the non-delivery of the goods. *Butler v. Carver*, 2 Stark. 433—*Ab.*

The assignees of a bankrupt are not entitled to the specific execution of a contract for a lease, entered into with a view to the personal accommodation of the bankrupt. *Flood v. Finley*, 2 Rose, 147.

A sole trader having agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of 18 years, and having become bankrupt five months after the commencement of the partnership, when only one instalment was due, his assignees are entitled at the respective periods to receive the remaining instalments. *Akkurst v. Jackson*, 1 Swans. 85.

A tenant in tail makes a mortgage, with a covenant for further assurance, and becomes bankrupt, his assignees are bound by the covenant. *Pye v. Denbux*, 3 Bro. C. C. 595.

A trader makes a conveyance of all his real and personal property to trustees, to sell for the benefit of his creditors, under which the trustees, contract to sell certain lands to the defendant. The contract not being completed, they file a bill against the defendant for a specific performance; but, before answer, the trader becomes bankrupt, and his assignees file a supplemental bill to enforce the contract:—Held, that although the conveyance to the trustees was an act of bankruptcy, the assignees may compel the performance of the contract made under it. *Goodwin v. Lightbody*, 1 Daniel, 153.

A. was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him saying that they disclaimed all right to the money. A. upon this brought an action in his own name:—Held, that he was not entitled to recover. *Hillary v. Morris*, 5 C. & P. 6—*Tenterden*.

Assignees take subject to all equities under

which the bankrupt stood. *Ex parte Herbert*, 13 Ves. jun. 188.

(b) *Bills, Notes, and Checks.*

*Generally.*—Assignees may maintain trover for bills sent by the bankrupt to one of his creditors after committing an act of bankruptcy, though he, being a bill broker, had merely lent money on them, and had not either discounted or given the full value for them. *Hall v. Barnard*, 1 C. & P. 382—Abbott.

To an action on a note given to an uncertificated bankrupt, after the commission issued, the defendant pleaded the bankruptcy of the plaintiff and the commissioners' assignment, and that the assignees demanded payment of him: the plaintiff replied, that there had been no new assignment to the assignees after the making of the note; and that the defendant treated with the plaintiff as one capable of contracting personally:—Held, on demurrer, that the demand by the assignees vested the right in them; that a new assignment of personal property was not necessary; and that the mode of contracting was immaterial. *Kitchen v. Bertsch*, 7 East, 53; 3 Smith, 58.

Assignees cannot recover the amount of a check, paid by the bankrupt's bankers after the bankruptcy, in trover for the check, against the creditor to whom the check was delivered, and the money paid. *Mathew v. Sherwell*, 2 Taunt. 439.

A bill was delivered by defendant to two partners, and after the bankruptcy of one, indorsed by the other to plaintiff:—Held, that no interest could pass to the assignees, and a verdict was taken for plaintiff with liberty to defendant to move the point whether a party without knowledge of the trustee can acquire an interest beyond that of the trustee. *Rensbottom v. Cator*, 1 Stark. 228—Ellenborough. The case was not moved.

Where bankers discount a bill for a customer, giving him credit for the amount of the bill, and debiting him with the discount, the bill becomes the property of the bankers, and, upon their bankruptcy, their assignees may maintain an action upon it, although there be no balance due to them from the customer. *Carestairs v. Bates*, 3 Camp. 301—Ellenborough.

One who had committed a secret act of bankruptcy, procured the defendant to lend him his acceptance, and as a security pledged the lease of his house; and having drawn the bill payable to his own order, indorsed it to the plaintiff for a valuable consideration, without notice of his bankruptcy:—Held, that in an action by the plaintiff, as indorsee, against the acceptor, the latter could not defend himself on the ground of the drawer's bankruptcy at the time of such indorsement, or on account of the assignees having withdrawn from him the lease deposited as a security for his acceptance. *Arden v. Watkins*, 3 East, 317.

A bill payable to the order of the drawer, and accepted for his accommodation, does not pass under a commission of bankruptcy against the payee, and he may indorse it after an act of bankruptcy; and his indorsee for a valuable consideration has

a right of action. *Wallace v. Hardacre*, 1 Camp. 46, 179—Ellenborough. And see *Willis v. Freeman*, 12 East, 656.

The bankrupt having delivered a promissory note as a security for a debt, less than the amount of the note, without indorsement; ordered that the creditor should be at liberty to bring an action on the note in the name of the assignees, indemnifying them, and undertaking to account for the surplus recovered; the petitioner to pay costs as upon an agreement without writing. *Ex parte Brown and Blundston*, 1 Glyn & J. 407.

An indorsement after bankruptcy of a security delivered to a creditor previously is valid. *Ex parte Greening*, 13 Ves. jun. 206.

The payee of a bill, who is a trader, and has delivered it over for a valuable consideration, and forgot to indorse it, may indorse the bill after he has become a bankrupt. *Smith v. Pickering*, Peake, 50—Kenyon.

So, where a bill was delivered to the indorsee with the intent of transferring the property in it to him more than two months before the commission, but the indorsement was not interfect written upon it till within the two months:—Held, that the writing of the indorsement had reference to the delivery of the bill, and that the case was clearly within the statute. *Anon.* 1 Camp. 492, n.—Ellenborough.

So, the defendant may give in evidence that the bill of exchange on which the action is brought was indorsed after the indorser became bankrupt. *Pinkerton v. Adams*, 2 Esp. 611—Kenyon.

Assignees were ordered to indorse a bill which the bankrupt, before his bankruptcy, had transferred to the petitioner for a valuable consideration, but with indorsement: the indorsement to be special, so as to secure the assignees from personal liability. *Ex parte Monbray*, 1 J. & W. 428.

A. obtains money from B., on the security of goods consigned to B.'s house in America, and shortly afterwards becomes bankrupt, B.'s agent in America, ignorant of the advances made and of the bankruptcy, remits bills for the proceeds of the goods to A.; A. delivers them to a person to get them accepted, who hands them over to B.; a petition praying that A., or the assignees, might be directed to indorse them, dismissed with costs on the ground of want of jurisdiction. *Ex parte Hall*, 1 Rose, 13.

*Short Bills in Bankers' Hands.*—Short bills in the hands of a banker are specifically the property of the remitter, subject to a lien for the balance of the account. *Ex parte Rowton*, 17 Ves. jun. 431; 1 Rose, 15; S. P. *Ex parte Worring*, 19 Ves. jun. 349.

And are to be delivered up, subject to the bankrupt's lien, and indemnifying the estate against the engagements on account of the party claiming them. *Id.*

An order was made upon the provisional assignee to deliver up short bills in the hands of bankers at the time of their bankruptcy, the estate being indemnified against their outstanding

acceptances on account of the petitioner. *Ex parte Buchanan*, 1 Rose, 280; 19 Ves. jun. 201.

The drawer of bills of exchange deposits short bills with the acceptor, to cover his drawing account. The drawer and acceptor become bankrupts. The holder of the acceptances can call upon the assignees of the acceptor to apply the short bills in discharge of the acceptances, to the extent of the lien which the acceptor had upon them at the time of his bankruptcy. To ascertain that lien, an inquiry directed. *Ex parte Parr*, Buck, 191.

A short bill in the hands of a bankrupt as agent, and not by consent or the course of dealing, is considered as cash; to be returned, or the proceeds received after the bankruptcy, though the bill was due previously, and retained so as to discharge the indorser. *Ex parte Sollers*, 18 Ves. jun. 229; 1 Rose, 155.

Whether bills are to be considered short or not, does not depend on the particular mode of entering them in the banker's books, but upon the habits of dealing between the parties, and all the circumstances, together with the mode of entering them, is only evidence. *Ex parte Pearce*, 1 Rose, 232; S. C. nom. *Ex parte Pease*, 19 Ves. jun. 25. And see *Ex parte Wakefield Bank*, 1 Rose, 243; *Ex parte Leeds' Bank*, 1 Rose, 254; *Ex parte Armistead*, 2 Glyn & J. 371.

The onus of that proof lies on the banker. *Ex parte Sargeant*, 1 Rose, 153.

A customer is not entitled to recover short bills in the hands of his bankers at the time of their bankruptcy, where the habit of dealing between the parties was such as to warrant an inference that they mutually considered and treated such bills as cash. *Ex parte Thompson*, 1 Mont. & Mac. 102.

A. was in the habit of indorsing and paying into his country banker B.'s hands bills not due, which were entered by B. in his pass book, as bills to his credit to the full amount. By the custom of the bank, the customers were at liberty to draw for the amount of such bills immediately, and the bank was at liberty to pay away such bills as they thought fit. There was no evidence of A.'s knowledge of this custom, and A. swore that he never gave authority to B. to negotiate them, but deposited them only that B. might receive the value when at maturity; that he never drew on account of any bill till after it was due; that the balance of accounts, independent of the bills, was always in his favour; and that he never received more than one such bill (deposited by another customer) in answer to his checks. B. having negotiated them to C. as a security for a debt, and B. becoming bankrupt before the bills were due:—Held, that they did not pass to B.'s assignees; and therefore, that A. was entitled to be indemnified from the surplus security in the hands of C. *Ex parte Benson*, 1 Deac. & Chit. 435; 1 Mont. & Bligh, 120.

Where a customer of a country banker was in the habit of indorsing and paying into his hands bills of exchange, which were never written short, but entered to the full amount in the pass-book, on the day they were paid in, and also in the

books of the bank, to the credit of the customer, as "bills" (not as "cash"), and after such entry, the customer was at liberty to draw to the full amount, by checks, and the bankers became bankrupts, having in their possession several of the customer's bills so paid in, and the assignees having converted the same to their use:—Held, that the customer (who had a cash balance in his favour at the time of the bankruptcy) might maintain trover against the latter for the amount, there being no evidence that he had, in point of fact, agreed, that when the bills were paid in, they were to become the property of the bankers. *Thompson v. Giles*, 3 D. & R. 733; 2 B. & C. 422.

If A. deposit bills, indorsed in blank, with B. his banker, to be received when due, and the latter raise money upon them, by pledging them with C. another banker, and afterwards become bankrupt, A. cannot maintain trover against C. for the bills. *Collins v. Martin*, 1 B. & P. 648; 2 Esp. 520.

A customer paying bills not due into his banker's in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers upon their becoming bankrupt: the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy: and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer, in an action for money had and received. *Giles v. Perkins*, 9 East, 12.

Where bills are paid in at a bankers' as short bills (i. e. bills which the bankers are to present when due, and carry the proceeds to account), and the bankers afterwards become bankrupts; if, before the choice of assignees, some of the bills were paid, the customer cannot recover the value of such bills as were so paid, in an action of trover against the assignees. *Tennant v. Strachan*, 4 C. & P. 31; M. & M. 377—Tenterden.

If the assignees of certain bankers who had become bankrupts, when called upon to return bills paid in at the bankers' as short bills, claim a right to retain such bills as have not been paid, alleging that the bankrupts had discounted them for the customer before the bankruptcy, this is presumptive evidence that those bills were the bills paid in by the customer. *Id.*

If a customer pay into the hands of his banker certain bills as short bills, and after the bankruptcy and choice of assignees of the bankrupts, the assignees present them for payment, and receive the proceeds, and claim to hold the proceeds against the customer, they are liable in trover. *Id.*

Bills of exchange were deposited with bankers before their bankruptcy, and handed over by them on the day of their bankruptcy to A. B. A demand of the bills having been made on A. B., but the assignees having received the proceeds of some of them before any demand was made on themselves:—Held, that they were nevertheless liable in trover for those received. *Id.*



Under an agreement to pay bills into a country bank on discount for the notes of the bank, bills paid in after the bankruptcy of some partners, but before that of the whole firm, cannot be retained by the assignees. *Ex parte McGee*, 19 Ves. jun. 607; 2 Rose, 376.

(c) Policies of Insurance.

**Generally.**—A policy of insurance, effected by a bankrupt upon his own life at an annual premium, passes to his assignees, however small the apparent value of it may be at the time of his bankruptcy, and although there are considerable arrears of premium then due upon it; and if, instead of delivering it up as part of his effects, he secretly assigns it to another person, who pays the arrears of the premium, and upon the death of the bankrupt receives the sum insured, this sum, deducting the amount of the arrears so paid, may be recovered by the assignees as money had and received to their use. *Schondler v. Waco*, 1 Camp. 487—Ellenborough. *But see Grant v. Hill*, 9 Taunt. 380; and *Wills v. Wells*, 2 Moore, 247; 8 Taunt. 264.

Upon a separate commission of bankruptcy, the benefit of an insurance effected by the bankrupt upon his own account upon joint property, is not liable to the joint creditors. *Ex parte Browne*, 6 Ves. jun. 136; *S. P. Ex parte Parry*, 5 Ves. jun. 575.

Utensils of trade being property of one partner, and insured in his name, are left in the ordering and disposition of the partners. A fire happens, by which they are consumed. After the fire, a joint commission issues against the partners. The insurance money is paid to the joint assignees:—Held, that the insurance money does not pass by the assignment under the joint commission. *Ex parte Smith*, 3 Madd. 63; Buck, 149.

**Assignment of.**—The assignment of a policy of insurance without notice to the office does not prevent the operation of the clause of reputed ownership. *Ex parte Tennyson*, 1 Mont. & Bligh, 67.

If notice of the assignment of a policy of assurance on a life is not given to the insurer, it remains, upon the bankruptcy of the assignor, in his order and disposition, although the office do not require notice, and keep no book or registry of notices which might be given; and it passes to his assignees. *Williams v. Thorp*, 2 Sim. 257; *S. P. Ex parte Colvill*, 1 Mont. 110.

A letter to the secretary of an insurance office, in which the writer says, "I am holder of the under-mentioned policies," and inquires what the office would give for them, is sufficient notice of an assignment. *Ex parte Stright*, 1 Mont. 502.

(d) Legacies.

A legacy left to the bankrupt at any time before the allowance of the certificate passes under the assignment. *Tudway v. Bowen*, 2 Burr. 716; 2 Ld. Ken. 423.

So, a legacy falling to a bankrupt before allow-

ance of his certificate by the testator's death, pending an unfounded petition to stay it, goes to his assignees, unless the petition was presented with that object. *Ex parte Ansell*, 19 Ves. jun. 208.

Legacy of 1000*l.* to the wife of J. A., who was largely indebted to the testatrix; J. A. becomes bankrupt, and his wife afterwards dies, without having asserted any claim in respect of this legacy. The assignees of J. A. claim the legacy:—Held, that the executors of the testatrix are entitled to retain the legacy in part discharge of the debt due to the testatrix. *Ranking v. Barnard*, 5 Madd. 32.

Devise of the copyhold estate to the wife of A., to be disposed of as she should appoint, and a bequest of 200 guineas to pay the fines of her admission, the surplus to herself. She is not admitted, but appoints to her husband, who is the residuary legatee, and gives her credit for the 200 guineas in account. He becomes bankrupt:—Held, that the 200 guineas not having been applied for the purpose of admission, fell into the residue, and the credit in account was a mere declaration of trust, without consideration, and not binding upon his creditors. *Ex parte Smith*, 1 Rose, 208.

(e) Annuities.

The bankruptcy and certificate of one of several joint grantors discharges the bankrupt, but not the others. *Baxter v. Nichols*, 4 Taunt. 90; 2 Rose, 111.

But an annuity given by will to a trader for life, payable to him only upon his own receipt, and no other, and to cease immediately upon alienation, was held not to pass by the assignment, as by that act it ceased. *Dommett v. Bedford*, 6 T. R. 684; 3 Ves. jun. 149.

But in another case, where an annuity was given as an unalienable provision for personal use and support, not subject to be anticipated or alienated, or liable to debts, control, or engagements, with a proviso that if the grantee should sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate the said annuity, or should do or execute any act, deed, matter, or thing, to charge, alienate, or affect the same, it should thereupon be suspended:—Held, that the annuity was not forfeited by the outlawry of the grantee. *Rex v. Robinson*, Wightw. 386.

An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge, passes on A.'s bankruptcy to his assignees. *Graves v. Dolphin*, 1 Sim. 66.

A testator directs that his estate and effects shall be laid out in the public funds, in the names of trustees, who are to pay the dividends from time to time into his son's hands, or to his order and on his receipt, to the intent that the same, or any part thereof, should not be grantable or assignable by way of anticipation. On the bankruptcy of the son, his assignees under the commission are entitled to his interest under the will.

*Brandon v. Robinson*, 1 Rose, 197; *S. C. nom.*  
*Ex parte Brandon*, 18 Ves. jun. 429.

Bequest to trustees in trust to pay C. H. an annuity during his life, provided that if C. H. should, by any ways or means whatsoever, sell, dispose of, or incur the right, &c. he might have for life, then his interest to cease, and the trustees to apply the same for the benefit of his children:—Held, that, on the bankruptcy of C. H., his interest ceased, and his children became entitled. *Cooper v. Wyatt*, 5 Madd. 482.

Testator declared trusts of stock for A. for life, and, after his decease, for his children, and declared that the provision he had made for A. should not be subject to any alienation or disposition by him; but if he should alienate, or attempt to alienate, it should operate as a forfeiture of the provision, and the same should devolve on the person next entitled. A., who had several children, became bankrupt:—Held, that his assignees were entitled to his life interest. *Lear v. Legget*, 1 Russ. & Mylne, 690; 2 Sim. 479.

A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or incur them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned, or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the lords' act (1 Geo. 4, c. 19), in the usual way; and some years afterwards the testator died:—Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold v. Moorhouse*, 1 Russ. & Mylne, 364.

The consideration for an annuity is money had and received from the time of the grant; therefore, where the grantor became bankrupt, after the grant, but subsequent to the setting aside of the annuity, his certificate is a bar. *Walker v. Liscarray*, 6 Esp. 98—Ellenborough.

#### (f) Stock.

By 6 Geo. 4, c. 16, s. 80, if a bankrupt shall have any government stock, funds, or annuities, or any stock of any public company, either in England, Scotland, or Ireland, standing in his name, in his own right, the commissioners may order all persons whose act or consent is thereto necessary, to transfer and pay the dividends of the same to the assignees.

This, as far as public stock was concerned, is similar to the previous enactments, under which it was held, that stock purchased by a father, afterwards a bankrupt, in the names of his son, a minor, and a trustee, was within the provisions of the 1 Jac. 1, c. 15, s. 5. *Brown v. Bellaris*, 5 Madd. 53.

Stock in the public funds, in the names of a bankrupt and others, on trust, the bankrupt being one of the cestui que trust, his equitable interest was not within the stat. 21 Jac. 1, c. 19, s. 11; and therefore, not being capable of actual transfer, passed by assignment. *Ex parte Kensington*, 2 Ves. & B. 79; 2 Rose, 138.

#### (g) Right of Action.

The right to bring a real action, ex. gr. a writ of entry sur abatement, passes to the assignees by the assignment. *Smith v. Coffin*, 2 H. Black. 451.

A right of entry vested in husband and wife in right of the wife, passes to the assignees of the husband upon his bankruptcy, and they may recover the freehold by a writ of entry. *Michell v. Hughes*, 6 Bing. 689; 4 M. & P. 577.

Assignees, under 6 Geo. 4, c. 16, may maintain an action for unliquidated damages, which have accrued before the bankruptcy by non-performance of a contract. *Wright v. Fairfield*, 3 B. & Adol. 797.

But a right of action of trespass quare clammum fregit, is maintainable by a tenant from year to year, who had become bankrupt after the committing the trespass, and before the commencement of the suit; and does not pass to the assignees by the assignment, unless they interfere; as the bankrupt may sue as a trustee for, and has a good title against all persons but them. *Clark v. Calvert*, 3 Moore, 96.

The assignees of a bankrupt may recover from the winner money lost by the bankrupt, before his bankruptcy, at play, in an action of debt, on stat. 9 Ann. c. 14. *Brandon v. Pate*, 2 H. Black. 308; *S. C. nom.* *Brandon v. Sunde*, 2 Ves. jun. 514. And see *Carter v. Abbott*, 2 D. & R. 575; 1 B. & C. 444.

Quære, whether a right to sue upon a covenant by a lessor to offer the lessee an option of purchasing the premises, passes to the assignees of the lessee upon his bankruptcy? *Collins v. Lettison*, 2 Marsh. 1; 6 Taunt. 234.

Where there is an implied duty on the part of a lessee to indemnify his under-tenant from the consequences of the non-performance of his covenants with the superior landlord, for breach of which an action would lie, and the under-tenant's goods are seized under a distress for rent by the superior landlord:—Held, that the injury resulting to the under tenant from the distress gave a right of action to his assignees, appointed under a commission of bankrupt issued against him. *Hancock v. Caffyn*, 1 M. & Scott, 531; 8 Bing. 359.

H., before his bankruptcy, hired a carriage of M., and let it to defendant; defendant sent it back to H. damaged; M. repaired it with the assent of H., and (H. having become bankrupt) proved the amount due for repairs under H.'s commission:—Held, that H.'s assignee had a right of action against the defendant, although H.'s estate paid no dividend, but for nominal damages only. *Porter v. Verley*, 9 Bing. 93; 2 M. & Scott. 141.

The assignor of a chose in action, who has become a bankrupt, may sue the debtor in his own name for the benefit of the assignee. *Winch v. Kesley*, 1 T. R. 619.

He must do so. *Carpenter v. Marnell*, 3 B. & P. 40.

A trustee under the 54 Geo. 3, c. 137 (Scotch Bankrupt Act), cannot sue in his own name for a chose in action. *Jeffrey v. M' Tuggart*, 6 M. & S. 126.

#### 10. Reputed Ownership.

##### (a) Statute.

If any bankrupt, at the time he becomes so, by consent of the true owner, has in his possession, order, or disposition, goods or chattels whereof he was reputed owner, and whereof he had taken on him the sale, alteration or disposition as owner, those goods or chattels passed by the assignment. 6 Geo. 4, c. 16, s. 72.

Under 21 Jac. 1, c. 19, s. 11, which was a similar enactment, it was held, that, to bring a case within the statute, the bankrupt must have been a trader when he was in possession of the property. *Gordon v. E. I. Comp.* 7 T. R. 228.

The enacting part of s. 11, stat. 21 Jac. 1, c. 19, is not restrained by the preamble, but extends to goods of a third person, which he permits a trader, who afterwards becomes bankrupt, to be in the possession of, and to sell as his own; as well as to the bankrupt's original property, so kept and disposed of by him as his own, after having conveyed it to a third person. *Mace v. Cadell*, Cowp. 232; *Lofft*, 782.

In trover by the assignee of a bankrupt to recover property in his order and disposition at the time of the act of bankruptcy, no demand and refusal are necessary. *Soames v. Watts*, 1 C. & P. 400—Best.

The court of Review has jurisdiction to order assignees to deliver a horse which they claimed, as in the reputed ownership of the bankrupts. *Ex parte Wiggins*, 1 Mont. & Bligh, 168.

##### (b) Property within the Statute.

*Fixtures.*—Quere, whether fixtures are within the s. 72 of the bankrupt act? *Ex parte Austin*, 1 Deac. & Chit. 207.

Stills and other things fixed to the freehold were held not to pass to the assignees under the words "goods and chattels," in the stat. 21 Jac. 1, c. 19, s. 11. *Horn v. Baker*, 9 East, 215.

A lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessees, who had become bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought by the lessors to try the right. *Sunderland v. Newton*, 3 Sim. 450.

Machinery affixed to the freehold of iron works

is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, such articles are furnished by, and continue to be the property of, the lessor. *Rafford v. Bishop*, 5 Russ. 346. And see *Hubbard v. Bagshaw*, 4 Sim. 326.

*Shares.*—Where a company is formed by act of parliament for the purchase of lands to make a canal, and the act declares that the shares "shall be deemed personal estate, and shall be transmissible as such:"—Held, that though the profits arose out of land, the shares were personal property, passing as such to the assignees on the bankruptcy of the proprietor. *Ex parte Lancaster Canal Company*, 1 Deac. & Chit. 411; 1 Mont. 116; 1 Mont. & Bligh, 94.

Where an act prescribes certain forms in the transfer of canal shares:—Held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage; and though the act only expressly relates to transfers between third parties, yet it impliedly relates to cases where the company are the transferees. *Id.*

Shares in the Vauxhall Bridge Company, who are seized of a real estate, were not within the stat. 21 Jac. 1, c. 19, s. 11. *Ex parte Vauxhall Bridge Company*, 1 Glyn & J. 101.

##### (c) Requisite Possession.

*Assignment of Chose in Action.*—Notice of an assignment of a chose in action must be given before the act of bankruptcy, to prevent the assignees' title attaching. *Hunt v. Mortimer*, 10 B. & C. 47—Parke.

Where a debt is assigned, unless notice be given to the debtor, the assignor must be considered as continuing, within the purview of the bankrupt acts, to have the order and disposition of the debt until notice to the debtor of the assignment. *Dean v. James*, 1 Nev. & M. 393.

So, where one of two co-debtors releases his interest to his companion. *Id.*

A bond debt was assigned by the obligee, and the bond delivered to the assignee, but notice of the assignment was not given to the obligor previous to the bankruptcy of the obligee:—Held, that the debt remained in the order and disposition of the bankrupt, within the statute 21 Jac. 1, c. 19. *Ex parte Monro*, Buck, 300.

A merchant pledges for value the bills of lading of an expected cargo, his property, in the profits of which his agents abroad were interested in a certain proportion. His agents, without the knowledge of the owner or the pawnee, dispose of part of the cargo abroad, after which the owner becomes a bankrupt: he induces the agents to replace the goods disposed of by others, of which the agents give him bills of lading, and he sends them to the pawnee, to make good their security:—Held, that the substituted goods passed to the assignees. *Meyer v. Sharpe*, 5 Taunt. 74; 2 Rose, 124.

Upon the question whether A., after executing

a conveyance of property to trustees for the benefit of his wife, had the disposition of the property; evidence of his making an assignment of it, is not admissible against the trustees, unless they were privy to it, or unless the property was delivered, and the assignment acted upon. *Meyer's Assignees v. Sefton*, 2 Stark. 274—Holroyd.

T. R. having taken shares in a mining company, it became necessary, in order to complete his title, that he should sign a deed of association in London by a certain day. Finding this inconvenient, he desired his son to sign in his stead, and to let the shares stand in his, the son's, name. The son executed the deed and received a voucher, certifying him to be the proprietor of seventy shares, not transferable without consent of the directors. The son afterwards sold the shares, and paid the proceeds to T. R., who had become bankrupt. The assignees of T. R. having brought trover against T. R. and his son for the voucher and shares.—Held, that there was no legal title on which assignees could maintain an action. *Dawson v. Rishworth*, 1 B. & Adol. 574.

*Dock and Companies' Warrants.*—If property is assignable by transfer tickets, the reputed owner is the possessor of the tickets. *Ridout v. Lloyd*, 1 Mont. 103.

The custom of the London docks is to acknowledge no title in wines, unless accompanied with possession of dock warrants indorsed by the party to whom they were originally issued. Where A. received warrants from B. not indorsed by B., and A. delivered and indorsed them to C., who afterwards procured B.'s indorsement, and A. became bankrupt:—Held, the wines passed to C., though the notice of the transfer to the dock company, and of the indorsement by B., were subsequent to the bankruptcy:—Held, also, that for want of B.'s indorsement to A., and transfer into A.'s name in the company's books, A. never had the order and disposition of them. *Ex parte Davenport*, 1 Deac. & Chit. 397; 1 Mont. & Bligh, 165.

A. sold a quantity of lac dye, then lying in the E. I. Company's warehouse, to B., and after being allowed to retain possession of the delivery warrant, pledged the latter to C. for an advance of money, and shortly afterwards became bankrupt, without having redeemed the warrant:—Held, that A. had not the possession, order, and disposition of the goods at the time of his bankruptcy within the words of 21 Jac. 1, c. 19, s. 11, and consequently the property in the warrant did not vest in his assignees. *Greening v. Clarke*, 6 D. & R. 375; 4 B. & C. 316.

Where A. having occasion to borrow money of B., left with him, as a collateral security, warrants of the West India Dock Company, for sugars deposited in their warehouses, and entered in his name in their books, and afterwards became bankrupt:—Held, that A. had not such a possession of the sugars as would enable his assignees to maintain trover for them, as the transfer of the warrants was a complete transfer of the possession, before the bankruptcy, so as to take the case out of the statute 21 Jac. 1, c. 19, s. 11. *Lucas v. Derrien*, 1 Moore, 29; 7 Taunt. 278.

A., having two pipes of wine lying in a bonded warehouse, in the name of B., who had given bond for the duties, sold them to C., and gave him a delivery order; and it was at the same time agreed that C. should pay the duties. B. was called upon, and paid the duties, and took the wines to his own cellar. A. refused the amount of duties to B. C. never required B. to transfer the wines to his own name; but he took away one pipe and paid warehouse rent to B. C. afterwards became a bankrupt. B. at A.'s request, may hold the pipe until the duties are paid. *Winks v. Hassall*, 9 B. & C. 372.

#### *Bankrupt's Possession at Time of Bankruptcy.*

—The statute 21 Jac. 1, c. 19, s. 11, only transfers to the assignees of a bankrupt such goods as, by the consent of the true owner, the bankrupt has in his possession at the time of his bankruptcy: therefore, where the purchaser of goods, lying at a wharf in the name of the seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months after, during which time the seller disposed of a part thereof; but, upon notice of the seller's insolvency, the purchaser carried the order to the wharfinger, and had the goods transferred into his own name; and nine days after that the seller became bankrupt:—Held, that the assignees of the bankrupt were not entitled to these goods; for there was a complete transfer of the possession before the bankruptcy. *Jones v. Dwyer*, 15 East, 21; 1 Rose, 339.

And where a trader, having goods lying at two wharfs, deposited blank delivery notes with a creditor, to cover advances made by him, and afterwards became insolvent: and the creditor, upon notice of the insolvency, filled up the blanks in his own name, and took possession of the goods the day before the trader committed an act of bankruptcy; in an action of trover by the assignees against the creditor:—Held, that the goods so taken possession of were not within the 11th section of the statute: but, that goods lying at the wharf, in the bankrupt's name, on any part of the day of bankruptcy, were within it; and that goods of the bankrupt, lying at such wharf in the names of his agents, and for which he had given delivery orders in his own name, were not within the statute, there being no reputed ownership. *Arbousin v. Williams*, R. & M. 72—Gifford.

So, where the bankrupt, prior to his bankruptcy, had given a delivery order to a warehouseman, who had accepted a bill for him. *Tucker v. Rusten*, 2 C. & P. 86—Abbott.

If three persons, of whom one is ship's husband, are interested as part owners of a ship, and in the proceeds of a whale fishery in which it is employed, and when each part owner's share is weighed it is placed separately in a warehouse, and the particular casks containing his oil are marked with his initials, and, after the division, it is the practice for the foreman to deliver to the separate order of each part owner the oil belonging to him, unless, previous to the delivery he receives a notification from the ship's husband that

the part owner's share of the disbursements has not been paid to him. If, after the arrival of a cargo, and after the weighing and marking, in the usual course, one of the part owners has delivered to his order twenty tuns of oil, part of his share of twenty-nine tuns which was allotted to him, when the foreman receives orders not to deliver the residue, as the part owner's share of the disbursements is not paid, and the part owner becomes bankrupt, and is indebted to his co-partners, the part owners have a lien on the nine tuns. *Holderness v. Shackells*, 8 B. & C. 615.

Stock, standing in the Accountant-General's name, is mortgaged to secure a debt; the Accountant-General transfers the stock to the mortgagor, without the privity of the mortgagee. The mortgagor then becomes bankrupt:—Held, that the stock could not be claimed by the assignees under the 21 Jac. 1, c. 19, ss. 10 & 11. *Ex parte Richardson*, Buck, 480.

**Necessary Consent.**—If a carrier, after notice from the vendor of goods to stop them in transitu, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee; and though, the vendee having become a bankrupt, the goods have passed into the hands of his assignees, yet, inasmuch as they did not come to the possession of the bankrupt with the consent of the true owner, they are not in the order and disposition of the bankrupt within the statute 21 Jac. 1, c. 19, s. 11. *Litt v. Cowley*, 7 Taunt. 169; 2 Marsh. 457; Holt, 338.

If a person sends his servant to sell his timber at another man's wharf, such timber does not pass to the assignees of the owner of the wharf, who became bankrupt, as goods in his order and disposition, under the above statute. *Body v. Edeale*, 1 C. & P. 62—Burrough. S. C. not S. P. 3 Bing. 174; 10 Moore, 569.

If the printer and publisher of a newspaper assign his interest therein to a creditor, as a security, but continue to print and publish as before, and no affidavit of the change of interest be delivered to the commissioners of stamps, and the printer become bankrupt, the right to the paper will pass to his assignees. *Longman v. Tripp*, 2 N. R. 67.

If a person buying wine of a merchant permit it to remain in his cellar, though for the purpose of ripening, and the merchant becomes a bankrupt, the assignees may take the wine as being in the possession of the bankrupt, under the 7 Jac. 1. *Turner v. Barnett*, Peake's Add. Cas. 98—Kenyon.

In an action of trover brought by the assignees of a bankrupt for a rick of bark, of which the bankrupt was the reputed owner, a witness may be asked what was the reputation of the neighbourhood, as to whom the rick belonged at the time of the bankruptcy, and if it appear that the bankrupt had exercised repeated acts of ownership ever it previous to that time, the action will lie. *Oliver v. Bartlett*, 3 Moore, 592; 1 B. & B. 269.

In an action by the assignees of a bankrupt,

claiming property which the bankrupt is alleged to have had in his possession, order, and disposition, as the reputed owner at the time of his bankruptcy, it is competent for the defendant who has paid a valid consideration for the property to give in evidence a contrary reputation, and to resist the claim of the plaintiffs, under the statute 21 Jac. 1, c. 19, s. 11, upon those grounds. *Gurr v. Rutton*, Holt, 327—Gibbs.

#### (d) Partnership Property.

**Dormant Partner.**—A dormant partner is within the meaning of the statute 6 Geo. 4, c. 16, s. 72. *Ex parte Church*, 1 Mont. 457.

It was doubted whether a dormant partner was within the statute of James. *Ex parte Dyster*, 2 Rose, 256; *Ex parte Barrow*, 2 Rose, 252.

Where A., the dormant partner of B., in a trading firm, (the whole of the business being carried on by B. and in his name,) allowed, on the dissolution of the partnership by effluxion of time, the partnership stock, effects, and debts to remain in the order and disposition of B.; and B., after continuing in trade for about two years afterwards on his sole account, became bankrupt:—Held, that A.'s share of the partnership property and effects, and of the debts due on the partnership account at the time of the dissolution, passed to B.'s assignees, as being in the order and disposition of B., within the meaning of the statute 21 Jac. 1, c. 19, s. 11. *In re Gilpin*, 3 D. & R. 636: S. C. nom. *Ex parte Enderby in re Gilpin*, 2 B. & C. 389; S. P. *Ex parte Wilson*, Buck, 48.

The share of a secret partner in the joint stock in trade, being in the possession of an apparent partner and the sole ostensible trader, is not liable on the bankruptcy of the latter, as being within the meaning or mischief of the 21 Jac. 1, c. 19; the bankrupt having such an interest and qualified property in the secret partner's share as to destroy the essential requisites of a true and independent ownership on the one hand, and of a fraudulent and reputed ownership on the other. *Coldwell v. Gregory*, 1 Price, 119; 2 Rose, 149.

Quære, whether the statute would, at any rate, have extended to goods, the joint property of two traders, but deposited at the wharf in the name of only one, who, after such sale in his own name, became bankrupt? *Jones v. Dwyer*, 15 East, 21; 1 Rose, 339.

J. C. S. and W. S., carrying on business as brewers, in co-partnership, admitted W. W. as a dormant partner. It was stipulated by deed that the stock and effects of the old firm, including the plant, &c. and book debts, should form part of the capital stock of the new co-partnership; that W. W. should be paid 10 per cent. on the capital advanced by him, and should not otherwise interfere. The business was carried on, as before, in the names of J. C. S. and W. S. only, until the new firm became bankrupt. Upon the petition of several creditors of the old firm, some of whom had notice of the dormant partner, it was held, that all the personal chattels of the new firm were within the order and disposition of J. C. S. and W. S., and ought to be administered in

the bankruptcy as the separate estate of the two. *Ex parte Jennings*, 1 Mont. 45.

**Other Cases.**—Although the property of a partnership be in one or more members of it, with an interest in the profits merely in the others, yet, in bankruptcy, the property is administered as to the joint creditors, as belonging to them all. *Ex parte Hunter*, 2 Rose, 382.

If one of four partners die, and the surviving partners compromise, and obtain securities for a debt due to the original firm, and become bankrupts, the securities are, by reputed ownership, distributable amongst the creditors of the three. *Ex parte Taylor*, 1 Mont. 240.

If goods are purchased and paid for by a firm of four, on the joint account of themselves and two other firms, and one member of the firm of four die, and the goods are in the possession of one of the two firms, upon the bankruptcy of the survivors the goods do not pass by reputed ownership to the assignees of the survivor. *Id.*

If a firm consign goods to Hayti, which, after the death of one member, are returned, and a bill of lading from Hayti is sent to the holder of a bill of exchange dishonoured by the partnership, and the goods remain in the West India Docks, they, upon the bankruptcy of the survivors, are not in their reputed ownership. *Id.*

If a firm is possessed, as mortgagees, of a real estate, which, after the death of one member, remains in the possession of the survivors, it is not in their reputed ownership. *Id.*

A trader in London, on his separate account, and at Brazil in partnership with B. and C., under the firm of B. & Co., becomes insolvent, when four of his creditors are appointed inspectors of his estate, who it was agreed should receive the several consignments and remittances expected from the Brazil house, as trustees for the persons to whom the same might be ultimately found to belong. The Brazil house, ignorant of his insolvency, make various consignments to A., directing him to sell them at certain places abroad, and the proceeds to be placed to the account of the Brazilian house. The goods are accordingly sold under the direction of the inspectors, and the proceeds received by them. At the time of A.'s insolvency, he was under acceptances to the Brazilian house to a larger amount than the value of the consignments, but such acceptances were on a general account, and not on the account of any particular consignment from the foreign house. A. afterwards becomes bankrupt, and a cession of the effects of the Brazilian house is also made to the assignees, according to the laws of Brazil:—Held, that the assignees of the Brazilian house, and not the assignees of A. in England, were entitled to the proceeds of these goods. *Ex parte Wucherer*, 2 Deac. & Chit. 27.

**Dissolution.**—By the bankruptcy of one partner, his interest is divested and vests in his assignees by relation to the act of bankruptcy. *Dutton v. Morrison*, 17 Ves. jun. 193; 1 Rose, 213.

The assignees can obtain no share of the part-

nership effects until they first satisfy all that is due from the bankrupt partner to the partnership. *Holderness v. Shackelle*, 8 Barn. & Cres. 615.

A partnership being dissolved by the bankruptcy of one partner, the assignees are entitled, beyond an account and distribution of the stock, &c., to a participation of subsequent profits made by the other partners carrying on the trade with the capital, as constituted at the time of the bankruptcy, as far as the profits may have been produced by a joint application of that and other funds. *Crawshaw v. Collins*, 15 Ves. jun. 218.

Assignees under a separate commission against a partner generally cannot engage in new adventures but with the consent of the creditors and bankrupt. *Id.*

Debts due to a partnership were assigned upon dissolution by the retiring partners to the continuing partner without notice to the debtors:—Held, upon the bankruptcy of the partners, to remain in the order and disposition of the partnership, within the statute of James. *Ex parte Burton*, 1 Glyn & J. 207; *S. P. Ex parte Osborne*, 1 Glyn & J. 358.

Upon a dissolution of the partnership between A. and B., it is agreed, that, until A. be provided for, B. shall allow him a third of the profits. B. afterwards forms a partnership with C., and carries into it the stock of A. and B. A commission issues against A. and B.:—Held, that, after satisfaction of the creditors of B. and C., the joint effects of B. and C. were the separate property of B., and the joint property of A. and B. *Ex parte Barrow*, 2 Rose, 252.

Under that agreement A. is a partner with B. as to a third of his interest, but is not a partner with B. and C. *Id.*

A., being entitled, under a parol partnership agreement with B. and C., to three-eighths of the capital and profits of the business, became bankrupt, being at the time indebted to the partnership, in respect of bills in which the partnership name had been used for his personal accommodation; the assignees claimed a share of the profits made subsequently to the bankruptcy, while the continuing partners insisted, that the bankrupt's interest in the profits ceased at that time. In consequence of this difference, no settlement of accounts between the bankrupt's estate and the partnership took place, and the assignees filed their bill; but B. and C., and afterwards C. alone, pending the litigation with the assignees, carried on the business for many years with the stock and capital which existed at the time of the bankruptcy, and the stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C.:—Held, that the assignees of A. were entitled to three-eighths of the profits which had been made, or should be made, until the concern was finally wound up, and to three-eighths of the money to be produced by the sale of what remained in specie of the capital and stock; and that A.'s proportion of the profits was not to be lessened, nor the proportion of C. to be increased in respect of the debt which A. owed to the partnership, or

of the money which C. brought into the business beyond his share of the original capital. *Crasey v. Collins*, 2 Russ. 325.

(c) *After Execution.*

Where a judgment creditor purchased by a bill of sale from the sheriff certain machinery, seized in execution, belonging to his debtor, and, after marking the same with the initials of his name, allowed the debtor to retain possession, upon his agreeing to pay a rent for the use of it, and the latter remained in possession until he committed an act of bankruptcy:—Held, that as the change of ownership was not notorious, the assignees were entitled to recover the property in trover, under the 21 Jac. 1, c. 19, s. 11, as there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. *Lingard v. Messiter*, 2 D. & R. 495; 1 B. & C. 308.

A warrant under a f. fa. against the goods of a trader is directed to his servant and another person, as special bailiffs: they in consequence take possession of the goods in his shop; but the business of the shop, though without the trader's interference, is carried on apparently as usual. While things are so situated, the trader commits an act of bankruptcy:—Held, that the goods pass under the commission to the assignees, as the possession of the servant was the possession of the master, and the goods were thus in the possession, order, and disposition of the bankrupt at the time of the bankruptcy. *Jackson v. Irvin*, 2 Camp. 48—Eldonborough.

A. levies an execution on the goods of B., a trader. He directs the sheriff's officer not to sell, but to leave a man in possession, with the warrant. B. carries on his trade as usual, and three months afterwards becomes a bankrupt:—Held, that notwithstanding the execution and the possession of the officer, the goods seized passed to the assignees by virtue of the statute. *Toussaint v. Horton*, Holt, 335—Gibbs: & C. not S. P. 1 Moore, 287; 7 Taunt. 571.

A. having contracted with a canal company to build locks and bridges on the canal, as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises, on the banks of the canal; and on the company's advancing money to him, they took a bill of sale of these goods, and a symbolical delivery of them by a halfpenny; afterwards the company took out execution, upon a judgment confessed by A., and the sheriff seized these goods, and A. became a bankrupt:—Held, that A. had not such a possession of the goods, as would enable his assignees to take them within the stat. 21 Jac. 1, c. 19, s. 11, for the best delivery was given that the nature of the goods would admit of, they being before on the company's premises. *Manton v. Moore*, 7 T. R. 67.

Where the plaintiff had taken the goods of the defendant in execution, which he withdrew on the latter's consenting that there should be a fresh levy if the debt were not paid on a given day, and that the warrant should remain in the hands of the officer for that purpose: and the defendant's

goods having been seized under a subsequent execution, by another creditor, the plaintiff's officer placed his warrant in the hands of the officer under that execution; and the defendant afterwards became bankrupt, and the residue of his effects were delivered over to the assignees after satisfying the second execution, to the exclusion of the plaintiff, who called on the sheriff to return the writ:—the court ordered the return to be enlarged until he was indemnified by the proper parties, to the satisfaction of the prothonotary. *Burr v. Creethy*, 7 Moore, 368; S. C. nom. *Burr v. Freethy*, 1 Bing. 71.

The plaintiff's attorney, upon issuing execution, wrote to the sheriff's officer, directing him to leave the defendant's mother or any one else in possession of the defendant's goods, and to allow his business to be carried on as usual. The officer delivered the warrant to defendant's shopman, ordering him to carry on the business, and account for monies received. No money was ever paid to the plaintiff, and the warrant lay in the shopman's hands from April to June; the defendant having then become bankrupt, and his assignees claiming his goods, the sheriff returned nulla bona to the plaintiff's writ. The jury having found a verdict for the sheriff in an action against him for a false return, the court refused to grant a new trial. *Doker v. Hasler*, 2 Bing. 479; R. & M. 198.

(f) *When leased.*

A., B., and C., partners and distillers, occupied certain premises, leased to A. and another, and used in common, in the trade, the stills, vats, and utensils necessary for carrying it on; the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and A. it was covenanted and agreed that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the distil-house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade, specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife, and the survivor, with liberty for C. and J., on the decease of A. and his wife, to purchase the distil-house and premises for the remainder of A.'s term, and the stills, vats, &c. mentioned in the schedule; and C. and J. covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased; and there was a proviso for re-entry if the annuity were two months in arrear. Under this, C. and J. took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix, who survived him, did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J., who continued in possession of the stills, vats, and utensils on the premises:—Held, that the vats, &c. which were not fixed to the freehold, did pass to the assignees, as being

left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners. *Horn v. Baker*, 9 East, 215. [In this case all the decisions on reputed ownership are collected and fully discussed.]

Where a colliery, with all the machinery and implements necessary for working it, was leased for years, with a proviso for re-entry for the landlord on non-payment of rent, and a covenant on the part of the lessee, at the expiration or other sooner determination of the demise, to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a re-valuation was to be made three months before the expiration of the demise, and the landlord recovered judgment in ejectment in Trinity term, for a forfeiture for non-payment of the rent, but did not execute the writ of possession, until the 8th November, and the tenant committed an act of bankruptcy next day:—Held, first, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), though no previous valuation had been made; second, that the possession of the machinery and implements by the tenant was only qualified, and did not come within the meaning of 21 Jac. 1, c. 19, so as to bar the landlord's right of re-entry on the 8th of November; and third, that the tenant's use of the machinery and implements in the interval between the judgment in ejectment and the execution of the writ of possession, did not give him the "possession, order, or disposition" thereof, with the consent of the true owner, within the meaning of the statute, so as to pass the property to his assignees. *Storer v. Hunter*, 5 D. & R. 240; 3 B. & C. 368.

L. took a lease of a mill and iron-forge, and bought the fixed and movable implements, &c.; but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. L. afterwards conveyed all his interest in the premises, implements, &c. to a creditor, in trust, if default should be made by L. in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue: and if the lessor should require a re-sale of the implements, &c., the proceeds of such re-sale were to go in discharge of the debt, if unsatisfied. L. made default, and subsequently became bankrupt, after which, and during the term, the creditor who had not before interfered, entered upon the property:—Held, on trespass brought by the assignees, that L. had, at the time of the bankruptcy, the reputed ownership of the movable goods, but not of the fixtures. *Clark v. Crownshaw*, 3 B. & Adol. 84.

The bankrupt was in the possession of property, as apparent owner, under an instrument which, though in appearance a lease, was in effect a contrivance to secure the seller of the property the price to be paid, together with 10% per cent. interest on the amount until it should be paid:—Held, that the bankrupt's having obtained the ap-

parent ownership by means of this fraud, would not prevent the assignees from recovering it under the statute of 21 Jac. 1. *Sinclair v. Stevenson*, 2 Bing. 514; 10 Moore, 46; 1 C. & P. 582.

If A. let a house to B., with a covenant that the lease shall determine on B.'s committing an act of bankruptcy on which a commission of bankruptcy should issue; and by another deed of the same date A. grants the use of the furniture to B. in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy: if B. become bankrupt, and the jury find that B. was the reputed owner of the furniture, it will pass to the assignees, notwithstanding these covenants; and if it be proved on the one side that several of the servants of B., and many of his customers, knew that the goods belonged to A.; and on the other side, several of B.'s creditors prove that they considered the goods to belong to B., and gave him credit upon the face of them, and that he acted as master of the house, &c., it will be for the jury to say whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them. *Hickenbotham v. Groves*, 2 C. & P. 492—Abbott.

Where, by agreement between B. and the defendant, B. agreed, on payment to him of a sum certain, to convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock; and that, after formal possession delivered to the defendant, B. should be allowed to remain in possession for three months, without paying rent; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and B. afterwards left in possession according to the agreement, and became bankrupt whilst he so remained in possession, and before the expiration of the three months:—Held, that this was not a possession by the bankrupt within the statute 21 Jac. 1, c. 19, s. 11. *Muller v. Moss*, 1 M. & S. 335; 2 Rose, 99.

The purchaser of a dyer's plant, being unable to pay the purchase money, re-sold it to the vendor, who never took actual possession, but demised it to the purchaser for three years, who, during that time, became bankrupt, and the assignees seized the plant in his possession, under 21 Jac. 1:—Held, that the property passed. *Dryson v. Wylie*, 1 B. & P. 83, n.

If the furniture of a coffee-house be taken in execution by a creditor, and without ever being removed, be let by him to the keeper of the coffee-house, who becomes bankrupt while in possession of it, the assignees may seize it under 21 Jac. 1, c. 19, s. 11. *Lingham v. Biggs*, 1 B. & P. 82.

Secus, as to furniture in a ready-furnished private-house; and also as to horses. *Id.* 88.

#### (g) On Sale or Return.

Seemle, that goods in the hands of a person on a contract of sale or return, are not in his possession, order, and disposition, within 21 Jac. 1, c. 19, s. 11. *Delauney v. Barker*, 2 Stark. 533—Abbott.

Goods in the hands of a retail dealer upon sale



or return, pass under a commission of bankruptcy against him under the statute. *Livesey v. Hood*, 2 Camp. 83—Lawrence.

Goods were sent from London to Sunderland, upon sale or return, and a letter, inclosing an invoice, requested the buyer to return such of them as were not approved by him in as short a time as possible. The goods arrived at the shop of the buyer on the evening of the 13th of November, and on the following day he committed an act of bankruptcy. In an action of trover brought by the seller against the assignees to recover these goods:—Held, that they did not pass to such assignees under the statute 21 Jac. 1, c. 19, s. 11, as the bankrupt should have been allowed a reasonable time to have selected such goods as he was disposed to retain. *Gibson v. Bray*, 1 Moore, 519; 8 Taunt. 76; Holt, 556.

Assignees may maintain trover against one who has purchased goods from the bankrupt in the usual course of his trade, after a secret act of bankruptcy, although the goods were purchased on sale or return, and although the assignees afterwards demanded payment from the defendant as upon the sale of the goods. *Hurst v. Guernsey*, 2 Stark. 306—Ellenborough. Rule for a new trial refused.

#### (h) Goods sold but not delivered.

The usage of a trade must be certain and uniform, to make it binding on transactions in such trade, so as to vest goods in a bankrupt, as reputed owner, under the stat. 21 Jac. 1, c. 19. *Wood v. Wood*, 1 C. & P. 59—Burrough.

A custom that purchasers of hops from hop merchants shall leave them in the merchant's warehouse for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. *Thackwaite v. Cock*, 3 Taunt. 487; 2 Rose, 105. And see *White v. Wilks*, 5 Taunt. 176; 1 Marsh. 2.

The custom not being clear, distinct, and precise enough to enable others to know that the hops so left were not the property of the possessor. *Id.*

A, a spirit merchant, sold to B, a wine merchant, several casks of brandy, some of which, at the time of the sale, were in A.'s own vaults, and others in the vaults of a warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place, but no notice of it had been given to the warehouse-keeper, with whom some of the casks were deposited: A. having become bankrupt while the brandies remained where they were originally deposited:—Held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the

true owner, within the 21 Jac. 1, c. 19, s. 11. *Knowles v. Horsfall*, 5 B. & A. 134.

Wine sold by the bankrupt, remaining in the bankrupt's cellars, set apart in a particular bin, and marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, is not in the order and disposition of the bankrupt. *Ex parte Marrable*, 1 Glyn & J. 402.

A., who resided at Liverpool, was in the habit of making consignments of goods to B., his agent in South America, for sale; on the faith of, and against which consignments, A. drew bills proportioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsement of C., A.'s correspondent in London. Some of the bills so indorsed were refused acceptance by the agent. C., on receiving information that they had been so dishonoured, requested that A. would order his agent, in case he did not pay his, A.'s drafts, immediately to hand over to C.'s agent such property as he had of A.'s, of an equivalent value to the bills that should not be paid by him. A. agreed to do so, but became bankrupt before his order to transfer the goods reached South America:—Held, that the bargain between A. and C. did not operate as a legal or equitable assignment of the property in A.'s goods held by B., his agent, but that they remained the property of A. at the time of his bankruptcy, and passed to his assignees. *Carvalho v. Burn*, 4 B. & Adol. 362.

A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his premises at the request of the person for whom it was made, on account of his being about to go abroad, cannot be taken by the assignees as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sell it to another. *Bartram v. Payne*, 3 C. & P. 175—Gaselee.

In such case an actual delivery of the carriage at the house of the person for whom it is made is not necessary to constitute him the owner. *Id.*

It is usual for coachmakers, when they have built a good carriage, to put it into their shew-room previous to sending it home. *Id.*

A chariot was built to plaintiff's order, and paid for by him: when finished in other respects, plaintiff ordered a front seat to be added; but the builder being slow in making the addition, plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. Plaintiff being afterwards dissatisfied, ordered the chariot to be sold, and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignees seized the chariot:—Held, that the chariot did not pass to the assignees. *Carruthers v. Payne*, 5 Bing. 270; 2 M. & P. 429.

#### (i) For a specific Purpose.

Where a bankrupt is in possession of the goods of another bona fide, with the consent of the owner at the time of the bankruptcy, for a specific purpose, beyond which he has not the right

of disposition or alteration, that is not such a possession as entitles the assignees to recover the value of them under the 21 Jac. 1, c. 19, s. 11. *Collins v. Forbes*, 3 T. R. 316.

Bills remitted to a banker on the general account, cannot, on his bankruptcy, be laid hold of by the remitter; if remitted for a particular purpose, they must be so applied. *Ex parte Pease*, 19 Ves. jun. 49; S. C. nom. *Ex parte Pearce*, 1 Rose, 232.

The statute 21 Jac. 1, c. 19, s. 11, does not apply to bills of exchange, which are considered, being in a banker's hands, as a trust. *Id.*

Bills lodged in a banker's hands, to be applied for a particular purpose, but not so applied, are claimable on the banker's becoming bankrupt, as they do not pass to his assignees. *Ex parte Aiken*, 2 Madd. 192.

Whether bills in the possession of a bankrupt, not due at the time of the bankruptcy, pass to the assignees, or remain the property of the remitter, always depends upon the question of agency. So, where a foreign mercantile house remitted to a London house, bills, some of which were not due when the London house became bankrupt, it was held, under the circumstances, of the case, that the London house acted as agents to procure payment for the foreign house, and being fixed with the trust, that the bills did not pass to the assignees. *Ex parte Smith*, Buck, 355; 2 Rose, 457.

Where a draft for money was intrusted to a broker to buy Exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds:—Held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor v. Plumer*, 3 M. & S. 562; 2 Rose, 457.

If a bill be sent by a correspondent to a merchant to be applied to a particular use; and the merchant become bankrupt before the money is received, the correspondent has a special lien, and shall be preferred to the general creditors. *Aliter*, where the bills are sent on a general account. *Ex parte Omsell*, Amb. 297.

By the terms of an agreement between F. & Co., and their bankers, S. & Co., the permission to discount indorsed bills of exchange was limited to the amount necessary to meet such acceptances of F. & Co. as were in the course of immediate payment at the house of S. & Co. To cover certain acceptances coming due, F. & Co. remitted to S. & Co. an indorsed bill of exchange: these acceptances were however dishonoured by S. & Co., who soon afterwards stopped payment; S. & Co. then procured the bill to be accepted, and made an entry in their books of their having discounted it, a commission of bankruptcy having issued against S. & Co.:—Held, that S. & Co.

had no right to discount the bill without executing the trust reposed in them, and their assignees were bound to deliver up the bill to F. & Co. *Ex parte Frere*, 1 Mont. & Mac. 263.

Two partners in trade borrowed a check for 200*l.* from the defendant, for the express purpose of enabling them to liquidate the balance of an account with their bankers; but before the check was presented, they committed an act of bankruptcy, and afterwards returned the check to the defendant, declining to use it:—Held, that the check did not pass to their assignees, so as to enable him to recover the amount of it in trover. *Moore v. Bartrup*, 2 D. & R. 25; 1 B. & C. 5.

So, where a trader, upon being arrested, borrowed money of his brother-in-law for the purpose of settling with his creditors, but not being able to do so, returned a part of it, and then became a bankrupt:—Held, that as the money was advanced for a special purpose, it did not pass by the assignment. *Theobald v. Milne*, 2 B. & A. 683.

If A. and B. have a general running account, consisting of bills drawn by B. on C. in favour of A., and of bills and other securities deposited by A. with B.; and, upon the failure of B. and C., A. be obliged to take up the bills received by him from B., whereby the balance of the accounts is in favour of A., still he cannot maintain trover for the bills deposited by him with B., unless they were specifically appropriated to answer B.'s drafts on C. in favour of A., and deposited for that purpose expressly. *Bent v. Fuller*, 5 T. R. 494.

A. and B. came to an agreement, that B. should purchase of A. all the light gold coin which he could send at a stated price, and that A. should, from time to time, draw upon B. for the money due upon such sale; and that B. should also, from time to time, accept other bills drawn by A. for his own convenience, for which A. was to remit value: after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A. (not knowing of the bankruptcy) sent a parcel of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s assignees: it was held, that A. who had since paid B.'s acceptances, might recover back the gold and bills sent after the bankruptcy, on the ground that they were sent for the particular purpose of paying the acceptances, and that, as that purpose was not answered, the property in the gold, &c. remained in A. *Tobbs v. Hollingworth*, 5 T. R. 215; 2 H. Black. 501. *And see Zinck v. Walker*, 2 W. Black. 1154.

Furniture left by a testator to trustees to be enjoyed with the mansion-house by whomsoever should be entitled for the time being to the freehold estates, but not to be removed without leave of the trustees, will not pass. *Staffesbury (Earl) v. Russell*, 3 D. & R. 84; 1 B. & C. 666.

If a person has goods in his possession as the servant of his father, for the purpose of carrying on a trade for the sole benefit of the latter, they will not pass to his son's assignees under that statute. *Stafford v. Clark*, 1 C. & P. 24—*Burr.*

If a bankrupt after his certificate, and who

trades again for himself, is left for several years in possession of his house, household goods, and furniture, in order to assist in settling the affairs of the bankrupt's estate, the assignees repeatedly stating the goods, &c., in their accounts with the creditors, as part of the estate, such possession does not fall within the 21 Jac. 1, c. 19, s. 11, so as to vest the goods in assignees under a second commission. *Walker v. Burnell*, 1 Dougl. 317.

A. assigned a leasehold messuage and household furniture to B., upon trust for the use of A. for life, and, after his decease, for the use of C., his wife, for life; and, after the decease of the survivor, for the use of their daughter D. A. occupied the messuage, with the furniture, until Oct. 1816, when he died. In Oct. 1817, C., the widow, married E., who immediately took possession of the messuage and furniture, and continued in possession until Oct. 1828, when a commission of bankruptcy issued against him. In Oct. 1818, E. had procured B. to assign the messuage and furniture to him by a deed which contained false recitals, and was in breach of trust:—Held, upon these circumstances, on the petition of C. and D., that the furniture was not in the order and disposition of the bankrupt E., and that his assignees should be restrained from selling the same. *Ex parte Horwood*, 1 Mont. & Mac. 169.

#### (j) Other Cases.

Goods in the hands of an agent are not in the reputed ownership of his principal. *Ex parte Taylor*, 1 Mont. 240.

If an inn-keeper borrow a chaise from a coachmaker while he has a new chaise making, and use it in the course of his trade, but does not have his name painted upon it under the stat. 4 Geo. 4, c. 62, s. 11, this is not such a reputed ownership of the borrowed chaise as will entitle the assignees of the inn-keeper to detain it from the coachmaker. *Newport v. Hollings*, 3 C. & P. 223—Vaughan.

A trustee for the sale of a brewhouse and plant, the cestui que trusts being infants, contracts to sell them, and lets the purchaser into possession:—Held, that the purchaser was in possession within the statute of 21 Jac. 1, c. 19; and therefore the plant, upon his becoming bankrupt, passed to his assignees without being subject to the lien for the purchase-money. *Ex parte Dale*, Buck, 365.

A. by deed assigns the cargoes of two ships to B. and C., but has no charter-party or bill of lading to deliver to them. On the arrival of one of the ships, he assigns to another person, and afterwards commits an act of bankruptcy:—Held, that B. and C. not having been ready to take possession of the ship on her arrival, had thereby permitted A. to continue reputed owner under the statute of 21 Jac. 1, c. 19. *Philpot v. Williams*, 2 Eden, 231.

#### 11. Bankrupt's Possession in Autre Droit.

##### (a) Trustees.

By 6 Geo. 4, c. 16, s. 79, if any bankrupt shall, as trustee, be seized, possessed of, or entitled to,

either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name, as trustee, government stock, funds, or annuities, or any stock of public companies, the chancellor, on petition of the party interested, on due notice given, may order the assignees to convey to new trustees.

Furniture, &c., in possession of a bankrupt according to the title under a trust, does not pass to the assignees under stat. 21 Jac. 1, c. 19, s. 11. *Ex parte Martin*, 19 Ves. jun. 491; 2 Rose, 331.

Where a testator directed, that, in case his son should carry on the testator's trade for the benefit of himself and his mother, his lease and furniture should not be sold, but that the trustees should permit the widow and children to reside therein and have the use of it, and the widow and son carried on the trade and became bankrupts:—Held, that the furniture, &c. was not in the order and disposition of the bankrupts. *Id.*

A debt due to a bankrupt as trustee for another, does not pass under the assignment of his effects to his assignees. *Winch v. Keeley*, 1 T. R. 619; *S. P. Carpenter v. Marnell*, 3 B. & P. 40.

Where a trustee becomes bankrupt, the court of Review will substitute a new trustee in his place. *Ex parte Page*, 1 Deac. & Chit. 321.

A new trustee may be appointed without a reference. *Ex parte Inkeroid*, 2 Glyn & J. 230.

Where, upon the bankruptcy of a trustee, one person is solely entitled to all the trust estate, the court will, upon petition, order the bankrupt to transfer and deliver it to such person without a new trustee. *Ex parte Hancox*, 1 Mont. 247.

An order was made for a reference to the master to approve of a new trustee in the room of the bankrupt trustee, and for the transfer of the trust funds by the assignees of the bankrupt trustee. *Ex parte Saunders*, 2 Glyn & J. 132.

#### (b) Friendly Societies.

The preference given to friendly societies by the statute 33 Geo. 3, c. 54, s. 10, over other creditors, is confined to debts in respect of money in the hands of their officers by virtue of their offices, and independent of contract. *Ex parte Lancaster Amicable Society*, 6 Ves. jun. 98.

Therefore does not extend to money held by the treasurer upon the security of promissory notes, payable, with interest, upon demand. *Ex parte Stamford Friendly Society*, 15 Ves. jun. 280.

Money paid by order of a friendly society from time to time upon notes carrying interest, there being no treasurer appointed, is not money in the hands of the party by virtue of any office within the act of parliament 33 Geo. 3, c. 54, s. 10, entitling the society to a preference in case of bankruptcy. *Ex parte Rose*, 6 Ves. jun. 802.

A person in the habit of receiving money of a friendly society, having no treasurer appointed, upon notes carrying interest, payable a month after demand, is not an officer of the society so as to entitle them to a preference under the

statute, 33 Geo. 3, c. 54, s. 10. *Ex parte Ashby*, 6 Ves. jun. 441.

(c) *Bankers of Public Bodies.*

Where by statute it was enacted, "that in case any treasurer, collector, officer, or other person appointed by the commissioners having the control of the pavements of any places mentioned in the act, for the collection and receipt of monies to be collected and received by virtue of any rates and assessments, &c., shall happen to become bankrupt before he shall have fully paid and satisfied all monies received by him or them, for or in respect of any such rates or assessments, or for or on account of the commissioners, &c., the assignee shall pay in full all the money due to such commissioners (if the bankrupt's estate be sufficient), in preference to all debts, except those due to the king:"—Held, that the bankers employed by the commissioners without any actual appointment were within the words "other persons" used in this section, as being in the nature of treasurers; and that inasmuch as the statute did not require the appointment of treasurers, collectors, &c. to be in writing, the employment was equivalent to an appointment. *Frost v. Bolland*, 5 B. & C. 611; 8 D. & R. 384.

The same statute enacted, that the commissioners might sue in the name of their clerk for the recovery of any penalty or rate, or any other sum or sums of money at any time due and payable from or by any water company or commissioners of sewers, or any other person or persons, due or payable by virtue of any local act or that act:—Held, that the commissioners might sue in the name of their clerk, to recover from the assignees of their banker the balance in his hands at the time when he became bankrupt. *Id.*

Under the Metropolitan Paying Act, 57 Geo. 3, c. 29, s. 51, if bankers receive money on account of the commissioners, and become bankrupts with such money in their hands, their assignees are liable to refund the full amount. *Dougan v. Bolland*, 8 D. & R. 435; 5 B. & C. 622.

Where bankers employed by commissioners of pavements had received on account of commissioners certain Exchequer bills, which they afterwards sold, and received the proceeds; and, before this money had been paid to the commissioners, became bankrupts:—Held, that the commissioners were entitled to recover in full from the assignees the balance due to them; for that the section referred to was not confined to monies received by virtue of rates or assessments, but included all monies received "for and on account of the commissioners:" and when the bankers sold the Exchequer bills, they must be considered as having received the proceeds to the use of the owners of the bills. *Id.*

(d) *Personal Representatives.*

Where a son, entitled on the death of his mother to take out letters of administration, neglected to do so for twelve years, and remained in possession of her goods during that period, and became a bankrupt; and a creditor of the intestate afterwards took out letters of administration,

and claimed the goods from the assignees of the son in an action of trover:—Held, that such goods were within the statute 21 Jac. 1, c. 19, as being in the possession and disposition of the bankrupt with the consent of the true owner; and that the assignees were therefore entitled to them, as the bankrupt might have obtained a legal right by taking out letters of administration. *Fox v. Fisher*, 3 B. & A. 135.

Where the wife of a bankrupt has administered to her father, and become possessed as administratrix of his estate, to which she and her infant brothers and sisters are entitled, and the husband has continued the business of the father for their benefit, this is not such a possession of the goods as shall be deemed an ordering and disposition within the statute. *Viner v. Cadell*, 3 Esp. 68—Eldon.

A bankrupt, who had obtained his certificate, being possessed of leasehold premises as executor and residuary legatee, mortgaged them to secure a debt of his own, and afterwards assigned the equity of redemption for a valuable consideration, the deed reciting that the assignment was made for the purpose of paying the debts of the testatrix. The assignee took an assignment of the mortgage. The certificate being in an action held to have been fraudulently obtained, the lease was claimed by the assignees under the bankruptcy, but it was determined they had no right against the assignee for valuable consideration. *Dickenson v. Lockyer*, 4 Ves. jun. 40.

An executor and trustee becoming a bankrupt, a receiver was appointed, though the testator knew, after he had made his will, that a commission had been issued. *Langley v. Hawk*, 5 Madd. 46.

J. S. became possessed (in trust, as executor of his deceased father,) of certain shares in the joint stock of the Lead Smelting Company. The only evidence of a party's interest in the stock of this company is, a book in which are entered all transfers of shares. In this book there was an entry signed by J. S., purporting to be a transfer of the shares in question from himself as executor to himself in his individual character. Where the transfer is made in pursuance of a bona fide sale for a money consideration, the words "sell and assign" are used; but in this instance those words were erased. On the faith of his apparent ownership of these shares, J. S. acted as a director of the company, and received the dividends to his own use up to the time of his bankruptcy; and, on passing his accounts under the commission, he treated the shares as his own property. Upon an issue directed to try the right to these shares, between J. S. and another, as executors of the original proprietor and the assignees of J. S., it was left to the jury to say whether or not the shares were, at the time of the bankruptcy, in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner. The jury having found for the plaintiffs, the court refused to disturb the verdict. *Cooper v. De Tastet*, 2 M. & Scott, 714.

(e) *Other Cases.*

An order was made for payment out of a bank-

rupt's estate, with interest to the time of payment, in preference to all other creditors, with costs, under stat. 5 Geo. 3, c. 15, s. 48, for an issue of Exchequer bills to relieve commercial credit. *Ex parte Holden*, 18 Ves. jun. 436; 1 Rose, 173.

If money be received by an overseer of the poor and kept apart by itself, and he become a bankrupt, it does not pass to his assignees. *Re v. Egginton*, 1 T. R. 369.

## 12. Bankrupt's Property in Possession of Others.

### (a) Specific Appropriation.

Money placed by a bankrupt under the control of an arbitrator for a specific purpose, and applied to that purpose, and from which he derived no benefit, cannot be afterwards recovered back from him on account of a previous act of bankruptcy, of which the arbitrator was ignorant. *Type v. Hockin*, 7 B. & C. 101; 9 D. & R. 881. And see *Coles v. Wright*, 4 Taunt. 198.

A. becomes bound as surety with B. in a respondentia bond upon a ship bound to the East Indies, conditioned to be void, upon payment within thirty days after arrival in the river Thames, or at the end of thirty-six calendar months, or upon utter loss. B. assigns all his goods on board the ship to A., upon trust, in the first place, to pay a debt owing from himself to A., and in the next place to pay off all those debts for which he had become surety on the respondentia bond. Before the time specified in the bond, A. becomes bankrupt, the assignees receive a sum of money on account of the proceeds of the goods, it was ordered, that, after deducting the amount of A.'s private debts, the residue of the proceeds and all future receipts should be divided among the respondentia creditors only. *Ex parte Carstairs*, 1 Rose, 130.

### (b) Goods purchased by Bankrupt but not delivered.

If the consignee of goods, upon discovering his insolvency, give notice to the wharfinger not to deliver the consignment, the goods remain in the consignor. *Bartrem v. Fairbrother*, 4 Bing. 579; 1 M. & P. 515.

Where goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them in transitu, and give them a new direction adverse to his principal; but if he give them a fresh direction in furtherance of the usual course of business of the principal, they pass to the assignees as in the order and disposition of the bankrupt. *Hawkes v. Dunn*, 1 Tyr. 413; 1 Price's P. C. 24.

L. came to the plaintiff's house, and bought a parcel of tobacco, to be paid for in ready money, and the same day absconded, leaving orders at his house to receive the tobacco; the plaintiff's servant afterwards brought the tobacco to L.'s house without demanding the money.—Held, that the sale was complete, and vested the property in L., which passed by an assignment under a commission against him on the act of bankruptcy by absconding. *Hastwell v. Hunt*, 5 T. R. 231.

### (c) Goods returned by Bankrupt to Seller.

A trader orders bags of wool of defendants,

(merchants), in December, which are delivered 19th February following; and by the course of dealing, the trader has the option of returning the wool, for which he has no call, though previously ordered. The trader being from home when the bags were delivered; on his return, the same day, he gives directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice, he being then in embarrassed circumstances, and intending not to take them into the account of his stock, if he found himself unable to pursue his business. On the 4th and 5th March, being then insolvent, he returns the bags, with a letter declaring his situation, and hoping they will not object to take back the wool, and requesting a line of approbation thereof; which approbation is given, after an act of bankruptcy committed the same day the letter was sent.—Held, that by the trader keeping possession of the goods so long, his option (which ought to have been exercised on the receipt of them) was gone; and that, being in a state of insolvency and on the eve of bankruptcy, he had not the power of restoring the goods to the vendors, and that the assignees were entitled to the property. *Neate v. Ball*, 2 East, 117.

A trader ordered goods from the country, to be sent to another place for the purpose of being afterwards sent to his correspondent abroad, which was the usual course of his dealing; it was competent for him, upon his becoming insolvent, but before an act of bankruptcy, to agree bona fide to give up the goods to the defendants from whom they were ordered, upon a claim of right of stoppage in transitu; and the circumstance of the trader having called a meeting of his creditors, and taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that they were given up bona fide, and not from any motive of voluntary and undue preference to the defendants, though done by him in a situation of impending bankruptcy at the time. *Dixon v. Baldwin*, 5 East, 175.

A. purchases goods of B. on October 8th, for the purpose of exportation; but finding that he must stop payment, and that he cannot apply the goods to the purpose for which they were bought, he returns them to B. on October 16. On the 17th he stops payment; but expecting remittances from abroad more than sufficient to pay his debts, has no doubt but his creditors will give him time; they however refusing, he is made bankrupt on November 2d. In an action by the assignees against B. for the value of the goods.—Held, that the jury were warranted in finding, that the delivery of the goods to B. was not made in contemplation of bankruptcy. *Fidgeon v. Sharp*, 1 Marsh. 196; 2 Rose, 153; 5 Taunt. 539.

Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for, he cannot rescind the contract, and return the goods, with the consent of the seller, so as to give the seller a preference to his other creditors. *Barnes v. Ireland*, 6 T. R. 80.

13. *Property of Bankrupt's Wife.*

Assignees of a bankrupt are entitled to an equitable interest for life of his wife, as well as a capital sum, subject to the equity requiring a provision for her out of it. *Wright v. Morley*, 11 Ves. jun. 21.

The general assignment in bankruptcy had not the effect of reducing into possession a legacy of stock, in trust for the bankrupt's wife, whose right by survivorship was established against the assignees. *Mitford v. Mitford*, 9 Ves. jun. 87.

If personal estate is left to a woman, subject to a life interest, and she marry a trader who becomes bankrupt, and the tenant for life and the wife die after the bankruptcy, the assignees are entitled to the legacy. *Ripley v. Wood*, 2 Sim. 165.

If the wife of a bankrupt has an interest in a legacy, and the assignees file a bill to compel payment, and the husband dies before any decree is made, the widow, and not the assignees, is entitled to the legacy. *Pearce v. Thornby*, 2 Sim. 167.

If a testator leave two annuities of 20*l.* a year each to two females, and upon one of the devisees marrying during the life of the testator, he, by a codicil, leaves her an annuity for her sole and separate use; and the other annuitant marry after his death, without any condition attached in the will to her annuity, it passes to the assignees under a commission against her husband. *Count v. Ward*, 7 Bing. 608.

A purchase by a trader, afterwards a bankrupt, in the joint names of himself and his wife, is void as against the creditors, within the stat. 1 Jac. 1, c. 15, s. 5. *Glaister v. Hewer*, 11 Ves. jun. 377; 9 Ves. jun. 12; 8 Ves. jun. 195.

So, if the purchase was made with the wife's money, if previously received, and disposable by him as his own, and not bound by any agreement with a trustee; and the receipt is not connected with the purchase. *Id.*

14. *Proof of Assignment.*

Assignments in bankruptcy ought to be admitted. *Read v. Cooper*, 2 Rose, 127; 5 Taunt. 89.

The production of the assignment to the plaintiffs (assignees), duly enrolled, is sufficient, without proof of its execution, unless notice has been given that it is to be disputed. *Tucker v. Barrow*, M. & M. 137; 3 C. & P. 85, 89; 7 B. & C. 622; 1 M. & R. 518.

The 96th section of the bankrupt act, 6 Geo. 4, c. 16, which enacts that the proceedings in bankruptcy shall not be received in evidence, unless the same shall have been first entered of record, does not dispense with proof of the execution of the assignment. *Gomersall v. Serie*, 2 Y. & J. 5. *But see Hunt v. Connor*, 2 Y. & J. 10, n.

Where the bankruptcy of a party is stated in an allegation in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness. *Rex v. Pope*, 5 C. & P. 208—Tenterden.

XII. *ASSIGNEES.*1. *Official Assignees.*(a) *Appointment and Office.*

By 1 & 2 Will. 4, c. 56, s. 22, a number of persons not exceeding thirty, being merchants, traders, or accountants, or persons who are, or have been engaged in trade in London, are to be appointed to act as official assignees in all bankruptcies, one to each fiat, together with the creditors' assignees; they are to give such security, and to be subject to such rules, to be selected for such estates, and to act in such manner as the court shall direct.

All the estate and effects are to be possessed and received by the official assignee alone, and to be paid into the Bank of England, subject to the direction of the court. *Id.*

They are to be subject to the same liabilities as the creditors' assignees. *Id.*

They are to be divided equally among the six commissioners. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvi.*

By 1 & 2 Will. 4, c. 56, s. 40, the commissioners have a discretion to appoint or not to appoint an official assignee, where the commission issued before that act began to operate.

Where the commissioner appointed one, thinking he had no discretion, the court would not on this ground alone remove the official assignee. *Ex parte Ellis*, 1 Deac. & Chit. 209; 1 Mont. & Bligh, 116.

Each commissioner shall appoint his class of assignees, to act in rotation under the several bankruptcies prosecuted before him, such rotation to be settled by ballot, except in special cases to be referred by the commissioner adjudicating therein to other commissioners of his subdivision court, or the court of Review. *Reg. Gen. H. T. 2 Will. 4; 1 Deac. & Chit. xxvi.*

The same rule for the appointment of the official assignees shall be followed as to existing commissions; but it is recommended, that no official assignee be appointed under commissions already opened, unless there appear good cause for so doing. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvi.*

No official assignee shall, either directly or indirectly, carry on any trade or business, or hold or be engaged in any office or employment, other than his said office and employment as official assignee. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvi.*

Each official assignee shall find sureties to the extent of 6000*l.*, and shall, together with such sureties, (except when otherwise especially directed by the court of Review), execute a joint and several bond to the two registrars for the time being, and the survivor of them, in the penal sum of 6000*l.* *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvii.*

The official assignees are to be made liable to the whole amount, and the sureties to be liable together to the like amount, in such proportions as shall be approved of by the court of Review, provided that no one surety shall be made liable for more

than 3000*l.*, nor for less than 1000*l.* *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvii.*

Where an official assignee had been appointed under an old commission, on a suggestion that a majority of the creditors objected to such appointment, the court, on motion, suspended an order for delivery up of the proceedings, &c. to the official assignee till the hearing of the petition. *Ex parte Parker, 1 Deac. & Chit. 530.*

The commissioners have a discretion to appoint official assignees, and, if necessary, the court of Review has jurisdiction to remove them. *Ex parte Ellis, 1 Mont. & Bligh, 116; 1 Deac. & Chit. 209.*

(b) *Duty and Authority.*

*Generally.*—By 1 & 2 Will. 4, c. 56, s. 23, the official assignees are not to interfere with the creditors' assignees in the appointment or removal of a solicitor or attorney, or in the directing the time and manner of effecting any sale of the bankrupt's estate or effects.

Each official assignee shall follow the instructions of the commissioner under whom he acts, according to the exigencies of each particular case, subject to such directions as shall from time to time be prescribed by the court of review. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvii.*

The official assignee is only a ministerial officer, and cannot resist payment of a dividend. *Ex parte Alexander, 1 Mont. 503; 1 Deac. & Chit. 513.*

An official assignee having sent to the petitioner (who was employed under the commission to sell part of the bankrupt's property,) the usual circular, that a dividend was due on his debt, cannot afterwards refuse to pay the same upon the plea that his accounts for such business done by him are erroneous. *Id.*

Official assignees cannot, under 1 & 2 Will. 4, c. 56, s. 22, take bankrupt's money out of the hands of a solicitor, without discharging his lien. *Ex parte Bowden, 2 Deac. & Chit. 182.*

An action lies against the official assignee to recover money received by him under a void commission of bankruptcy. *Munk v. Clarke, 10 Bing. 102.*

Although all creditors, save one, and the bankrupt and assignees consent, the court cannot direct that the official assignee be at liberty to award a party remuneration for trouble incurred touching the bankrupt's estate between the time of stopping payment and issuing the fiat. *Ex parte Barles, 1 Deac. & Chit. 543.*

*Money coming to his hands.*—Each official assignee shall pay into the Bank of England to the credit of the accountant-general of the high court of Chancery, all such sums of money as shall come to his hands, as soon as they shall amount to 100*l.*; and, at the time of paying in such monies, shall state in writing, delivered therewith to the cashier of the Bank of England, the date, and the amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts, and the particular estate to which the money belongs, and

that it is to be placed to the credit of the accountant-general, and of such particular estate, and shall take a receipt for the same from the cashier of the Bank, and carry it to the office of the accountant-general, who will give a proper voucher for the receipt, to be produced when called for by the commissioners. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvii.*

Where, in case of the death, removal, sickness, or unavoidable absence of any official assignee named in the certificate of the accountant-general, any other shall be appointed to act in his stead, the official assignee so appointed shall leave at the Bank a certificate of his appointment under the seal of the court, and shall at the same time sign his name in the firm book; and thereupon all drafts for that dividend drawn and signed by such official assignee, shall be payable and paid as if they had been signed by the official assignee named in the certificate of the said accountant-general. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. f.*

Any one of the judges of the court of Bankruptcy may, as often as it shall appear to him expedient, by order under his hand, direct any money, which may have been paid into the Bank of England by any official assignee to the credit of the bankrupt's estate, to be invested in the purchase of Exchequer bills; and may in like manner direct the sale or exchange of such Exchequer bills, and also the exchange, sale, and transfer of any stock in the public funds, or in any public company, or of any Exchequer bills, India bonds, or other public securities, which shall have been transferred, delivered, or paid by any official assignee into the Bank of England to the credit of such estate; and may direct the proceeds thereof to be laid out in the purchase of Exchequer bills, or to be carried to the credit of the accountant-general of the high court of Chancery, and of such bankrupt's estate; and the accountant-general of the high court of Chancery shall and may, pursuant to such order, make such purchase, sale, and transfer, without any further order or direction from the court: and the expenses thereof may be charged to the account of the estate, for the benefit of which the same shall have been respectively made. *Reg. Gen. March 19, 1832, 1 Deac. & Chit. xxxii. a.*

Any one of the judges of the court of Review may from time to time, upon application to him in that behalf, make such order relative to the payment and delivery in, investment, and payment and delivery out, of the monies, bills, securities, and effects of any bankrupt, in the hands of any official assignee, or by him paid and delivered into the Bank of England, as to such judge shall seem expedient and just, such order to be executed in duplicate, and one part thereof to be filed with the proceedings, and the other to be delivered to the official assignee. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. f.*

Where, in consequence of the death, sickness, or unavoidable absence of the chief registrar, or for any other sufficient cause, it may be expedient to appoint some other person to sign drafts, or to do any other act by the rule required from the chief registrar, any one of the judges of the court

may, by order under his hand, to be executed in duplicate, name and appoint one of the deputy registrars to act for the chief registrar in that behalf, one part of which order shall be left by the deputy registrar named in such order at the Bank of England, who shall at the same time sign his name in the firm book kept at the Bank for such purpose, and the other part of such order shall be filed with the proceedings in that bankruptcy; and thereupon all drafts for that dividend, signed by such deputy registrar, shall be payable and paid, as if the same had been signed by the chief registrar named in the certificate of the said accountant-general. *Reg. Gen.* March 28, 1832, 1 Deac. & Chit. xxxii. f.

All sums of money which are by law payable out of any bankrupt's estate for allowance to the bankrupt, or for remuneration to the official assignees, or for the discharge of the solicitor's bill, or of any other lawful expenses incurred or payable by the assignees, shall and may, when duly settled and allowed, be paid out of the monies and securities so delivered and paid into the Bank of England as aforesaid, at such times and in such manner as any one of the judges of the court shall by order under his hand direct; provided that such order specify the amount of such payment, the purpose to which it is to be applied, and the person to whom, or to whose order the same is to be made. And the accountant-general of the high court of Chancery shall and may, pursuant to such orders, pay the sum of money specified therein out of such bankrupt's estate, without any further evidence of the same being due and payable, and without any further order or direction of the court. *Reg. Gen.* 19 March, 1832, Flather's New Bankrupt Court Act, 59.

*Bills and Notes.*—Each official assignee shall present for acceptance all unaccepted bills of exchange as soon as he shall receive the same, and before he deposits them in the Bank of England, as is hereinafter directed. *Reg. Gen.* Feb. 2, 1832, 1 Deac. & Chit. xxxi.

Each official assignee shall deposit in the Bank of England, to the credit of the accountant-general of the High Court of Chancery, all bills, notes, and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit, in like manner, all unaccepted bills of exchange, as soon as the same shall have been accepted, or refused acceptance; and shall, at the time of such deposit, leave a statement in writing with the cashier of the Bank of England, specifying the date and contents of the instruments so deposited, the name of the official assignee making the deposit, the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belongs; and that such instruments respectively are to be deposited to the credit of the said accountant-general, and of such particular estate; and shall also take a receipt for the same from the cashier of the Bank, and carry it to the office of the said accountant-general, who will give a proper voucher, to be produced when called for by the commissioners. *Id.*

When, and as soon as any bill, note, or other negotiable instrument, deposited as aforesaid in the Bank of England, in the name of the accountant-general, in pursuance of the stat. 1 & 2 Will. 4, c. 56, or of any order of the Lord Chancellor or the said court, shall become due, the governor and company of the Bank of England shall, without any direction from the accountant-general, deliver all such bills, notes, or other negotiable instruments, to one of the cashiers of the Bank, who is to present the same for payment, and receive the sums of money due thereon respectively, and forthwith to pay the sums so received (if any) into the Bank of England, to the credit of the respective estates to which the said bills, notes, or other negotiable instruments were placed at the time of delivering the same to the cashier. *Id.*

And in case the said bills, notes, or other negotiable instruments, or any of them, shall not be paid, the said governor and company of the Bank of England shall cause such bills, notes, and other negotiable instruments, as are by law required to be noted and protested, to be delivered to a notary for that purpose, and to be noted and protested accordingly; and shall, after the same shall have been so noted and protested, as the case may be, again deposit the same in the Bank of England, to the credit of the said accountant-general, and to the credit of the respective estates to which the same were placed at the time of delivering the same to the cashier. *Id.*

And the said governor and company shall debit the account of each estate with such sums of money as shall be paid by them for the expenses of noting and protesting such bills, notes, or other negotiable instruments respectively as shall have been placed to the credit of such estate. *Id.*

And the said governor and company of the Bank of England are forthwith, after every such receipt of money or deposit of any note, bill, or other negotiable security, to certify to the accountant-general the sum of money received (if any) on each such bill, note, or any such negotiable security, and placed to the credit of each such estate as aforesaid, or that such bill, note, or other negotiable instrument has been dishonoured, and been again deposited to the credit of such estate, as the case may be, and the sum with which each such estate has been debited as aforesaid. *Id.*

Where any exchequer bill or bills deposited in the Bank of England, to the credit of the accountant-general of the high court of Chancery, and of the estate of any bankrupt, pursuant to the statute 1 & 2 Will. 4, c. 56, or to any order of the court, shall be in the course of payment, the governor and company of the Bank of England shall and may, without any direction from the accountant-general, cause all such bills, in course of payment, to be delivered to one of the cashiers of the Bank, who is to receive the interest due thereon, and exchange the same for new bills, in case such new bills are issued, or otherwise to receive the principal money and in-



terest due on such of the said bills so in course of payment as cannot be exchanged, and pay the said interest, or principal and interest, (as the case may be), into the Bank of England, and deposit all such new bills in the Bank, to be there placed to the credit of the accountant-general, and of the same bankrupt's estate to which the former bills were, at the several times of delivering the same to the cashiers, for the purpose aforesaid placed; and the said governor and company of the Bank of England are forthwith, after every such exchange and receipt of interest, or of principal and interest, to certify to the said accountant-general, without any direction from him for that purpose, the number, dates, and sums of the new bills taken in exchange, and the amount of the interest, or principal and interest, (as the case may be), received on each bill, or set of bills, placed to the same account. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. g.*

As often as any bill, note, or other negotiable instrument, that shall have come to the hands of any official assignee, shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable security respectively. *Reg. Gen. Feb. 15, 1832, 1 Deac. & Chit. xxxiii. a.*

#### (c) Remuneration.

By 1 & 2 Will. 4, c. 56, s. 57, the remuneration to the official assignee is in the discretion of the commissioners.

It is recommended to the commissioners to allow the official assignees 1 per cent. on the monies they respectively receive, and 1½ per cent. more on the monies actually to be divided, subject nevertheless to be increased or diminished, in any case, under special circumstances, to be referred to the court of Review. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxviii.*

Official assignees are not, as a matter of course, entitled to poundage upon all monies passing through their hands. *Ex parte Ellis, 1 Mont. & Bligh, 116; 1 Deac. & Chit. 209.*

### 2. Choice of Creditors' Assignees.

#### (a) Who may be.

If a trader commit an act of bankruptcy, by assigning all his stock in trade to one who is a party to the deed of assignment, the latter may nevertheless act as an assignee under a commission sued out by a third person upon such act. *Jackson v. Irvin, 2 Camp. 49—Ellenborough. And see Tappenden v. Burgess, 4 East, 330; 1 Smith, 33.*

A bankrupt, whether certificated or not, cannot be an assignee under his own commission. *Ex parte Jackson, 2 Rose, 221; Coop. C. C. 286.*

The court will not permit the solicitor to the commission, nor his partner, to be assignee. *Ex parte Rice, 1 Mont. 259; S. P. Ex parte Badcock, 1 Mont. & Mac. 231.*

A banker receiving the money under a bankruptcy ought not to be an assignee. *Ex parte Lacey, 6 Ves. jun. 625.*

An assignee permanently resident in Scotland was removed. *Ex parte Grey, 13 Ves. jun. 274.*

One of two assignees having quitted the country, a petition was presented by the remaining assignee, that the bargain and sale to the two assignees might be vacated, and that a choice should be made of a new assignee in the stead of the one abroad, and that a new bargain and sale might be executed to the petitioner and the new assignee; and that service of the petition at the last place of residence of the assignee abroad might be deemed good service. On production of an affidavit of service of the petition, an order was made according to the prayer of the same. *Ex parte Bonbonous, 3 Madd. 23.*

#### (b) When and how Choice made.

*Requisite Proof.*—By 6 Geo. 4, c. 16, s. 61, all creditors who have proved debts under the commission to the amount of 10*l.* and upwards, are entitled to vote.

The election of assignees must be made by those creditors, however few, who are in a condition to vote, although those not in condition might have made a different choice. *Ex parte Butterfell, 1 Rose, 192.*

Seem, that a creditor who has proved is entitled to vote in the choice of assignees, if he apply before the commissioner has signed the declaration of appointment, although the commissioner had previously declared the choice complete. *Ex parte Nash, 1 Deac. & Chit. 445; 1 Mont. 501.*

Seem, also, that the appointment is not complete till the declaration of appointment is signed by the commissioner. *Id.*

The deposition of the petitioning creditor, at the opening of the commission, is not a proof to entitle him to vote. *Ex parte Rawson, 2 Glyn & J. 353.*

Where an order of court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c. *Ex parte Wyatt, 2 Deac. & Chit. 211.*

Quære, whether a creditor, on a voluntary bond, is entitled to vote in the choice of assignees? *Ex parte Venables, 1 Mont. & Bligh, 494.*

If assignees are elected by the vote of the petitioning creditor before he has proved, the choice may be vacated, although the petition be presented six months after the election. *Ex parte Danby, 1 Mont. 67.*

Where the commissioners had improperly rejected the petitioner's proof to a very large amount, whereby two creditors, for comparatively trifling sums, were enabled to choose the assignees, a new choice was directed, the petitioner indemnifying the estate against all the costs. *Ex parte Edwards, Buck, 411.*

Though a case appear in which the court would, upon an immediate application, vacate the choice on account of an improper rejection, yet it will not interfere where there is delay in making the application. *Ex parte Scholey, 1 Glyn & J. 2.*

It is not a ground for the removal of assignees, that the commissioners have improperly rejected

the proof of a debt that would have turned the choice, unless the rejection was fraudulent. *Ex parte Durent*, Buck, 201.

*Other Matters.*—By 1 & 2 Will. 4, c. 58, s. 20, the choice is to be made on the first of the two meetings.

By 6 Geo. 4, c. 16, s. 61, the assignees were to be chosen at the second meeting, or any adjournment thereof.

Persons authorized by letter of attorney from creditors entitled to vote, upon proof of the execution thereof, either by affidavit or by oath, may vote. *Id.*

The choice is to be made by the major part in value of the creditors entitled to vote. *Id.*

Where the assignee was chosen before one commissioner only, and the assignment was executed to him by three commissioners, a new choice was directed. *Ex parte Moore*, 1 Glyn & J. 190.

Commissioners have power to adjourn a meeting for the choice of assignees. *Ex parte Garland*, 1 Madd. 318; 2 Rose, 361.

Although all the creditors present concur in an election. *Id.*

Where the major part in value of the creditors had been accidentally, and without default on their parts, excluded from voting, a new choice was directed to be made. *Ex parte Dechapeau-rouge*, 1 Mont. & Mac. 174. *But see S. P. contra, Ex parte Surtees*, 12 Ves. jun. 10.

Commissioners were ordered forthwith to execute the assignment to the petitioners, who had been elected assignees by the major part in value of the creditors who had proved and voted, where the meeting had been adjourned by the commissioners, for the purpose of investigating a claim not sufficient to turn the choice. *Ex parte Woolley*, 1 Glyn & J. 366.

Where, through the error of the commissioners, the great body of the creditors were prevented from proving their debts, and voting in the choice of assignees, a new choice was directed. *Ex parte Hawkins*, Buck, 520.

Creditors having, subsequent to the appointment, signed resolutions authorizing the assignees to do certain acts, as assignees, which they could not have performed without such authority, and to act generally as assignees, are debarred from questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature. *Ex parte Nash*, 1 Deac. & Chit. 445; 1 Mont. 501.

A person appointed by the court to prove and receive dividends cannot vote in the choice of assignees. *Ex parte Shaw*, 1 Glyn & J. 127.

One partner is allowed to act for another in executing powers of attorney for voting in the choice of assignees, &c. *Ex parte Mitchell*, 14 Ves. jun. 597.

On an application tending to enforce a party to take the office of assignee upon him against his wish, he must be served with notice of it. *Ex parte Green*, 1 Deac. & Chit. 487.

### (c) Certificate of Choice.

By 1 & 2 Will. 4, c. 56, s. 29, a certificate of the appointment of assignees, purporting to be under the seal of the court, shall be received as evidence of the appointment in all courts and places whatsoever, without further proof.

The appointment of any assignee or assignees shall be under the hand of the commissioner, and shall remain of record in the court of Bankruptcy; and certificates of such appointment, under the seal of the court, shall be delivered to such assignee by the registrar, upon application for the same. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxvi.*

Where any certificate of the appointment of an assignee or assignees, hereafter to be made in any bankruptcy prosecuted elsewhere, shall be brought to the registrar of the court to be sealed pursuant to the act 1 & 2 Will. 4, c. 56, there shall be produced to him duplicate original certificates, written in the form thereinafter mentioned, with an affidavit of an attesting witness to the signatures to both; and that one of such duplicates, together with the affidavit, shall be left with the registrar, to be filed of record; and the other, when so sealed, shall be returned to the party producing the same. *Reg. Gen. 27 March, 1832, 1 Deac. & Chit. xxxii. c.*

Every such certificate shall (*mutatis mutandis*) be drawn according to the form there set out. *Reg. Gen. 27 March, 1832, 1 Deac. & Chit. xxxii. c.*

All such duplicates shall be signed as often as circumstances will permit, at the meeting where such assignees are appointed; and no charge shall be allowed to any commissioner for or in respect of any such certificate; nor shall the registrar make any charge for or in respect of the sealing thereof, except the charge allowed by the said act, and for filing affidavits and other documents. *Reg. Gen. 27 March, 1832, 1 Deac. & Chit. xxxii. c.*

By 1 & 2 Will. 4, c. 56, s. 27, the certificate of appointment must be registered, where the conveyance of the property would require registration.

This section does not require the certificate of the appointment to be registered, in order to protect them against subsequent purchasers of the bankrupt's freehold property without notice, unless the property is situate in a register county. *Ex parte —*, 1 Deac. & Chit. 349.

### (d) Jurisdiction to control.

By 6 Geo. 4, c. 16, s. 61, the commissioners have power to reject any person chosen an assignee who shall appear to them unfit; and, upon such rejection, a new choice is to be made.

The rejection by commissioners of an assignee as unfit under that section is not final; an appeal lies against the decision. *Ex parte Candy*, 1 Mont. & Mac. 197.

There is jurisdiction to control the choice of assignees having an interest adverse to the general creditors, if the question can be fairly tried without removal, by appointing a person to act as an assignee under the name of agent or inspector. *Ex parte Mills*, 3 Ves. & B. 139; 2 Rose, 68.

An application that a trustee or inspector may be appointed to protect the interests of a class of creditors, is premature until the choice of assignees. *Ex parte Simpson*, 2 Rose, 337; 1 Mer. 38.

An inspector was appointed for the separate estate, where the joint creditors had no interest in it. *Ex parte Batson*, 1 Glyn & J. 269.

A solvent partner was appointed receiver, without salary, of the partnership property, &c. *Ex parte Stoeckel*, 1 Glyn & J. 303.

Adverse interest by an elector is not a reason for a rejection of the elected; adverse interest in the elected may amount to unfitness. *Ex parte Candy*, 1 Mont. & Mac. 198.

Where, upon a joint choice of three persons as assignees, the court rejects the nomination of one of them, it will set aside the choice altogether, as it cannot collect from the nomination of three persons jointly, an intention to intrust the administration to two of the three if one be rejected. *Ex parte Shaw*, 1 Glyn & J. 127.

There is no jurisdiction in bankruptcy to reject a debt, on the ground that it must command the choice of assignees, and the creditor has an adverse interest to the general creditors by property and security obtained immediately before the bankruptcy; but an unjust use of his legal right by choosing himself will be controlled by the Lord Chancellor, either by removing him, if the election is recent, and nothing done under it, or otherwise by some arrangement, as in this instance, from the great amount of the debt, appointing another assignee to act solely in the investigation and decision of the disputed claim. *Ex parte De Tustet*, 1 Ves. & B. 281; 1 Rose, 324.

#### (c) Where joint and separate Flats.

The choice of assignees is with the creditors entitled to prove under the act of parliament, excluding persons who could not be admitted without an order,—as separate creditors under a joint commission, now admitted under the general order, (8 March, 1794). *Ex parte Parr*, 18 Ves. jun. 70; 1 Rose, 76.

Without such order, separate creditors are not entitled to vote under a joint commission. *Ex parte Haynes*, 1 Rose, 321; *Ex parte Jenson*, 19 Ves. jun. 225.

A new choice on that ground directed, though the Lord Chancellor would not interfere if a creditor had been excluded by mistake, and not for the purpose of preventing his voting. *Id.*

Section 62 of 6 Geo. 4, c. 16, by which joint creditors may prove under separate commissions to vote, applies only to partnerships subsisting at the time of the bankruptcy. *Ex parte Morris*, 1 Mont. 218.

Joint creditors cannot vote or interfere in the choice of assignees under a separate commission. *Ex parte Alecock*, 11 Ves. jun. 603; *S. P. Ex parte Longman*, 18 Ves. jun. 71.

If there is only one separate creditor, an arrangement will be made for the joint creditors by order. *Ex parte Parr*, 18 Ves. jun. 70; 1 Rose, 76.

Unless they pay the separate creditors 20s. in the pound. *Ex parte Hubbard*, 13 Ves. jun. 424.

The right of joint creditors under a separate commission to an account, and application of joint effects, is limited as to the separate estate to the surplus, and does not extend to voting in the choice of assignees. *Ex parte Wilson*, 18 Ves. jun. 442.

Though joint creditors have no right to vote under a separate commission, yet the court will in some cases appoint persons in the nature of assignees to take care of the interest of the joint creditors, and to use the name of the assignees upon indemnifying them. *Ex parte Bassarow*, 1 Rose, 266; *S. P. Ex parte Mills*, 3 Ves. & B. 139; 2 Rose, 68.

The choice under a separate commission was not disturbed upon the ground that the assignees had been elected by joint creditors, who had been admitted upon the proceedings as separate creditors. Secus, if they had been admitted and voted as joint creditors. *Ex parte Jeffery*, 1 Rose, 315.

Joint creditors were not allowed to vote in the choice of assignees under a separate commission, although the petitioning creditor, whose debt would have carried the choice, consented. *Ex parte Simpson*, 2 Rose, 337; 1 Mer. 38.

But, in another case, an order was made for joint creditors to vote under a separate commission, where the petitioning creditor, who was a joint creditor, and whose debt overbalanced the separate debts, consented. *Ex parte Taylor*, 18 Ves. jun. 284; 2 Rose, 442.

So, where the petitioning creditor, who was a joint creditor, consented, and the only separate debt was under 10l. *Ex parte Jones*, 18 Ves. 283.

A joint creditor, being the petitioning creditor under a separate commission, is entitled to prove and vote with the separate creditors, not being within the rule excluding the other joint creditors. *Ex parte Hall*, 9 Ves. jun. 349.

### 3. Removal of Assignees.

#### (a) For what Cause.

It is a general rule, that an assignee having adverse interests will be removed, or an arrangement made by the appointment of some other creditor for the investigation of his claims. *Ex parte De Tustet*, 1 Rose, 324; 1 Ves. & B. 281. And see *Ex parte Surtees*, 12 Ves. jun. 10.

The court has jurisdiction to remove the persons nominated by the creditors as assignees before the execution of the assignment. *Ex parte Shaw*, 1 Glyn & J. 127.

Assignees were removed on the ground that one of them had purchased the bankrupt's estate, under the commission, for himself. A re-sale was directed, and the purchaser to account for a profit gained by him upon a re-sale of part; but he was discharged from the purchase only conditionally, in case the re-sale should produce more. *Ex parte Reynolds*, 5 Ves. jun. 707.

Till the debt is set aside, the court will not re-

move a creditor from his office as assignee upon suspicion of its unfairness. *Ex parte Mills*, 2 Rose, 68; 3 Ves. & B. 139.

An assignee was discharged from being such on his own petition, but on terms. *Ex parte Thorley*, 3 Madd. 273; Buck, 231, 465.

Semble, that where one assignee had obtained an order to discharge himself from the office (which was not drawn up), but the commissioners had, by their memorandums, virtually recognised such discharge by excluding his name from them, he cannot be made liable by any subsequent memorandums. *Ex parte Learmouth*, 1 Deac. & Chit. 491.

#### (b) Proceedings.

By 1 & 2 Will. 4, c. 56, s. 36, the court of Review has power to remove any assignee; and the order of that court thereupon is final and conclusive, and not subject to review by the Chancellor or otherwise.

The court of Review has power to remove an official assignee as well as any other assignee. *Ex parte Ellis*, 1 Deac. & Chit. 209; 1 Mont. & Bligh, 106.

By 6 Geo. 4, c. 16, s. 64, the Chancellor might, on petition, vacate, except as against purchasers, the bargain and sale or assignment, and direct the commissioners to execute new ones to new assignees.

Assignees removed, and the assignment and bargain and sale vacated, except as to purchasers. *Ex parte Leman*, 13 Ves. jun. 271. And see *Ex parte Bainbridge*, 6 Ves. jun. 451.

On an application to remove one of several assignees, the proper course is to petition for a new choice. *Ex parte Steel*, 1 Deac. & Chit. 489.

An assignee removed for the benefit of the estate, is entitled to his costs out of any fund in hand, before it is transferred to the new assignees. *Ex parte James*, 1 Mont. & Bligh, 262; 1 Deac. & Chit. 272.

Where an assignee, on being chosen, accepts the office, he can only retire on payment of the costs occasioned by his removal. *Ex parte Watts*, 1 Deac. & Chit. 322.

Where there is only one assignee surviving, and he, from his advanced age (72), is desirous of being removed from the office, the proper course is to procure a new choice in the room of those who are dead, and then to apply that he may be removed. *Ex parte Rapp*, 1 Deac. & Chit. 461; S. C. nom. *Ex parte Rapp*, 1 Mont. & Bligh, 261.

#### 4. Appointment of new Assignees.

By 1 & 2 Will. 4, c. 56, s. 25, in case of the death or removal of assignees, and of new assignees being duly appointed, the estate shall vest in them by virtue of the appointment, either alone, or jointly with the existing assignees.

Upon the removal of an assignee, and the appointment of a new assignee, the estate, by section 25 of the statute 1 & 2 Will. 4, vests in the new assignee by operation of law; and there is no

need of an assignment. *Ex parte Falar*, 1 Mont. & Bligh, 262; 1 Deac. & Chit. 32.

The court has not jurisdiction in bankruptcy to declare the infant heir of an assignee a trustee of the bankrupt's estate. *Ex parte Kirk*, Buck, 78.

The infant heir of a messenger, to whom, in bankruptcy, a provisional assignment had been made, and who died before the choice of assignees:—Held, to be within the statute of Anne. *Ex parte Carter*, 5 Madd. 81.

The retiring assignee must permit his name to be used in any legal proceedings already commenced, he being indemnified by the new assignee. The indemnity to be settled by the Master. *In re Roberts*, Buck, 465.

A new assignee of a bankrupt may sue in debt upon a judgment recovered by a former assignee, displaced by the Lord Chancellor; which judgment was "for damages sustained, for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee, as such, after the bankruptcy;" for such recovery will be presumed to have been for injuries done to the bankrupt's estate and effects; and the plaintiff may declare in a general form, as having been duly constituted and appointed assignee, &c. *De Cosson v. Vaughan*, (in error), 10 East, 61.

If an assignee be removed, and assign his interest to the other assignees, they may maintain an action for money had and received against him, to recover money received by him as such assignee. *Smith v. Jameson*, 5 T. R. 601; Peake, 213. And see *Wray v. Barois*, Peake, 69.

Where, on a petition to the Vice-Chancellor for a change of assignees, an order was obtained under the statute 5 Geo. 2, c. 30, s. 31, directing that a new assignment should be executed to the plaintiff, in which the two former assignees should join, and one of such assignees absconded, and the assignment was executed to the plaintiff by the other alone:—Held, that the plaintiff could not maintain an action of assumpsit for goods sold and delivered in his character of assignee, as an application should have been previously made to the Vice-Chancellor, stating the reason of the nonjoinder of the assignee who had absconded. *Aldrit v. Kittridge*, 6 Moore, 569; 1 Bing. 355.

Where the declaration so stated that the defendant was indebted; and it was proved that the goods had in fact been sold by the bankrupt with the concurrence of a former assignee, whose appointment had been vacated by the Lord Chancellor, and the plaintiff was appointed in his stead:—Held, that this was no variance. *Aldrit v. Kittridge*, 8 Moore, 372.

Where the assignee of a bankrupt is removed, and a new one appointed, quære, whether a party having money in his hands which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received to the use of the newly appointed one? *Stead v. Thornton*, 3 B. & Adol. 357 (n).

But the former assignee having been insane

when the money was received:—Held, that such receiver was liable at all events; for he could not be the agent of an insane person, and, therefore, held the property as a mere stranger. *Id.*

In one case, the assignment and bargain and sale were vacated under the circumstances, without directing a new choice of assignees. *Ex parte Kersley*, Buck, 477.

Upon a new choice of assignees, there is no necessity to vacate the assignment. *Ex parte Forster*, 1 Mont. & Bligh, 87.

Where one of three assignees declines to act, the two acting assignees should join in the petition for a new choice. *Ex parte Harris*, 2 Deac. & Chit. 4.

A retiring assignee must pay the costs of the meeting for a new choice, and the costs of his application to retire. If the new assignee do not continue any legal proceedings already commenced, the retiring assignee must pay the costs incurred by them, unless the master report that such costs were properly incurred. *In re Roberts*, Buck, 465.

An assignee who retires must give security, to be approved of by the master, to protect the estate against any costs that may arise in any action at law or suit in equity, occasioned by his retiring. *Ex parte Thorley*, Buck, 231; 3 Madd. 273.

By 6 Geo. 4, c. 16, s. 67, whenever an assignee shall die, or a new assignee be appointed, no action or suit shall be thereby abated; but the court, upon a suggestion of such death or removal, may allow the name of the surviving or new assignee to be substituted.

The plaintiff assignee of a bankrupt having died, and another assignee having been appointed in his stead, the rule to enter a suggestion of such fact on the record, in pursuance of the statute, is absolute in the first instance. *Westall v. Sturges*, 4 M. & P. 217.

A second assignee, who continues, by suggestion on the record, a suit commenced by his predecessor, may recover a penalty as well as his predecessor. *Bates v. Sturges*, 7 Bing. 585; 5 M. & P. 568.

### 5. Rights and Authority of Assignees.

#### (a) To repay their Expenses.

By 6 Geo. 4, c. 16, s. 106, the commissioners were to audit the accounts within six months, and not earlier than four months, after the last examination, allowing the assignees to retain all money expended in suing out and prosecuting the commission, and all other just allowances.

An assignee sustaining a litigated commission is entitled to his costs out of the estate, as between attorney and client. *Ex parte Bryant*, 2 Rose, 1: S. C. not S. P. 1 Ves. & B. 211, 506.

Assignees are not entitled to travelling expenses. *Ex parte Elsee*, 1 Mont. 1.

Assignees, being accountants, cannot charge the estate for business done as accountants. *Ex parte Read*, 1 Glyn & J. 77.

The provisional assignee was entitled to his

costs from the mortgagee, in a suit for foreclosure by the mortgagee, who was allowed to add them to the principal and interest due to him on the mortgage. *Peake v. Gibbon*, 1 Tam. 505.

Assignees were made to pay the costs of a trial of an issue directed to try the validity of the commission, they being the plaintiffs, and the bankrupt the defendant; but they were not made to pay the costs of the petition to supersede the commission. *Ex parte Edwards*, Buck, 232.

A messenger sues the assignees for his costs and expenses, and obtains a judgment against them; and one of them pays the debt and costs under the judgment: he has a right of action for contribution against his co-assignee, and is not bound to shew that any funds came into his hands from the bankrupt's estate. *Hurt v. Biggs*, Holt, 245—Gibbs.

Contribution is enforced among assignees, to reimburse a payment of one under an order, for a loss occasioned by their joint act; and the objection, that the defendants acted only for conformity upon the representation and advice of the plaintiff, will not prevail. *Lingard v. Bromley*, 1 Ves. & B. 114; 2 Rose, 118.

Extra costs incurred by assignees in conducting prosecutions for perjury and conspiracy, directed to be allowed under 6 Geo. 4, c. 16, s. 106. *Ex parte Strange*, 1 Mont. & Mac. 31.

#### (b) To act for each other.

Where there are more assignees than one, one of them may receive money belonging to the estate, and give a good discharge for it. *Smith v. Jamesons*, 1 Esp. 114—Kenyon.

But otherwise where the express dissent of the other assignee appears. *Bristow v. Eastman*, 1 Esp. 174—Kenyon.

Semble, that evidence that a release executed by one assignee only was done in the presence and with the concurrence of the others, is admissible. *Williams v. Walsby*, 4 Esp. 220—Ellenb.

But a general authority from one of several assignees to the others to act for him, and use his name, is not sufficient to enable the others to execute such a release by deed; there must be a special authority for that purpose. *Id.*

Assignees cannot delegate their general authority. *Douglas v. Brown*, 1 Mont. 93.

Money deposited in the bank in the name of three assignees, ordered to be paid to the checks of two, the third having absconded. *Ex parte Hunter*, 2 Rose, 363; 1 Mer. 408.

Where part of the bankrupt's estate was paid into the bank in the names of five assignees; and one of them having died, and another gone abroad, the remaining assignees applied to the bank for the money, for the purpose of making a dividend, but the bank refused to pay it without proof of the two other assignees being dead: the court made an order on the bank to pay the money to the three remaining assignees. *Ex parte Collings*, 2 Cox, 427.

If four persons are chosen assignees, and, at the choice, it is verbally agreed that one shall act,

and notice is given to the banker to pay the drafts of the one, and a dividend is declared, and notice is given to the creditors "that they may receive the dividend upon application to the assignees," and the acting assignee pay the dividends by checks, which are dishonoured, he having overdrawn the account and absconded, the other three assignees are liable. *Ex parte Booth*, 1 Mont. 243.

B., one of two assignees, signs the checks for the dividends, and delivers them to S., his co-assignee, who undertakes to distribute them to the creditors. The checks are signed by S., and the money is fraudulently received on some of them by a clerk of S., who became bankrupt before the actual demand of the dividends:—Held, that B. was not liable for the checks, the credit of S. not being impeached at the time of the delivery of the checks. *Ex parte Griffin*, 2 Glyn & J. 114.

Where a former memorandum of commissioners finds that a sum of money is in the hands of one assignee, and directs it to be invested in the name of all three assignees, which, however, could not be done, as the money was not forthcoming; the commissioner is not warranted in finding that the money is in the hands of all three assignees, and thereupon ordering them to divide; and the court of Review has no jurisdiction to entertain the question of the liability of the co-assignees to answer the consequences of trusting the assignee in default. *Ex parte Learmouth*, 1 Deac. & Chit. 491.

Whenever two of three assignees direct the solicitor to be changed, the third, not concurring, has a right to know whether such change would be beneficial, and he not appearing on a petition for that purpose, the order was made. *Ex parte —*, 1 Rose, 207.

If the creditors meet for the purpose of considering whether unfinished work of the bankrupt shall be finished and sold, and they refuse to finish it until one of the assignees agrees to find funds, on which they all agree, the other assignee is not liable for materials provided to finish the work. *Bothomley v. Usborne*, Peake's Add. Cas. 39—Kenyon.

## 6. Duties of Assignees.

### (a) Generally.

It is the first duty of assignees to satisfy themselves that the commission is well founded. *Ex parte Graves*, 1 Glyn & J. 86.

An assignee must consider the commission under which he derives his authority to be valid, and act under it at his own risk and responsibility; the Lord Chancellor not having jurisdiction to indemnify him against the consequences of its invalidity. *In re Bryant*, 2 Rose, 17.

The court of Review will not order resolutions passed at a meeting of creditors to be carried into effect, without referring it to the commissioners, to certify whether it would be for the benefit of the estate. *Ex parte Farmer*, 1 Deac. & Chit. 110.

On a summary application against the assignees for delivery up of goods, seized by them as the property of the bankrupt under the fiat, out of the hands of the petitioner (a stranger to the bankruptcy), who claimed the goods as his, but who, together with the bankrupt, had been indicted for a conspiracy, in secretly and fraudulently removing the goods, which indictment was still pending: the court refused to decide on petition till after the trial, on the ground that it would tend to disclose the assignees' evidence in support of the indictment. *Cross, J.*, dissent. *Ex parte Heath*, 2 Deac. & Chit. 140.

In general, the assignees of a bankrupt cannot lend; but as they might lend under particular circumstances by the 5 Geo. 2, c. 30, s. 32, counts may be joined for debts due to the bankrupt, and for money lent by the assignees as such. *Richardson v. Griffin*, 2 Chit. 325; 5 M. & S. 294.

### (b) To sell Estate.

*Generally.*—In bankruptcy, the mode of selling an estate is left to the commissioners, and not directed by the court, as in a sale by a master. *Ex parte Cominges*, 1 Ves. jun. 112.

The court will not sanction a sale of the bankrupt's property by private contract, without a previous reference to the commissioners. *Ex parte Goding*, 1 Deac. & Chit. 323.

An assignee, instead of selling the estate, taking a lease himself, is answerable for profit and loss. *Ex parte Hughes*, 6 Ves. jun. 617.

A landlord being assignee cannot resume possession and re-let, but for the benefit of the estate. *Ex parte Wright*, 2 Rose, 244.

Assignees are bound as other persons to make a good title, unless guarded by express stipulation. *McDonald v. Hanson*, 12 Ves. jun. 277.

But if it appear before the contract executed, that they cannot make such title, the parties would be left to law. *White v. Foljeme*, 11 Ves. jun. 343.

A purchaser, under a bankruptcy, must take such title as the bankrupt had, and cannot insist upon a title strictly free from objection, as in other cases. In such a case, the purchaser objecting to the title, but insisting upon his purchase, his bill for a specific performance was, under the circumstances, dismissed with costs, except as to some parts of the answer and the depositions which contained irrelevant matter. *Pope v. Simpson*, 5 Ves. jun. 145.

A bankrupt's assignees had contracted for the sale of his copyhold lands, and received a deposit. The commission was afterwards superseded, because, when it issued, the petitioning creditor's debt was not due. Another commission issued upon the petition of another creditor, and the same assignees were chosen:—Held, that the plaintiff, having abandoned his contract pending the old commission, might recover back his deposit. *Bartlett v. Tuckin*, 6 Taunt. 259; 1 Marsh. 583; 2 Rose, 436.

An application by creditors to restrain the assignees from a sale of the bankrupt's stock in trade

and lease was granted. *Ex parte Montgomery*, 1 Glyn & J. 338.

An injunction was granted, ex parte, to restrain the assignees from selling the bankrupt's effects. *Ex parte Figez*, 1 Glyn & J. 122.

**Purchase by Assignees.**—An assignee desirous of becoming a purchaser of the estate of the bankrupt, must first obtain the consent of the creditors, and then petition, and serve the other assignees, and also the bankrupt, with the petition. *Ex parte Bage*, 4 Madd. 459.

Where real property of the bankrupt was put up to sale by auction in two lots, and bought in by the assignee without the authority of the creditors; and upon a re-sale there was a loss on one lot and a gain on the other, though the balance was in favour of the bankrupt's estate, the assignee was charged with the loss on the lot under-sold. *Ex parte Lewis*, 1 Glyn & J. 69.

Leave was given to assignees to bid for part of the bankrupt's estate, a meeting of the creditors having previously given their sanction to the application. *Anon.* 2 Russ. 350.

Though the creditors, at a meeting convened by advertisement, sanction a sale of the bankrupt's effects at a valuation to one assignee, the court will not order that the assignee should be allowed to become the purchaser, without a reference to ascertain whether the effects can be more advantageously disposed of. *Ex parte Serle*, 1 Glyn & J. 187.

The assignees may be justified in declining to continue works in a mine which do not appear likely to prove immediately beneficial to the estate, and even in relinquishing the bankrupt's interest as *damnosæ hereditas*; but however pure their motives, neither assignees nor commissioners can be permitted to possess themselves by purchase or otherwise of any part of the bankrupt's interest in such property. *Ex parte Badcock*, 1 Mont. & Mac. 231.

Against all transfers of the bankrupt's estate, either to the assignees or commissioners, the rule of the court is uniform and inflexible. *Id.*

A purchase by an assignee of dividends cannot be for his own benefit. *Ex parte James*, 8 Ves. jun. 337.

An assignee, under particular circumstances, was permitted to bid at the sale of the bankrupt's estate, his solicitor not having the management of the sale. *Ex parte Morland*, 1 Mont. & Mac. 76.

#### (c) To keep Accounts.

By 6 Geo. 4, c. 16, s. 101, assignees were directed to keep accounts.

By ss. 102, 103, & 104, provisions were made as to the manner in which the accounts were to be kept, and the estate invested and disposed of.

By s. 106, the commissioners are to audit the accounts of the assignees, and to allow their expenses.

The court of Chancery, sitting in bankruptcy,  
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had no jurisdiction to direct that the personal representative of a deceased assignee should account for the personal estate of the bankrupt in his hands. *Ex parte Crowe*, 1 Mont. & Mac. 281.

Creditors who wish to have the accounts of the assignees taken, must first apply to the commissioners for that purpose; and if they miscarry in their judgment, or refuse to act, the creditors may then petition the court to have the accounts taken. *Ex parte Brocksopp*, Buck, 304.

The court will not review the allowance by the commissioners of the assignees' accounts, except in matter of principle. *Ex parte Anthony*, 2 Glyn & J. 55.

The court has jurisdiction to review the quantum allowed by the commissioners to the assignees in passing their accounts; and the jurisdiction is not confined to the principle upon which the allowance is made. *Ex parte Anthony*, 2 Glyn & J. 177.

A petition for leave to except must set out the objectionable items. *Id.*

Where a partnership between bankrupts commenced at different times, separate accounts of each partnership's fund was directed. *Ex parte Marlin*, 2 Bro. C. C. 15.

A petition for keeping separate accounts, which might be done under the general order, was dismissed with costs. *Ex parte Green*, 1 Deac. & Chit. 382.

Creditors are not entitled to apply to the court for any order to have copies of the assignees' accounts delivered to them. They are entitled under the 6 Geo. 4, c. 16, s. 101, to inspect such accounts, and for that purpose an application must be made in the first instance to the commissioners. *Ex parte Granger*, 1 Mont. & Mac. 289.

The assignees are bound to furnish a creditor, who has proved, with a copy of their accounts, if he offers to pay the expense of making such copy. *Ex parte Aberdeen*, 2 Deac. & Chit. 34.

#### (d) To distribute Estate.

By 6 Geo. 4, c. 16, s. 76, if the bankrupt shall have entered into a contract for the purchase of an estate, or interest in land, the vendor may compel the assignees to elect whether they will abide by or decline the agreement.

The authority of assignees in bankruptcy is limited to the purposes of their trust—the distribution of the estate under the bankrupt laws; and does not therefore extend to an agreement disposing of the surplus after 10s. in the pound to the creditors. *Ex parte Barfit*, 12 Ves. jun. 15.

The joint estate is to be first applied to the joint debts, and, after they are paid, the surplus, if any, to the separate debts, and vice versa, as to the separate estates. *Ex parte Abell*, 4 Ves. jun. 840.

An account and application of the joint estate is directed on the application of any joint creditor, the residue to be distributed according to the respective interests of the partners. *Dutton v. Morrison*, 17 Ves. jun. 209; 1 Rose, 213.

A surplus of separate estate must be carried to a deficient joint estate before payment is made on a voluntary bond. *Ex parte Spurrier*, 1 Mont. 246.

The representatives of a surviving assignee of an estate that had paid 20s. in the pound, all the commissioners being dead, were ordered to execute a power of attorney to a receiver appointed under a decree of the court in a cause in which the surviving assignee was a defendant, to collect and get in the said estate, they being indemnified. *Twoood v. Hankey*, Buck, 65.

Assignees must not keep money in their hands. *Ex parte Goring*, 1 Ves. jun. 169.

Where there is a joint commission against partners, and a separate commission against one, the assignees, having taken possession of the whole fund, must divide it among the joint creditors, and the separate bond creditors of the other partner cannot claim against him. *Hankey v. Garratt*, 3 Bro. C. C. 457.

Joint creditors cannot touch the separate estate till the separate creditors are fully satisfied. *Gray v. Chiswell*, 9 Ves. jun. 124.

Under a joint commission, the affairs of the separate creditors may be arranged, and also of separate firms of two or more of the partners. *Ex parte Bonbonas*, 8 Ves. jun. 545.

In bankruptcy, the usual directions are, to apply the funds respectively, the joint to the joint debts, the surplus of each to the creditors remaining on the other. *Ex parte Eldon*, 3 Ves. jun. 241.

The court will not, at the petition of the bankrupt, direct inquiries as to the management of the estate, if he have not a pecuniary interest therein. *Ex parte Harrison*, Buck, 246.

Under a separate commission, there being a solvent partner, the separate estate is applied to the separate creditors exclusively. *Ex parte Yonge*, 3 Ves. & B. 39; 2 Rose, 40.

## 7. Liability of Assignees.

### (a) For Losses.

Assignees are not responsible for a loss sustained in the bankrupt's effects, where, under the circumstances, it could be inferred that there had been no blamable negligence in their conduct. *Ex parte Turner*, 1 Mont. & Mac. 52.

Where an assignee employed a broker to sell a quantity of tobacco, and the broker received the money, and at the end of ten days failed before he paid it over; the assignee was held not bound to make it good. *Ex parte Belchier*, Amb. 218.

Where the bankrupt's reversionary estate was offered for sale by auction, and 950l. bid, and the same was bought in for 1000l. upon a reserved bidding to that amount, and afterwards, when reduced into possession, sold for 510l.:—Held, under the circumstances, not to make the assignee liable for the difference. *Ex parte Bauxton and Jenkinson*, 1 Glyn & J. 355.

A provisional assignee was not responsible for the fraud of an agent appointed with due care. *Raw v. Catten*, 9 Bing. 96; 2 M. & Scott, 123.

### (b) Retaining Money.

By 6 Geo. 4, c. 16, s. 104, an assignee disobeying directions to invest money, or retaining it in his hands, or employing it for his own benefit, or permitting his co-assignee to do so, is to be charged with 20l. per cent.

The act is imperative that an assignee shall be charged 20l. per cent. for money wilfully retained in his hands. *Ex parte Bray*, 1 Rose, 144.

The bankrupt himself has no equitable claim to it either in respect of his allowance, or his right to the surplus. *Ex parte Lowe*, 1 Deac. & Chit. 137—Pell, J. dissent.

Quære, whether this charge is to be 20l. per cent. per annum, during the whole period of retention, or only one single charge of 20l. per cent. upon the gross sum retained? *Id.*

Quære, whether the charge can be sustained on monies retained by assignees previous to the 1st of September, 1825, when the 6 Geo. 4, c. 16, first came into operation. *Id.*

The 20l. per cent. given by the 49 Geo. 3, c. 121, s. 4, applied to a solvent assignee only. *Ex parte Goldsmith*, 1 Glyn & J. 405.

Where assignees gave checks upon the banker of the estate, to an agent to enable him to purchase Exchequer bills for the benefit of the estate, and the agent received the money at the bank, and converted it to his own use; but the money was subsequently replaced in the bank:—Held, that the assignees were not, under the 49 Geo. 3, c. 121, s. 4, chargeable with 20l. per cent. upon the monies so misapplied by their agent. *Ex parte Wilkinson*, Buck, 197.

Where the creditors of a bankrupt appointed the Bank of England as the place where the estate should be deposited, and a dividend was declared; and two of three assignees signed drafts for the dividends, which they forwarded to the other assignee for his signature, and he also signed them and received the money, which he applied to his own purposes; and upon his death, a creditor's suit was instituted by the assignees for the administration of his assets:—Held, that the estate of the assignee was liable under the statute to pay 20l. per cent. upon the funds misapplied. *Wackerbath v. Powell*, Buck, 435; S. C. contra, *Ex parte Wackerbath*, 2 Glyn & J. 151.

The interest at 20l. per cent., given by the 49 Geo. 3, c. 121, s. 4, cannot be recovered in assumpsit, on the common money counts. *Barnford v. Birch*, 1 C. & P. 373—Abbott.

Quære, whether the assignee ought not to be charged by the commissioners with such interest before any action is brought? *Id.*

Before these statutes, an assignee keeping money unnecessarily in his hands, and using it in his trade, was charged with interest for it. *Traves v. Twisshead*, 1 Bro. C. C. 384; S. C. nom. *Traves v. Twisshead*, 1 Cox, 50.

An assignee was removed, and charged with interest at 5l. per cent. before stat. 49 Geo. 3, c. 121, s. 4, for money paid in at his banker's to his account, and used as his own property. *Ex parte Twisshead*, 15 Ves. jun. 470.



An assignee was charged with interest, where he was a partner in the bank into which the money was paid by direction of the creditors, for keeping it there too long. *Ex parte Baker*, 18 Ves. jun. 246; 2 Rose, 441.

An assignee used never to be charged with interest for money retained in his hands at a higher rate than 4l. per cent. unless a special case was made out for it. *Ex parte Strutt*, 1 Cox, 439.

Interest at 4l. per cent. against assignees of a bankrupt, for not making a dividend when they ought, would be increased upon circumstances. *In re Hilliard*, 1 Ves. jun. 89.

An assignee becoming bankrupt, with monies in his hands, his estate is not entitled to any dividend on the proof made by him under the estate of which he was assignee, until full reimbursement of the money which such assignee had in his hands. *Ex parte Bignold*, 2 Madd. 470.

A sum paid by mistake by an assignee of one bankruptcy to assignees under another bankruptcy, and divided amongst the creditors by the latter, directed to be paid out of future effects. *Id.*

#### (c) When Bankrupt carries on Business.

By 1 & 2 Will. 4, c. 56, s. 35, the assignees may, with the approbation of the proper subdivision court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade for behoof of the creditors, and in all or any other respects they may think fit, to aid them in administering the bankrupt's estate and effects, as they may think best for the benefit of the persons interested.

A commissioner having certified that the business of the bankrupt might be carried on by a provisional assignee beneficially for the creditors, the official assignee was ordered to advance funds for the purpose. *Ex parte Wyatt*, 1 Mont. & Bligh, 261; 1 Deac. & Chit. 229.

If a bankrupt carry on the business for the benefit of the creditors, as their agent, under the authority of the assignee, and order goods in his own name, which are used in the business, the assignee is liable for the goods. *Kinder v. Howarth*, 2 Stark. 354—Holroyd.

Assignees may maintain an action on a note given as a collateral security for goods sold by them to one of the bankrupts. *Rawson v. Walker*, 1 Stark. 361—Ellenborough.

### 8. Actions by and against Assignees.

#### (a) Limitation.

By 6 Geo. 4, c. 16, s. 44, every action brought against any person for any thing done in pursuance of the act must be commenced within three calendar months next after the fact committed.

The right construction of this section appears to be, that if the assignee does an act directed by the statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, it is not done in pursuance of the statute, and he is responsible for it. *Edge v. Parker*, 8 B. & C. 697.

Where assignees entered the premises of a third person to seize goods, which were the property of the bankrupt, it is not necessary that an action against them should be brought within three months after the fact committed; the act of the assignees not being done "in pursuance of the statute." *Id.*

The section does not apply to actions against assignees, who only act in the disposition and distribution of the property of the bankrupt, and not under any power conferred on them by law, or for any special purpose under the act; for the act does apply to acts done for the purpose of taking possession of the bankrupt's property by the commissioners, or messenger acting under their warrant. Therefore, trover for a chariot seized by assignees on the premises of the bankrupt was held to be maintainable, although the action was not commenced by the owner against the assignees within three months after the seizure. *Carruthers v. Payne*, 2 M. & P. 420; 5 Bing. 270.

#### (b) What form of Action.

Assignees cannot at first affirm the act of a creditor interfering with the bankrupt's effects as a contract, and afterwards disaffirm it as a tort; although such act, if disaffirmed in the first instance, would have amounted to a conversion of the bankrupt's goods, and would have rendered the creditor liable to the assignees in trover. *Brewer v. Sparrow*, 1 M. & R. 2; 7 B. & C. 310.

Trover will not lie by assignees against a person who had wrongfully continued the bankrupt's business, though bona fide for the benefit of the creditors, where, by accepting the proceeds, they had either affirmed his acts as their agent, or had received them as a satisfaction for the wrongful act. *Id.*

Assignees (when goods were pledged to secure accommodation acceptors) having elected to bring trover, cannot afterwards sue the defendant, to recover back the original sum for which the goods had been in the first instance pledged, although paid to them after the depositor had become bankrupt. *Birdwood v. Raphael*, 5 Price, 593.

If they accept the balance of the amount it is an affirmation, and they cannot maintain trover. *Bennett v. Spackman*, 1 C. & P. 274—Abbott.

If short bills are delivered by a banker, on the eve of his bankruptcy, to a third person, who receives payment, and pays the money to the assignees, trover does not lie, but assumpsit. *Tenant v. Strachan*, M. & M. 377; 4 C. & P. 31.

Quære, whether the assignees of a bankrupt can sue in case for a tort committed against the estate of the provisional assignees? *Freen v. Cooper*, 6 Taunt. 358; 2 Marsh. 59.

Assignees may sue both in the debt and detinet, because the whole property of the bankrupt is vested in them by law. *Winter v. Kretschman*, 2 T. R. 45.

Assignees are not restrained from bringing a second action (having been non-suited in the first,) for the recovery of certain sums from a creditor, who had given credit for them in his account, and

had proved for the balance. The general rule, however, is, that they must proceed by petition if the creditor has proved. *Ex parte Hilson*, 1 J. & W. 467.

If a person, after notice of an act of bankruptcy, sets up a claim of lien upon certain deeds, and the bankrupt pays the sum he demands to get possession of the deeds, the assignees cannot question the amount of this lien, unless there be a count for money had and received to the use of the assignees; but if the person had really no just claim at all, the assignees may recover the same in an action for money had and received to the use of the bankrupt; however, if it appear that the defendant never received any money, but that A., who was to have conveyed a house to the bankrupt, at his desire mortgaged it to the defendant, an action for money had and received will not lie. *Noble v. Kersey*, 4 C. & P. 90—Tenterden.

#### (c) What cause of Action.

Assignees under a joint commission against two partners may recover, in the same action, debts due to the partners jointly, and debts due to them separately. *Graham v. Mulcaster*, 4 Bing. 115; 12 Moore, 327.

But otherwise, if it be proved that one alone had committed an act of bankruptcy; neither are they entitled to recover the separate property of that one under such commission. *Hogg v. Bridges*, 2 Moore, 122; 8 Taunt. 200.

The court will restrain a bankrupt controverting his bankruptcy from vexatiously bringing actions against his assignees; but will not so interfere, upon the ground that the bankrupt has failed upon the trial of one action and on an application for a new trial, and was about to bring a second action. *Ex parte Bryant*, 2 Rose, 1; 1 Ves. & B. 211, 506.

Assignees cannot recover in trover goods delivered upon a transaction which the bankrupt himself could not impeach, unless the delivery is subsequent to an act of bankruptcy taking place after the petitioning creditor's debt has accrued. *Ward v. Clarke*, M. & M. 497—Tenterden.

Where the plaintiff and a bankrupt, before the bankruptcy, being partnership brokers, effected an insurance for the defendants, and the receipt of the premium was acknowledged in the policy at the time of effecting such insurance, but which was not in fact paid until after the plaintiff's partner's bankruptcy, when the plaintiff paid it out of his own separate property; the principal insured was held liable to the solvent partner only. *Thacker v. Shepherd*, 2 Chit. 652.

A. having become bankrupt, his goods were sold by order of his assignees. Some goods of his in B.'s hands at the time of the bankruptcy, and on which B. claimed a lien, were also included in the sale; but this was done by B.'s order, and the assignees refused to authorize it. The assignees afterwards signed a memorandum that all the goods included in the sale were the property of A., the bankrupt, to exempt them from auction duty, under 6 Geo. 4, c. 16, s. 98:

—Held, that this was no adoption of the sale, so as to prevent the assignees from maintaining trover against B. for the goods. *Blenden v. Hancock*, M. & M. 465—Tindal.

A., the partner of B., is also in partnership with C. A., being indebted to the firm of A. & B., indorses to A. & B. a bill belonging to the firm of A. & C., and immediately afterwards indorses it in the names of A. & B. to D., a creditor of A. & B., who receives the amount at maturity. A. & C. afterwards became bankrupts; their assignees cannot maintain trover against B. *Jones v. Yates*, 4 M. & R. 613.

Nor can such assignees maintain an action against B. for money taken by A. from the funds of A. & C. and applied to the use of A. & B. *Id.*

If a declaration on a bill (indorsee against acceptor) state that it was indorsed to the plaintiff, as surviving assignees of a bankrupt, after his bankruptcy, the plaintiffs must prove that the bill was indorsed to them after the bankruptcy, and in their capacity of surviving assignees. *Bernasconi v. Argyle*, (Duke), 3 C. & P. 23—Tenterden.

Assignees may maintain trover for a bill which the bankrupt transferred after his bankruptcy, upon which the bankrupt had a lien for a part of the amount. *Hall v. Bernard*, 1 C. & P. 382—Abbott.

By statutes 1 Jac. 1, c. 15, ss. 11 & 12, and 5 Geo. 2, c. 30, s. 29, after any person has been convicted on an indictment for falsely swearing to a debt under a commission of bankruptcy (on which indictment he is to suffer the punishment inflicted by the several statutes against perjury), the assignees of the bankrupt may recover from him double the sum so sworn to in an action; and in a declaration in such action it is sufficient to state the conviction of the defendant on the indictment, without also alleging that the defendant did take such false oath. *Holmes v. Walsh*, 7 T. R. 458. And see 6 Geo. 4, c. 16, ss. 99, 100.

In order to make the assignees of a bankrupt liable for money had and received by the bankrupt for a specific purpose, it is necessary to prove that the money came into their hands with a knowledge of the purposes for which it was destined. *Kieran v. Johnson*, 1 Stark. 109; 2 Rose, 463—Bayley.

If A. fraudulently procure a bill from B., and afterwards become bankrupt, and his assignees receive the money for the bill, B. may recover it from them in an action for money had and received. *Harrison v. Walker, Peake*, 111—Eaton. And see *Willis v. Freeman*, 12 East, 656; *Gladstone v. Hadwen*, 1 M. & S. 517; *Milner v. Forbes*, 4 Esp. 171; and *Harcwell v. Hunt*, 5 T. R. 231.

#### (d) Parties.

By 6 Geo. 4, c. 16, s. 89, the assignees of one or more members of a firm may sue the names of the solvent partners in suits with themselves.

A bankrupt ought not to be joined as a party in an action by a creditor against his assignees.

because he may be a witness. *Griffin v. Archer*, 3 Anst. 478.

A trustee under the 54 Geo. 3, c. 137 (Scotch bankrupt act) cannot sue in his own name for a chose in action. *Jeffery v. M<sup>r</sup> Tuggart*, 6 M. & S. 126.

In assumpsit, by assignees, they must all be joined as plaintiffs, and the omission of any one of them is a ground of nonsuit. *Snellgrove v. Hunt*, 1 Chit. 71.

Secus in trover, when the omission of one of the assignees as plaintiff can only be pleaded in abatement. *Id.*

Three persons having been appointed and acted as assignees, two of them paid each half of his bill to the solicitor:—Held, that the two could not maintain a joint action against the third for his proportion of the money paid, but must each bring a separate action. *Brend v. Boulcott*, 3 B. & P. 235.

An order of the Lord Chancellor, under the stat. 5 Geo. 2, c. 30, for removing one of several assignees, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate. *Blaxam v. Hubbard*, 5 East, 407; 1 Smith, 487.

But advantage can only be taken of the non-joinder by plea in abatement to the whole action; though the other assignees who sue can only recover their proportional parts. *Id.*

The payment of money to the defendant's use by a solvent partner, out of his separate property after the bankruptcy of his partner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner. *Thacker v. Shepherd*, 2 Chit. 652.

The assignees of A., a bankrupt, and also of B., a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the defendant to both the bankrupts, and also separate debts due to each; and if in such an action, the jury have assessed the damages severally on the separate counts, the court will arrest the judgment on those counts which demand the debts due to each bankrupt separately. *Hancock v. Haywood*, 3 T. R. 433. *And see Stone v. Macnair*, 1 Moore, 126; 7 Taunt. 432; 4 Price, 48.

But where the plaintiffs sued as assignees of A. & B., and also as assignees of C., for a joint demand due to all the bankrupts, such declaration was held good, on motion in arrest of judgment after verdict. *Streetfield v. Halliday*, 3 T. R. 779.

Where A. and B. are partners, and A. committed an act of bankruptcy, and afterwards, but before the bankruptcy of B., the sheriff seized goods which had belonged to A. & B., under an execution against them:—Held, that the assignees of A. &

B., under a joint commission, could not, in an action brought by them as such, recover A.'s share of the property. *Hogg v. Bridges*, 8 Taunt. 200; 2 Moore, 122.

A., B., and C., having been appointed assignees under three separate commissions of bankrupt, cannot sue as joint assignees, but must state their several and respective interests in the declaration. *Ray v. Davies*, 2 Moore, 3.

Quære, whether the assignees appointed under two former separate commissions against two, and who were also assignees under a subsequent joint commission against the two together with a third, issued pending the other two commissions, can maintain an action of trover to recover property of such third person jointly with him? *Butts v. Bilke*, 4 Price, 240; 2 Rose, 171, n.

Proceedings in an action at the suit of assignees of a bankrupt, were allowed to be amended by making the official assignee a joint plaintiff with the other assignees. *Baker v. Neaver*, 1 Dowl. P. C. 616; 1 C. & M. 112.

Assignees cannot make themselves parties to a suit commenced by the bankrupt before interlocutory judgment. *Barnes v. Maton*, 3 Dougl. 186; 1 Tidd's Prac. 175; 15 East, 613, n.

#### (e) Pleadings.

Counts for money lent and money paid by plaintiff, as assignee of a bankrupt, were joined with counts for money had and received to plaintiff's use, and upon an account stated with him as assignee:—Held, upon error after verdict, that these counts were well joined. *Richardson v. Griffin* (in error), 5 M. & S. 294; 2 Chit. 325. *And see Harris v. Davis*, 1 Chit. 625.

In proceedings by sci. fa. against bail, the declaration stated that "S. (the plaintiff in the original action) became bankrupt," whereupon a commission of bankrupt was duly awarded against him; and A., B., and C. (plaintiffs in the sci. fa.) were duly chosen assignees of the estate and effects of the said S. under the commission; and now on behalf of the said A., B., and C., as assignees as aforesaid, we have been informed, &c.:—Held, that this was a sufficient averment of the plaintiff's title to sue as assignees, without alleging that an assignment of the bankrupt's effects had been actually made; but, upon special demurrer, it seems that would have been bad for uncertainty. *Fletcher v. Pogson*, 5 D. & R. 1; 3 B. & C. 192.

The assignees under a joint commission against A. & B., in suing on a separate contract entered into with A., may describe themselves generally as the assignees of A., without noticing the name of B. *Stonehouse v. De Silva*, 3 Camp. 399; 2 Rose, 142—Ellenborough.

The assignees under a joint commission against A. & B. may, in an action to recover a debt due to A. alone, describe themselves in the declaration as the assignees of A. alone. *Harvey v. Morgan*, 2 Stark. 17—Ellenborough.

The defendants received money to the use of A. and B. as assignees. B. was afterwards re-

moved, and A. became the sole assignee, the money still remaining in the hands of the defendants; he may well declare as for money had and received to his own use as assignee, without mentioning B. at all. *Stewart v. Lee, M. & M. 158*—Tenterden.

Under a joint commission against two partners, the assignees may declare in the same action for separate as well as joint debts due to the bankrupts. *Graham v. Mulcaster, 4 Bing. 115; 12 Moore, 327.*

In an action by the assignees to recover back money paid by the bankrupt after he had committed an act of bankruptcy, and before the commission was opened, it is not necessary for them to declare as assignees. *Thomas v. Rideing, Wightw. 65; 1 Rose, 121.*

Assignees, in assumpsit against the vendee of goods sold by the bankrupt after the commission, need not name themselves assignees in the declaration; secus, if on a contract made by the bankrupt before the commission. *Evans v. Mann, Cowp. 569.*

Goods taken under an execution against A., which had been in his possession more than two months before the issuing of a commission against him, may be considered as his property, under 49 Geo. 3, c. 121, s. 2, and may be described as such in a declaration of assumpsit by his assignees, on a guarantee given by the defendants to the bankrupt. *Sampson v. Burton, 4 Moore, 515; 2 B. & B. 89.*

Defendant, in an action by assignees, cannot plead the pendency of a former action brought against him by the bankrupt for the same cause of action; for the assignees have no power to proceed with the former action. *Bigge v. Cox, 7 D. & R. 409; 4 B. & C. 920.*

Plaintiffs declared as assignees of a bankrupt, concluding as follows: "Wherefore the said plaintiffs, assignees as aforesaid,—instead of 'as' assignees as aforesaid,—say they are injured, &c."—Held good, on special demurrer, as the words "assignees as aforesaid," might be rejected as surplusage. *Cobbett v. Cochrane, 1 M. & Scott, 55; 8 Bing. 17.*

A declaration in scire facias by the assignees of a bankrupt, stating, "that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain, without alleging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter v. Kretschman, 2 T. R. 45.*

#### (f) Practice.

Assignees are bound to sue in courts of requests, like other persons, when the matter is within the jurisdiction of such courts. *Keay v. Rigg, 1 B. & P. 11.*

It is not sufficient ground for the postponement of a trial, that the bankrupt is an important witness, and will shortly be competent, by the Chancellor's allowance of his certificate which has been signed by the commissioners. *Tennant v. Strachen, M. & M. 377; 4 C. & P. 31*—Tenterden.

Where the plaintiff becomes bankrupt before interlocutory judgment, the defendant may be arrested and held to bail by the assignees, in a second action, for the same cause. *Barnes v. Mates, 1 Tidd's Prac. 175; 15 East, 131, n.; 3 Dougl. 186.*

But where the defendant has been arrested in an action brought in the name of a bankrupt by the authority of his assignees, he cannot afterwards be arrested at the suit of the assignees for the same cause of action, when the first action has not been discontinued, nor the costs paid. *Carter v. Hart, 1 Chit. 276.*

A defendant may be arrested by assignees of a bankrupt, although he was arrested by the bankrupt for the same cause, if it was necessary to discontinue the first action on the ground of the bankruptcy. *Anon. 1 Chit. 274, n.*

So, where the first action is brought in the name of the bankrupt, without the authority of the assignees, it seems that the defendant may be arrested a second time, without the first being discontinued, or the costs paid. *Anon. 1 Chit. 276, n.*

Where an uncertificated bankrupt, in order to try the validity of his commission, held his assignee to bail in an action for money had and received, the court discharged the assignee upon filing common bail. *Chambers v. Bernasconi, 6 Bing. 498; 4 M. & P. 218.*

#### (g) Costs.

The 6 Geo. 4, c. 16, s. 44, grants double costs to successful defendants, who have acted under the authority of that statute.

It does not apply to assignees, or those acting under their authority. *Worth v. Budd, 1 Dowl. P. C. 328; 2 B. & Adol. 172.*

By 6 Geo. 4, c. 16, s. 90, if notice to dispute have been given, and the matter disputed be proved or admitted, the judge may, if he thinks fit, grant a certificate of such proof or admission, and the assignee, commissioner, or other person, shall be entitled to the costs occasioned by such notice, to be added or deducted, as the case may be.

Where, in an action by assignees, the bankruptcy is disputed, but the cause referred to arbitration, the judge before whom the cause is opened cannot certify under 6 Geo. 4, c. 16, s. 90, for the costs of proving the bankruptcy, although, upon referring, the defendant agrees to admit the validity of the commission. *Barthrop v. Anderton, 8 Bing. 268; 1 M. & Scott, 361.*

If assignees, suing for a debt due before the bankruptcy, receive notice of disputing the trading, &c., the judge will grant them a certificate only for the costs of producing the depositions, and not for the costs of the attorney's attendance, or of witnesses to prove the bankruptcy. *Reips v. Dawes, 3 C. & P. 362*—Tenterden.

If the plaintiffs, as assignees, proved the petitioning creditor's debt, trading, and act of bankruptcy at the trial, pursuant to notice by the defendant so to do, and were afterwards nonsuited, they were not entitled to costs under 49 Geo. 2, c.

121, s. 10, as that clause related only to cases where they obtained a verdict. *Atkins v. Seward*, 3 Moore, 601; 1 B. & R. 275.

### 9. Suits in Equity by and against Assignees.

#### (a) Practice.

Plaintiff becoming bankrupt, a special motion must be made, and notice served on the assignees, that the assignees may file a supplemental bill, in the nature of a bill of revivor, within a given time, or that the bill may stand dismissed. *Porter v. Cox*, 5 Madd. 80; Buck, 469.

Where there are two plaintiffs, and one of them only becomes bankrupt the bill may be dismissed upon the usual motion. *Caddick v. Masson*, 1 Sim. 501.

If a sole plaintiff become bankrupt, the bill will be dismissed without costs, unless the assignees file a supplemental bill within three weeks. *Sharp v. Hullet*, 2 Sim. & Stu. 496.

Plaintiff becomes bankrupt. Upon motion to dismiss the bill for want of prosecution, assignees allowed a month's time to adopt the suit. At the expiration of that time, defendant to apply again. *Mumford v. Randall*, 1 Rose, 196.

Assignees who are brought before the court by a supplemental bill, may be made liable to the costs of the whole suit. *Whitcombe v. Minchin*, 5 Madd. 91.

If a bankrupt is made a party in an equity suit after his bankruptcy, and he sets up a claim in his answer, when it is manifest he has no interest, the bill as against the bankrupt will be dismissed with costs. *Bennett v. Lane*, 1 Tam. 238.

A bill by assignees to restrain a bankrupt from further proceedings at law to impeach the commission will not be entertained: the remedy is by petition. *Kirkpatrick v. Dennett*, 1 Glyn & J. 300.

#### (b) Consent of Creditors.

By 6 Geo. 4, c. 16, s. 88, *the consent of the major part in value of the creditors who have proved, and who shall attend a meeting called on twenty-one days' notice, and, if one-third of the creditors do not attend such meeting, the consent of the commissioners, is necessary before assignees can commence suits in equity.*

To a suit by assignees, the consent of the creditors was unnecessary, under 5 Geo. 2, c. 30, s. 38, where their interests were not affected: nor need all the assignees be plaintiffs; such as refused to join might be made defendants. *Wilkins v. Fry*, 2 Rose, 371; 1 Mer. 244.

A demurrer does not lie to a bill by assignees, on the ground that it does not state the suit to be instituted with consent of the creditors or of the commissioners. *Jones v. Yates*, 3 Y. & J. 373.

Upon a bill filed before the bankruptcy of the plaintiff, a supplemental bill may be filed by the assignees, without the consent of creditors. *Benson v. Lewis*, 2 Glyn & J. 245.

### 10. Reference to Arbitration by Assignees.

By 6 Geo. 4, c. 16, s. 88, *assignees, with the consent of the major part in value of the creditors who have proved, who attend at a meeting called on twenty-one days' notice, or, if one-third do not attend, with the consent of the commissioners, may submit matters in dispute to arbitration.*

By 1 & 2 Will. 4, c. 56, s. 43, *if the assignees shall agree to refer any matter in dispute with any party to arbitration, in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the court of Bankruptcy.*

A reference to arbitration of all matters in dispute by assignees of a bankrupt, and a consequent award to pay a sum of money, is conclusive upon the assets. *Robson v. —*, Rose, 50.

If the assignees attend meetings under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award. *Dod v. Herring*, 1 Russ. & Myhne, 153; 3 Sim. 143.

## XIII. PROTECTED TRANSACTIONS.

### 1. Statute.

By 6 Geo. 4, c. 16, s. 81, *all conveyances, and all contracts and other dealings and transactions, by and with any bankrupt, bona fide made and entered into more than two calendar months before the date and issuing the commission against him, and all executions and attachments against his lands or chattels, bona fide executed or levied more than two calendar months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy; provided the parties had no notice of it; except that where the commission has been superseded, and another issued within two months, the two months must be calculated from the issuing of the first commission.*

By s. 89, *payments made by the bankrupt, or any person on his behalf, to any creditor (not being a fraudulent preference), and payments made to the bankrupt before the date and issuing of the commission, shall be valid, notwithstanding a prior act of bankruptcy, provided the parties had no notice of it.*

By s. 83, *the issuing of a commission is notice of a prior act of bankruptcy, if the adjudication has been notified in the Gazette, and the party to be affected may reasonably be presumed to have seen it.*

By s. 84, *parties having in their possession effects of the bankrupt, are not to be endangered by reason of the payment or delivery thereof to him or his order, if they have no notice of any act of bankruptcy.*

By s. 85, *notice to the accredited agent of a corporation or public company is notice to them.*

By s. 86, *purchases from the bankrupt for valuable consideration, where the purchaser had notice of an act of bankruptcy, are not to be impeached, unless a commission issues within twelve months.*

**Two Months.**—Under the 81st section, where the computation of time is to be from an act done, the day when such act is done is to be included. For some purposes, the court notices the fraction of a day. *Ex parte Farquhar*, 1 Mont. & Mac. 7. And see *Thomas v. Desanges*, 2 B. & A. 586.

On a commission issuing on the 14th of May, a dealing on the 14th of March is valid, as "more than two calendar months" before the issuing of the commission. *Cowie v. Harris*, M. & M. 141—Tenterden.

A trader sends goods to an auctioneer to be sold, and goes to prison, where he lies above two months; within this time the auctioneer, not knowing of the trader being in prison, sells the goods, and accounts with him for the proceeds: at the end of the two months a commission of bankruptcy issued out against the trader.—Held, that his assignees could not maintain trover for the goods against the auctioneer, and that the payment of the money to the trader under these circumstances was protected by 1 Jac. 1. c. 15. *Coles v. Robins*, 3 Camp. 183; 1 Rose, 225—Ellenborough.

If a trader become a bankrupt by lying in prison two months after an arrest, his assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against him, sells his goods, and pays him the produce before the two months have expired. *King v. Leith*, 2 T. R. 141.

Where there was an act of bankruptcy by lying two months in prison, and, during the imprisonment, A. advanced to the bankrupt money for the purpose of settling with his creditors; and the purpose failing, a part of the money was repaid to A. by the bankrupt:—Held, that the repayment was protected, and that the assignees could not recover the money so repaid. *Thovey v. Milne*, 2 B. & A. 683.

A *fi. fa.* was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of the 13th of August, and sold the same ten days afterwards. On the 13th of October following, about noon, a commission issued against the defendant, under which he was declared a bankrupt:—Held, first, that the seizure of the goods by the sheriff was a sufficient executing or levying, within the meaning of those words in the stat. 6 Geo. 4. c. 16, s. 81; secondly, that more than two calendar months had elapsed between the execution and the issuing of the commission; thirdly, that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two calendar months before the issuing of the commission, it was protected by s. 81, and not taken out of that section by the proviso in s. 108. Semble, that that proviso only applies to executions executed within two calendar months before the issuing of a commission. *Godeon v. Sanctuary*, 4 B. & Adol. 255; 1 Nev. & M. 52.

**Notice of Act of Bankruptcy.**—Under stat. 6 Geo. 4. c. 16, s. 82, a *bona fide* payment made

by a bankrupt more than two months before the issuing of the commission, the receiver having no notice of an act of bankruptcy, is protected; and the fact of his knowing the bankrupt to be in difficulties makes no difference. *Tucker v. Baynes*, 3 C. & P. 85; M. & M. 137; 7 B. & C. 622; 1 M. & R. 518.

The issuing of a commission was not of itself sufficient notice to all the world of a prior act of bankruptcy having been committed; therefore, a payment made of a debt to a bankrupt after the issuing of such commission, but before the party paying had any actual knowledge of the bankruptcy, was protected by the stat. 1 Jac. 1. c. 15, s. 14. *Soverby v. Brooks* (in error), 4 B. & A. 523; reversing S. C. nom. *Brooks v. Soverby*, 3 Moore, 157; 2 Moore, 55; 8 Taunt. 283.

A commission issued out, and not acted on, nor gazetted, is sufficient to defeat a transaction within two months of it, under the proviso of the 81st section. *Peckham v. Lashmore*, M. & M. 251—Tenterden.

If a commission has passed the great seal, although it has never been opened or acted upon, it has issued within the meaning of the 49 Geo. 3. c. 121, s. 2, so as to be notice of a prior act of bankruptcy, and to deprive any party, who has received payments from the bankrupt after an act of bankruptcy, and more than two months before the suing forth of the effective commission, of the benefit of the 46 Geo. 3. c. 135, s. 1. *Watkins v. Mound*, 3 Camp. 308; 1 Rose, 361—Ellenborough.

L., who held the lease of a public house, was indebted to defendants in 1275*l.*, and had deposited his lease in their hands as security. T., who had 650*l.* in defendant's hands, purchased L.'s lease for 1690*l.*, the defendants agreeing to advance him enough to make up the purchase-money on retaining the lease as a security. L., T., and the defendants' clerk met to complete the transfer, when T. drew a draft on the defendants in favour of L. for 1690*l.* The defendants' clerk received this draft; and, on L.'s executing the transfer of the lease, gave him a draft on the defendants for 415*l.* On the evening of that day, L. having previously committed acts of bankruptcy, a creditor of his gave the defendants' clerk notice not to pay the draft, as a docket would be struck against L. Another of the defendants' clerks, in consequence, refused payment when the draft was presented the next day, having also received a similar notice from the plaintiff, another creditor of L.'s. The defendants some days afterwards paid the draft to a banker, who presented it, but not till he had executed an indemnity:—Held, that the plaintiff, as assignee of L., under a commission of bankruptcy subsequently issued, might sue the defendants in an action for money had and received for the amount of this draft:—Held also, that the defendants had, before the payment of the draft, sufficient notice of the bankruptcy. *Spratt v. Hobhouse*, 4 Bing. 173; 12 Moore, 395.

Insolvency, within the meaning of the bankrupt laws, does not mean an inability to pay

90s. in the pound, when the affairs of a bankrupt shall be ultimately wound up; but a trader is in insolvent circumstances, when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade and business usually do. *Shane v. Lucas*, 3 D. & R. 218.

A fraudulent deed, concerted between the petitioning creditor and the bankrupt, cannot be used to invalidate a payment made after notice of the execution of the deed. *Burbridge v. Watson*, 4 C. & P. 170—Tindal.

A bankrupt assigned all his property to two trustees, one of whom was the petitioning creditor, who was present at the execution of the assignment by the bankrupt, and executed it himself, but not in the presence of any attorney or solicitor.—Held, that this was not such an assignment as, being communicated to a creditor of the bankrupt, before the receipt by him of money from the bankrupt, would enable the assignees to recover such money, as money received after, and with notice of, an act of bankruptcy. *Id.*

If a London banker, having a branch bank at Edinburgh, stop payment in London, and after the stoppage, but before notice, a customer pay to the agent at Edinburgh bank notes and cash, to be remitted to London, and at that time the banker is indebted to the agent, and the agent, after the notice, in pursuance of a special direction from the banker, receive money from other agents, for the purpose of forwarding to London, and a fiat issue against the banker, at which period the monies in the hands of the agent are more than sufficient to cover the amount due to him from the banker, but the amount which he had at the time of notice of the stoppage, including the bank notes, was insufficient, and the customer require the agent to return the bank notes, which he does not comply with, and the agent refuse to pay any part of the money to the assignees, and the Court of Session in Scotland order the agent to pay, without prejudice, the balance of monies, after deducting in the mean time the amount due to him, to the assignees, which he does; and afterwards, it appearing clear that he was not entitled to retain any part of the sum which he received from the other agents after notice, he pay to the assignees the difference between the sum paid to the assignees under the order of the Court of Session and the amount so received from the other agents.—Ordered, that the assignees must refund to the customer the amount paid in by him.—Affirmed by the Lord Chancellor. *Ex parte Cunningham*, 1 Mont. & Bligh, 269, 286. And see *Ex parte Solomons*, 1 Mont. & Bligh, 308.

## 2. What a Preference.

To constitute a fraudulent preference, two things must concur: first, insolvency in the trader; secondly, a voluntary payment or transfer by him. *Hunt v. Mortimer*, 10 B. & C. 44; 5 M. & R. 12—Littledale.

Legal preference is where property is duly and regularly transferred, and the transfer itself complete before an act of bankruptcy. As where

a payment is made by a trader in the ordinary course of dealing, or enforced by legal process, though but the evening before he becomes bankrupt. *Harman v. Fisher*, Cowp. 117; Lofft, 472.

Therefore, where A., a trader, in contemplation of absconding, encloses bills to T., a particular creditor, in discharge of his debt, saying he had the honour to shew him that preference, which he conceives was due; and it was done without the privy of T., and followed by an act of bankruptcy before the notes could possibly be delivered:—Held, that the essential motive being to give a preference, and the act itself incomplete, it was clearly void, though in favour of a very meritorious creditor. *Id.*

An insolvent debtor cannot go out of the common course of trade to prefer a particular creditor. *Alderson v. Temple*, 4 Burr. 2235; 1 W. Black. 660.

If a person in trade pay a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably anticipate bankruptcy at the time he makes such payment, it is fraudulent; and if bankruptcy afterwards ensue, the assignees may maintain assumpsit for money had and received to their use, against the person to whom such voluntary payment has been made, though the cause of action arises before the actual bankruptcy. *Poland v. Glyn*, 2 D. & R. 310; 4 Bing. 22, n.

Sept. 24, 1824, D. the obligor, who, on the 14th August preceding, had quitted premises he held of the obligee, paid the obligee the balance on a bond due Oct. 19 following, the fixtures left on the premises, which were valued on the 24th September, being taken in discharge of the other portion of the sum payable under the bond. In July preceding, D., upon looking into his affairs, found he could only pay 17s. in the pound, and he sold his watch and part of his stock to satisfy some claims upon him, and became bankrupt October 28, 1824, but said he had no intention of becoming bankrupt at the time he paid the obligee, though he made the payment because he expected other creditors would get possession of his property. In an action by D.'s assignees against the obligee:—Held, that the jury were properly directed to consider whether the payment were made by D. with a view to the probability of his becoming bankrupt, and in fraudulent preference of the obligee. *Flook v. Jones*, 4 Bing. 20; 12 Moore, 96.

Whether a particular payment has been made by a trader in contemplation of bankruptcy, is purely a question for a jury. *Id.*

A payment made in June, 1825, by a debtor, bona fide, without intention of fraudulent preference, ten days before a commission issued against him:—Held, to be protected under 6 Geo. 4. c. 16, s. 82. *Churchill v. Crease*, 5 Bing. 177; 2 M. & P. 415.

A trader in the Fleet prison, under an arrest for debt, eight days before the suing out of a commission against him, obtained a day rule, and went to an insurance office to receive a sum of money that was due to him; the defendant, to

whom the bankrupt was indebted, knowing that he was about to receive the money, without any communication from him, met him at the office, and procured payment of his debt out of the money received by the bankrupt. The payment was made on the 8th June, the debtor having been committed to prison the 19th of April preceding, and on the 18th June a commission issued against him on an act of bankruptcy committed by his lying in prison. In assumpsit by the assignees for money had and received by the defendant to their use, the jury having found that there was no fraudulent preference, and that the defendant did not know of his debtor's insolvency and imprisonment at the time of the payment:—Held, that the payment was protected under the 82d section of the statute, and was not a fraudulent preference within the exception in that clause. *Churchill v. Crease*, 5 Bing. 177; 2 M. & P. 415.

In order to make void a deed as fraudulent against creditors, it is not necessary to prove that the party was insolvent at the time, if it appear that the intention was to delay creditors. *Richardson v. Smallwood*, Jacob, 553.

Delivery of effects, in contemplation of bankruptcy to a creditor, though standing perfectly bona fide, is bad if voluntary and without pressure. *Ex parte Scudamore*, 3 Ves. jun. 88.

A trader stopped payment generally on the 5th January, and, on the evening of the 6th, sent a 100l. note to a particular creditor, saying it was to help him over his payments:—Held, that such trader afterwards becoming a bankrupt, his assignees might recover the money, although, at the time of payment, a bill for a larger amount was becoming due which had been accepted by the creditor for the bankrupt's accommodation, and for which he had promised to provide; and that the creditor could not be considered as the agent of the bankrupt to pay the money for the bill, because he being a party to it, the payment operated pro tanto in his discharge. *Guthrie v. Crossley*, 2 C. & P. 301—Abbott: *S. P. Herbert v. Wilcocks*, M. & M. 355, n.

A creditor obtains a preference in contemplation of an intended deed of composition, which would be fraudulent against the creditors under that deed; the composition going off, the creditor may hold his securities against a commission subsequently issued, and not contemplated at the time of the preference. *Wheelwright v. Jackson*, 5 Taunt. 109, 633; 2 Rose, 127.

Where a trader, having accepted a bill for the use of a third person, is induced by that person to pay the bill, after having informed him that he was insolvent on the promise of such person to guarantee the payment of a composition to the trader's creditors, and he afterwards becomes bankrupt, that payment is a fraudulent preference. *Singleton v. Butler*, 2 B. & P. 283; 3 Esp. 215.

Assignees may maintain an action on a promissory note, reserving interest half yearly, given for the balance of an account, consisting, amongst other articles, of money lent by the defendant to the bankrupt, such note not being given in the usual and ordinary course of trade and dealing,

so as to be protected by the stat. 19 Geo. 2, c. 32. *Harwood v. Lomas*, 11 East, 127.

So, if the payee of a bill received from a third person as the price of an estate, give time to the drawee, on condition that he shall allow interest, and afterwards the drawee discharge the bill, having in the mean time committed an act of bankruptcy; this is not such a payment in the ordinary course of trade as is protected by 19 Geo. 2, c. 32, and the assignees may recover the money from the payee. *Vernon v. Hall*, 2 T. R. 648.

### 3. Attachments.

B. by charter-party hired a ship of defendants, the owners, to carry a cargo to Hayti, and engaged to find a homeward cargo. On the ship's arrival at Hayti, B. assigned the cargo to C. as a security for advances. The hire not having been paid, defendants, under a judgment of a court at Hayti, attached the cargo in the hands of C. to discharge the claim for hire; and B. having declined to find a homeward cargo, the captain procured one for defendants, who received the freight on its arrival in London:—Held, on B.'s having become bankrupt subsequent to the assignment, that his assignees could not recover from the defendants the proceeds of the cargo attached at Hayti, or of the homeward freight. *Kymer v. Larkin*, 5 Bing. 71; 1 M. & P. 183.

A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter drew bills on A., which he accepted, on the security of such shares standing in his name; and these bills were assigned by B. for a valuable consideration to C., a British subject. Before they became due, B. authorized A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before the letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured: B. also afterwards became bankrupt. C., by process in the foreign country, attached the bank shares still standing in the name of A. for the debts due to him on the bills; and the court there decreed that the bank shares should be sold, and the proceeds should be applied first to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree C. received a certain sum of money on account of the bills:—Held, that the assignees of A. could not recover such sum back, as money belonging to B. *Cazenove v. Prescott*, 5 B. & A. 78.

A creditor for goods sold and delivered to a trader, who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment, and received the amount from such third person; a commission afterwards issued:—Held, that this was not a protected payment, as it could not be said to be in any way a payment made by the bankrupt. *Hovil v. Browning*, 7 East, 154; 3 Smith, 156.

So, if, after the assignment of a bankrupt's estate, a creditor knowing it and residing in Eng-



land attach the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use. *Hunter v. Potts*, 4 T. R. 182.

#### 4. Mortgages.

If a trader, before his bankruptcy, deposit a lease as a security for money, but no mortgage or assignment of it then takes place, the assignees may recover it, as no legal title passes to the party it is delivered to. *Dos d. Maslin v. Roe*, 5 Esp. 105—Ellenborough.

So, if the trader before his bankruptcy has given a power of attorney to another, to receive sums of money due to him, in consideration of engagements entered into by such person on account of the bankrupt; money received under such power, after bankruptcy, may be recovered by the assignees. *Hovill v. Lethwaite*, 5 Esp. 158—Ellenborough.

If a mortgagor in possession become bankrupt, and the mortgagee give notice to the tenants to pay him the by-gone rents, a payment to the mortgagee is good against the assignees of the mortgagor. *Pope v. Biggs*, 9 B. & C. 245.

#### 5. Delivery of Bills as Security.

A., being indebted to B. & Co. who became bankrupts, deposited a promissory note with the defendants as their assignees, and afterwards paid them the amount of the debt due from him to B. & Co., on which the note was given up: the commission against them was superseded, and another commission issued, under which the defendants were re-appointed assignees. Four months after A. had made the payment to them, he became bankrupt on a secret act of bankruptcy previously committed by him.—Held, in an action for money had and received, brought by his assignees against the defendants in their own right, between the superseding the first commission and issuing the second, that they are not entitled to recover the payment made to the latter by A., it being protected by the 46 Geo. 3, c. 135, s. 1, as the subsequent commission re-vested those rights in the defendants, which they believed to exist when the payment was made: and as such payment, if made to B. & Co., could not have been disturbed, if they had remained solvent. *Davenport v. Carter*, 5 Moore, 16; 2 B. & C. 317.

An action of trover cannot be maintained by the assignees of a bankrupt, to recover bills of exchange from the holder, who drew them with a knowledge of the bankrupt's insolvency, and, after compelling such bankrupt to sign, induced his creditors, who were not aware of the circumstances, to accept them. *Walker v. Laing*, 1 Moore, 281; 7 Taunt. 568.

Where a person, previous to his bankruptcy, deposited a bill with defendant for the purpose of raising money thereon, and an advance was accordingly made:—Held, that the assignees of such bankrupt were entitled to recover the bill in an action of trover, on having tendered the money advanced, although a balance remained due from the bankrupt to the defendant, on a general ac-

count; and that this, therefore, was not a case of mutual trust or credit, within the statute 5 Geo. 2, c. 30, s. 28. *Key v. Flint*, 1 Moore, 451; 8 Taunt. 21.

Where A., shortly before his bankruptcy, was applied to by B., to whom he owed 47l., for payment, and A. gave him a bill for the purpose of getting it discounted, and, after paying his own debt, to pay over the surplus to A., who, before the bill was discounted, became bankrupt:—Held, that B. could not retain the bill in an action of trover against the assignees of A. *Humphries v. Wilson*, 2 Stark. 566—Dallas.

Where assignees have recovered a sum of money from the bankrupt's banker, received by him, and paid over to a creditor of the bankrupt, with knowledge of the bankruptcy, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy. *Vernon v. Hanson*, 2 T. R. 287.

A., an agent, held funds belonging to B. his principal, but had accepted bills drawn by B., to the full amount of them. B. paid away the bills to his creditors, who, to relieve A. from liability, and without the knowledge of B., accepted from A. a composition of 10s. in the pound, and gave him up the bills; A. then holding funds belonging to B. to the full amount of the bills. B. afterwards became bankrupt, and his assignees brought assumpsit for money had and received against A. for the difference between the amount of the bills and the composition:—Held, that as B. had been benefited to the full amount of the bills, the payment of the composition was, as between him and A., a full payment of the bills, and therefore, that the action was not maintainable. *Stonehouse v. Read*, 5 D. & R. 603; 3 B. & C. 669.

The defendant, having, for securing a debt, taken an indorsement of the bills of lading of certain cargoes, which was void, because made after an act of bankruptcy committed by the indorser, effected for his own account an insurance on the cargoes; and a loss happening, he recovered against the underwriters on a count averring interest in the assignees of the indorser, then a bankrupt:—Held, that the assignees could not recover over this money, as had and received by the defendant for their use. *Grant v. Hill*, 4 Taunt. 380.

A. desires leave to place certain long bills in B.'s hands, and to be allowed permission to draw, without renewal, bills of shorter dates, and desires B. to calculate the sum to be drawn for, allowing commission; and the long bills indorsed by A. are inclosed to B. in the same letter. B. answers, that, agreeable to A.'s wishes, he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills; on condition of being allowed to draw shorter bills, and B. having accepted A.'s bills, and such acceptances being dishonoured in consequence of B.'s bankruptcy, and the long bills having remained in specie in B.'s hands at the time of his bankruptcy, and B.'s assignees having afterwards received the value of

them, A. may recover the amount of them as money had and received to his use. *Parke v. Eliason*, 1 East, 544.

A person having three bills of exchange, applied to a country banker, with whom he had no previous dealings, to give for them a bill on London of the same amount, and the bill given by the banker was afterwards dishonoured.—Held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange.—Held also, that if the exchange had not been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, within the statute of James. *Hornblower v. Proud*, 2 B. & A. 327.

If a trader, on receiving bills from one of his creditors abroad, to whom he is indebted beyond the amount of them, after becoming insolvent, but before committing an act of bankruptcy, delivers these bills with the consent of his other creditors, to an agent of the person who had remitted them, for the use of the latter if he should be ultimately entitled to them; this is a legal and valid transaction: and if a commission afterwards issues against the trader, his assignees cannot maintain an action against the trustee to recover the produce of the bills. *Grafte v. Greffulhe*, 1 Camp. 89—Ellenborough.

Where a trader, indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former claim, and deposits with them certain policies of insurance made on his account as collateral security; and after notice of a loss upon these policies the policy-broker, at the bankrupt's request, gives his own acceptance to the defendants, which was afterwards paid in order to induce them to give up their lien on the policies; after which a commission having issued against the trader on the prior act of bankruptcy.—Held, that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, which was the money of the broker, and not of the bankrupt; though the broker in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get the policies out of their hands. *Hovil v. Pack*, 7 East, 164; 3 Smith, 164.

A. sold goods to B., for which the latter was to pay by a bill at three months; B. gave A. a check on his bankers, (who were also the bankers of A.), requiring them to pay A. on demand, in a bill at three months; A. paid the check into the bankers, and took no bill from them; but the amount was transferred in the banker's books from B.'s account to A.'s, with the knowledge of both; the bankers failed before the check became due; and it was held, that A. could not recover the value of the goods against B. *Belton v. Richard*, 6 T. R. 139; 1 Esp. 106.

A trader in contemplation of bankruptcy, and without solicitation, put three checks in the hands of his clerk, to be delivered to a creditor at the counting-house of the latter; but, before they

were delivered, the creditor called upon the trader, and demanded payment of his debt:—Held, that the intention to give a voluntary preference not having been consummated, this was a valid payment. *Bayley v. Ballard*, 1 Camp. 416—Ellenb.

A factor gave his acceptance to his principal, for the amount of goods sold on account, after a secret act of bankruptcy of the principal, but without notice to the factor; and, after having received notice, paid the acceptance to the holder:—Held, that it was a protected payment by stat. 1 Jac. 1, c. 15, s. 14. *Wilkins v. Casey*, 7 T. R. 711.

A banker is not justified in paying the drafts of a person, who has placed money in his hands, after he has notice of an act of bankruptcy committed by him. *Vernon v. Hankey*, 2 T. R. 113.

A trader having securities in his banker's hands, to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount, on the score of his accommodation, payable to his own order, which, after acceptance, he indorsed to the plaintiff, who knew of his partial insolvency, but not of his bankruptcy:—Held, that the plaintiff could only recover against the acceptors the amount of the sum accepted for the accommodation of the bankrupt, over and above the amount of the securities in their hands. *Willis v. Freeman*, 12 East, 656.

#### 6. Delivery of Goods as Security.

A creditor, knowing his debtor to be in distressed circumstances, and not able to pay his debt, applied to him, in the first instance, about two months before his bankruptcy for a security, and took part of his stock in trade for that purpose: this is not an undue preference, though the creditor did not threaten to sue him in case of a refusal. *Smith v. Payne*, 6 T. R. 152.

So, if the debtor give goods out of his shop in part payment of a bond, not then due, and shortly afterwards become bankrupt, the mere circumstance of the bond not being due will not alone vitiate the part payment. *Hertkorn v. Slodden*, 2 B. & P. 583; 4 Esp. 60.

Where the act of delivering goods by a trader, to secure the defendant, who was under acceptances for him, payable at a future day, was clearly not voluntary on the trader's part, but made in consequence of the urgency of the defendant, (evidenced by the proposal for giving such security originating with him), it is immaterial to consider whether the trader had his bankruptcy in contemplation at the time: nor will the transaction, being bona fide, and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world. *Crosby v. Crouch*, 11 East, 256; 2 Camp. 166.

Where a trader, being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became a bankrupt; this, inasmuch as the act done did not redeem the trader, even

from any present difficulty, which is the ordinary motive for such an act, when really done under the pressure of a threat, is evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy; and is therefore void against the other creditors of the bankrupt. *Thornton v. Hargreaves*, 7 East, 544.

A bond assigned as security for money paid to the use of a person who had committed a secret act of bankruptcy, cannot be retained against the assignees. *Hammersley v. Purling*, 3 Ves. jun. 757.

In trover for a bill delivered as a fraudulent preference, non-delivery of the bill upon demand, after it is due and payment has been made, is not a conversion. *Jones v. Fort*, 9 B. & C. 764.

The delivery of goods upon a threat of arrest is not a payment within 6 Geo. 4, c. 16, s. 82. *Smith v. Moon*, M. & M. 458—Tindal.

A trader may make a transfer of his goods, on the eve of bankruptcy, to a creditor who compels him so to do by any threat; but a voluntary and fraudulent preference is an act moving from the trader, whereby he elects to favour a particular creditor. *Reed v. Aytton*, Holt, 503—Wood.

If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit they affirm the contract, and then the creditor may set off his debt. *Smith v. Hodson*, 4 T. R. 211.

Whether a trader in embarrassed circumstances, who delivers goods to a creditor in discharge of his debt, does it in contemplation of bankruptcy, is a question of fact for the jury. *Fidgeon v. Sharpe*, 5 Taunt. 359; 1 Rose, 153.

A transfer of goods in a warehouse by a bankrupt to A. & Co., by mistake for A. & Son, more than two months before the issuing of the commission, but corrected within two months, vests the property of the goods in A. & Son from the time of the first transfer, under 6 Geo. 4, c. 16, s. 81. *Peckham v. Lashmoor*, M. & M. 251—Tenterden.

If A. have a lien on goods of a bankrupt in his hands, and B. without knowledge of any act of bankruptcy pay A. the sum for which he has a lien, and advance a further sum to the bankrupt upon those goods which are delivered to him, trover will not lie by the assignees: he has the same lien as A. But if the value of the goods be more than the whole sum advanced, the assignees may maintain an action for money had and received for the residue. *Dixon v. Purse*, Peake's Add. Cas. 187—Kenyon.

A merchant pledges for value the bills of lading of an expected cargo, his property, in the profits of which his agents abroad were interested in a certain proportion. His agents, without the knowledge of the owner or the pawnee, dispose of part of the cargo abroad, after which the owner becomes a bankrupt: he induces the agents to replace the goods disposed of by others, of which the agents give him bills of lading, and he sends them to the pawnee, to make good their security:

—Held, that his assignees might recover the substituted goods from the pawnee. *Meyer v. Sharpe*, 5 Taunt. 74.

An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. *Lempriere v. Pasley*, 2 T. R. 485.

Where R., a tradesman, being arrested at the suit of the defendant upon a ca. sa., placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the defendant:—Held, that the assignees of R., who had committed an act of bankruptcy, before the arrest, might recover the money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the sheriff's officer, and although the money paid to the defendant was not the identical money raised by the pledge. *Alanson v. Atkinson*, 1 M. & S. 583; 2 Rose, 134.

### 7. Sale of Goods.

Where a trader on the eve of bankruptcy makes a collusive sale of his goods to A., the assignees cannot maintain trover for them, without proving a demand and refusal. *Nixon v. Jenkins*, 2 H. Black. 135.

If one buy goods of a bankrupt under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, and the assignees need not adduce evidence of a demand and refusal. *Yates v. Carne*, 3 C. & P. 99—Tenterden.

A fraudulent sale of goods by a bankrupt to a creditor, in order to keep up his sinking credit, to prefer this one and cheat the others, is void. *Martin v. Peutress*, 4 Burr. 2477.

A sale two months before the date of the commission, though after an act of bankruptcy, is to be considered as if there had been no prior act of bankruptcy. *Southwood v. Taylor*, 1 B. & A. 471.

An assignment of all, except a trifle, of a man's stock in trade, in favour of particular creditors just before an act of bankruptcy committed, is fraudulent and void. *Compton v. Bedford*, 1 W. Black. 362.

But a trader may lawfully assign part of his stock in favour of a particular creditor, the same day on which he afterwards commits an act of bankruptcy. *Hooper v. Smith*, 1 W. Black. 441.

A bill of sale made by a trader two days before he absconded, is a fraud on all the bankrupt laws, and void. *Linton v. Bartlet*, 1 Wils. 47.

Goods of a trader bona fide sold to and paid for by a customer, in the interval between a secret act of bankruptcy by the seller and the suing out of a commission, without the purchaser's knowledge of the bankruptcy, are not recoverable in trover by the assignees; as, under a commission issued against the seller, such payment was protected by the statute. 1 Jac. 1, c. 15, ss.

13 & 14. *Cash v. Young*, 3 D. & R. 652; 2 B. & C. 413. And see *Coles v. Robins*, 3 Camp. 183; 1 Rose, 225.

After a secret act of bankruptcy by P., defendant accepted a bill of exchange for him for 98*l.*, at three months, which P. paid to a creditor standing by: later in the course of the same day, P. agreed to sell defendant four horses as security for 70*l.* of the 98*l.* The horses were subsequently delivered to the defendant, who paid the 98*l.* bill when it became due:—Held, that the transaction was not protected by the 82*d* sect. of 6 Geo. 4, c. 16, as it only amounted to a set off of the price of the horses against a by-gone debt, and was not a payment by the bankrupt within the meaning of the act; and the court directed a new trial. *Carter v. Breton*, 4 M. & P. 424; 6 Bing. 617.

A trader, after a secret act of bankruptcy, consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money:—Held, that he was answerable to the assignees for the value of the goods. *Copland v. Stein*, 8 T. R. 199.

A bona fide purchaser, for ready money, of goods sold, after an act of bankruptcy, without notice, is entitled to retain them under a commission which issues within two months, if the assignees do not repay the money. *Hill v. Farnell*, 9 B. & C. 45.

A. purchased of B., a hop merchant, a library, and paid him the value, B. at that time had committed an act of bankruptcy, of which A. had no knowledge:—Held, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment made by A. was declared valid by 6 Geo. 4, c. 16, s. 82; and, in order to give full effect to that enactment, A. must at least have a lien on the books in respect to which he had made the payment, until the assignees tendered him the sum paid. *Id.*

Where a bankrupt, after a secret act of bankruptcy, bought on credit, and sold for ready money at unusually low prices, the purchasers were held not protected by 6 Geo. 4, c. 16, s. 82, unless the purchase was in the usual course of business. And if the purchaser knew the price to be greatly under the value of the commodity, it is not within the protection of the statute. *Ward v. Clarke*, M. & M. 497—Tenterden.

Where a bankrupt, before his bankruptcy having purchased goods on credit, has fraudulently resold them for ready money under their value, an action for goods sold and delivered cannot be maintained by his assignees against the purchaser, to recover the difference between the sum paid to the bankrupt and the value of the goods. *Burrs v. Clarke*, 4 Camp. 355—Gibbs.

A., at the instigation of B., procures credit for goods to a large amount, which he sells to B. at very inadequate prices, in fraud of his creditors; the assignees of A., after his bankruptcy, cannot recover the difference from B. *Hegg v. Mitchell*, 1 Stark. 241—Ellenborough.

Upon the question under stat. 46 Geo. 3, c. 135, (repealed by stat. 6 Geo. 4, c. 16), whether a party dealing with a trader knew him to be insolvent, the jury may infer such knowledge from the fact of the party buying goods of the trader to a great extent, for a period of near two years, at prices more than 30 per cent. under prime cost. *Yates v. Carnesew*, 3 C. & P. 99—Tenterden.

A. became bound as a surety for B., who, in order to indemnify him, agreed that he should retain out of any money which should be due from him to B., in respect of any dealings between them in trade, so much as he should pay on the bond; B. afterwards sold goods to A. of a less value than the money secured by the bond, and then became a bankrupt, and A. was obliged to satisfy the bond:—Held, that the assignees of A. could not recover in an action for goods sold and delivered, there being nothing due to the bankrupt's estate on the original contract. *Dobson v. Lockhart*, 5 T. R. 133.

Assignees may maintain trover against one who has purchased goods from the bankrupt in the usual course of his trade, after a secret act of bankruptcy, although the goods were purchased on sale and return, and although the assignees afterwards demanded payment from the defendant as upon the sale of the goods. *Hurst v. Guennep*, 2 Stark. 306—Ellenborough. Rule for a new trial refused.

A. sold goods to B., to be paid for by a bill at two months, and not being able to obtain it from B., and doubting his solvency, A. employed his broker to re-purchase them in his own name, which was done, although at a great loss. B. afterwards became a bankrupt, without knowing that the goods had been re-purchased by the broker on the account of A. In an action of trover brought by the assignees of B. against A. for the goods:—Held, that they were not entitled to recover, as the transaction was not fraudulent on the part of A. *Harrie v. Linsell*, 4 Moore, 18.

A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the hands of the defendant; the trader became bankrupt by lying two months in prison:—Held, that his assignees could not recover from the defendant, who was a mere bearer, the money he had so received and paid over. *Coles v. Wright*, 4 Taunt. 198; 2 Rose, 110. And see *Type v. Hedin*, 7 B. & C. 101; 9 D. & R. 881.

### 8. Gifts of Money.

#### (a) To Children.

Money given by a father, who is a trader, to his son, to advance him in a partnership trading concern, was not within 1 Jac. 1, c. 15, s. 5, and could not be recovered from the son by the assignees of the father, who afterwards became bankrupt. *Kensington v. Chantler*, 2 M. & S. 36.

A father, at the request of his son, executed a mortgage to secure a debt due from the son to the mortgagee:—Held, that the mortgage was not a voluntary conveyance, without consideration, within 1 Jac. 1, c. 15, s. 5. *Ex parte Hara*, Buck, 165.

A bond given by a father by way of settlement, previous to a solemnization here of a valid marriage in Scotland, cannot be sustained against creditors under his commission. *Ex parte Hall*, 1 Rose, 30.

A mere gift of money by the bankrupt to his son was not within the statute 1 Jac. 1, c. 15. *Ex parte Shorland*, 7 Ves. jun. 88.

#### (b) Other Gifts.

A fraudulent gift of money, in contemplation of insolvency, may be avoided by the assignees. *Abell v. Daniell*, M. & M. 370—Tenterden.

Where a bankrupt, in the habit of supplying his son with money to pay his bills, gave him 200l. just before he stopped payment, being at the time insolvent, but not expecting to become a bankrupt:—Held, that the question for the jury, in an action by his assignees against the son to recover that money, is, whether it was given in the ordinary course of maintaining the son, or as a fraudulent preference of the son over the creditors, made in contemplation of insolvency. Such gift of money is not within the meaning of the 6 Geo. 4, c. 16, s. 83. *Id.*

A voluntary settlement in favour of strangers, by one not indebted at the time, nor meaning a fraud, is good against the subsequent creditors. *Holloway v. Millard*, 1 Madd. 414.

### 9. Payments by or on account of Bankrupts.

#### (a) Under legal Compulsion.

**Arrest.**—A payment under an arrest was held to be protected by the stat. 19 Geo. 2, c. 32, as a payment in the ordinary course of trade. *Teale v. Young*, M'Clel. & Y. 497; *S. P. Cox v. Morgan*, 2 B. & P. 398.

Even where the payment was made a few days after the arrest, if in consequence thereof. *Holmes v. Wennington*, 2 B. & P. 399, n. And see 7 East, 138; *Harwood v. Lomas*, 11 East, 127; and *Allanson v. Atkinson*, 1 M. & S. 583; 2 Rose, 134.

A., after committing an act of bankruptcy, in order to procure his discharge from arrest at the suit of B., draws and indorses to B. a bill of exchange, which C. accepts, in expectation of receiving goods of A.'s into his hands; C. receives the goods, sells them, and pays the amount of the bill to B.; the assignees of A. cannot maintain an action against B. for this money as money had and received to their use. *Waller v. Drakeford*, 1 Stark. 481—Ellenborough. Rule for a new trial refused.

A creditor of the bankrupt who had sued out a writ against him, and without proceeding upon it, afterwards received from him a bill in part payment of his debt, after being apprized that there had been a meeting of his creditors, and that the bankrupt's affairs, at that time, were only capable of paying the demands of his creditors by instalments, although he was assured by the bankrupt's agent that they would come round, was held liable to refund the proceeds of such bill to the assignees, as a payment not in the usual

course of trade, and after notice of his insolvency. *Bayly v. Schafeld*, 1 M. & S. 338; 2 Rose, 100.

A trader, subsequently to an act of bankruptcy, being arrested and detained in prison, at the suit of several creditors, sent for all his creditors but one, and paid their debts in full; but no other circumstance occurred from which it could be presumed that they knew of his bankruptcy or insolvency:—Held, that such payments were not protected by the 19 Geo. 2, c. 32. *Soutkey v. Butler*, 3 B. & P. 237.

A., being a bankrupt, continues in possession of his estate, and grants an annuity out of certain premises to B. The tenant in possession pays the rent to B., in order to prevent a distress. The assignees cannot maintain an action for money had and received against B. *Dayton v. Pigman*, Peake's Add. Cas. 111—Kenyon.

**Threat of Arrest.**—Although voluntary payments are not protected, yet payments enforced by coercion of law are valid against the assignees, in case any commission be afterwards taken out. *Foster v. Allanson*, 2 T. R. 479.

If a bankrupt gives a preference to a creditor under the apprehension of legal process, however groundless, such preference is binding. *Thompson v. Freeman*, 1 T. R. 155.

Where a party made a payment to defendant on the eve of bankruptcy, and after a threat by defendant to arrest him:—Held, that, notwithstanding such a threat, the motives and state of mind of the bankrupt at the time of payment may properly be left to the jury, upon a question whether the payment was voluntary or compulsory. *Cook v. Rogers*, 7 Bing. 438; 5 M. & P. 353.

Where a bankrupt made a payment to defendant on the eve of bankruptcy, as he said, and as circumstances indicated, to benefit defendant:—Held, that the assignee might recover the amount from the defendant, notwithstanding the defendant, adduced evidence to shew that he had pressed for payment, and had threatened to arrest the bankrupt. *Id.*

A payment in the course of trade, if without notice of the act of bankruptcy, is good, though under process. *Ex parte Farr*, 9 Ves. jun. 515.

Money paid to a landlord by a bankrupt tenant to avoid a threatened distress, is a protected payment. *Stevenson v. Wood*, 5 Esp. 200—Ellenb.

A bankrupt proposed, after an act of bankruptcy, to dispose of a beneficial lease; but the purchaser refused to take it unless five quarters' rent in arrear to the landlord were first paid. After a negotiation between the bankrupt and the landlord, who knew the situation of the former, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises, but the landlord having a right of re-entry:—Held, that the assignee of the bankrupt could not recover from the landlord the rent so paid him. *Mayer v. Cresme*, 8 Moore, 171; 2 Bing. 261.

*Criminal Process.*—A transfer on the eve of bankruptcy, for fear of criminal process, is valid. *Ex parte De Tastet*, 1 Mont. 154.

A transfer of property made on the eve of bankruptcy, but under the apprehension that a degree of force, civil or criminal, is about to be applied, is valid. *Id.*

A transfer by one of two partners on the eve of bankruptcy, under circumstances which overcome the free will of the party, such as the apprehension of a prosecution for forgery, is valid. *De Tastet v. Carroll*, 2 Rose, 462; 1 Stark. 88. Rule for a new trial refused.

Where a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money, and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds:—Held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor v. Plumer*, 2 Rose, 415; 3 M. & S. 562.

#### (b) Claim of Lien.

Where a master and part owner of a vessel consigned her to the defendants, who were ship-brokers, on the usual terms of commission, on which the ship's papers were handed over to them, and they made disbursements on his account; and he was afterwards arrested, and lay in prison more than two months, on which a commission was issued against him, and the plaintiffs were appointed his assignees; and whilst he was in prison, the defendants adjusted their account with him, and received the balance due to them, on account of their disbursements, and at the same time delivered to him the ship's papers:—Held, in an action brought by the assignees for the recovery of such balance, that they were not entitled to recover, as the defendants had a lien on the papers until their account was adjusted and paid; and that neither the bankrupt nor his assignees could have disposed of the vessel before the papers were given up. *Thompson v. Beaton*, 7 Moore, 548; 1 Bing. 145.

Money paid by a trader, after a secret act of bankruptcy, to a carrier, for the carriage of goods, is not protected, and may be recovered back in assumpsit by his assignees. *Bradley v. Clark*, 5 T. R. 197.

#### (c) Payments by Bills.

The stat. 19 Geo. 2, c. 32, only protected payments of bills of exchange after secret acts of bankruptcy, where the bankrupt was liable on the bills to the party receiving the money. *Holroyd v. Whitehead*, 2 Rose, 145; 3 Camp. 530; 1 Marsh. 128; 5 Taunt. 440.

Therefore, where A. accepted a bill payable at his banker's, to a larger amount than his effects

in their hands, which was there paid: afterwards, having committed an act of bankruptcy, he repaid them the balance:—Held, that this was a payment in fraud of the bankrupt laws, and not protected. *Id.*

Assignees cannot recover the amount of a check paid by the bankrupt's bankers after the bankruptcy, in trover for the check, against the creditor to whom the check was delivered, and the money paid. *Mathew v. Sherwell*, 1 Rose, 118.

A., shortly before his bankruptcy, draws a bill, and having procured it to be discounted, gave B. a creditor, an order to receive the amount, which he directs C., who discounts the bill, to transmit to B.; whilst the money was in the hands of the carrier, A. commits an act of bankruptcy; B., who afterwards receives the money, is liable to A.'s assignees. *Henry v. Liddard*, 2 Rose, 463.

A. having recovered a verdict against B. B. committed an act of bankruptcy; afterwards A., having had no notice of the bankruptcy, gave time to B., and instead of entering up judgment, and suing out execution, took a bill drawn by B. on C., at a distant period, for the amount of the sum recovered:—Held, that this was not a protected payment; and that A. was liable to refund the money received for the bill to the assignees of B. *Pinkerton v. Marshall*, 2 H. Black. 334.

A. in London agrees to consign goods to B. & Co. at Hamburg, on a commission del credere, to receive the proceeds through the hands of C., their partner in London, who is to make advances to A., and repay himself out of the proceeds. B. & Co. purchase bills at Hamburg, drawn on D. in London, indorsed to themselves, and which they indorse and remit to C. as part of the proceeds, advising A. thereof, and desiring him to give them credit for them when duly honoured; the bills are accepted by D., but never indorsed over to A., and before they become due, D. stops payment:—Held, that the jury were justified in considering that the bills were sent on the account and at the risk not of A. but of C.; and therefore, A. having become bankrupt, that his assignees were entitled to recover the balance of the proceeds from C. *Lucas v. Groving*, 2 Marsh. 460; 7 Taunt. 164; 1 Stark. 391.

A. agreed to consign goods to B. & C. abroad, to be there sold on commission on his account; on which the defendant guaranteed that B. & C. should sell them to the best advantage, and render a just account of sales. Before any consignments were made, C. had ceased to be a partner with B., and the defendant became one in his stead, under the firm of B. & Co. A. afterwards consigned goods to B. & Co., who remitted the proceeds thereof to the defendant, for the purpose of being handed over to A., who in consequence drew bills on the defendant, which he by letter agreed to accept, depending on A.'s promise to provide for them, if remittances should not arrive from B. & Co. to meet them. A. became bankrupt, previous to which B. & Co. had remitted to the defendant, directing him to pay A. on account of the goods consigned by him, which remittances were not received by the defendant till after the

bankruptcy. B. & Co. afterwards sent other remittances, with similar directions, with which the defendant credited the bankrupt in his account, and debited him for the acceptances given by him before the bankruptcy, but which were paid afterwards. In an action by the assignee, to recover those subsequent payments:—Held, that he was not entitled to recover, as there was a specific appropriation of the proceeds to provide for the defendant's acceptances before the bankruptcy. *Thomas v. De Costa*, 2 Moore, 386.

Where S. obtained bills from the defendant, upon a fraudulent representation, that a security given by him to the defendant (which was void) was an ample security; and on the next day, having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one, which had been discounted), and also two bank-notes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against S.; the assignees under which commission brought trover against the defendant for the bills and bank-notes:—Held, that the defendant was entitled to retain them. *Gladstone v. Hadwen*, 1 M. & S. 517; 2 Rose, 131.

A general agreement between a bankrupt and the defendants, before the bankruptcy, that the latter should accept bills, to enable the former, by his agent abroad, to purchase cargoes and transmit them to the defendants, who were to pay their acceptances out of the proceeds, and place the surplus to the account of the bankrupt, constitutes no defence to an action of trover brought by the assignees for the recovery of certain proceeds received by the defendants after the bankruptcy, in payment of their claim on the bankrupt. *Carter v. Barclay*, 3 Stark. 43—Abbot.

And where in such action an account stated between him and the defendants was produced, from which it appeared that certain proceeds, constituting part of the account, had got into the possession of the defendants subsequently to the bankruptcy:—Held, that such account was sufficient to throw upon them the onus of proving their right to retain such proceeds, although a large debt upon the balance was due to them. *Id.*

If the payment of a bill be made after an act of bankruptcy, the burden of shewing that it is a bona fide payment is cast upon the receiver. *Bagwell v. Andrews*, 7 Bing. 217; 4 M. & P. 839.

A trader, in a state of insolvency, and concealing himself from his general creditors, after a secret act of bankruptcy, in part payment of a debt delivered a bill to a creditor who was acquainted with his place of retreat, and with whom he was in friendly communication:—Held, that this was not a payment protected by the 89d section. *Id.*

#### (d) Other Payments.

If country bankers in embarrassment, and after they have stopped payment, deliver to their London banker, upon the faith that assistance will be given by him, bills and notes of such an amount that if assistance is not given, the bank must fail, and such assistance is not given, it is a preference, although, at the time, there is not any contemplation of an act of bankruptcy. *Simpson v. Sykes*, 6 M. & S. 295.

A payment by a trader after he has committed an act of bankruptcy, and when he contemplated the probability of bankruptcy, is not a preference, if made to enable him to stand his ground. *Vacher v. Cocks*, 1 B. & Adol. 145; M. & M. 353.

An army agent was in the habit of advancing money to his customers on their pay and pensions, by checks on his bankers. Having overdrawn his banking account, he received a new credit from the bankers, and engaged in return to pay over to them, on receipt, the sums which usually came to his hands half-yearly from Government for the discharge of pensions. The agreement was not known to the persons who issued these funds. He committed an act of bankruptcy unknown to the bankers; and having subsequently received some Government remittances, paid them over according to the above arrangement, being indebted to the bankers in more than the amount. *Quære*, whether such payments were justifiable, or a fraudulent preference?—Admitted, that if the sums were put into the bank merely to enable the bankrupt to go on in business for a time, these were not payments in fraud of creditors. *Id.*

In an action to recover money paid by a bankrupt in contemplation of bankruptcy, on the ground of fraudulent preference, the declarations of the bankrupt as to the state of his affairs, made about the time of the transaction, but unconnected with it, are receivable in evidence. So, also, are letters received by him, refusing to advance him money, for the purpose of shewing the fact of such refusal, but not as evidence of other facts stated in them. *Id.*

If A. advance money to B., an insolvent trader, for the purpose of enabling him to execute an order for goods, upon the terms of being repaid out of the price of the goods, a payment made by B. to A. out of the price when received, is not a fraudulent preference. *Hunt v. Mortimer*, 5 M. & R. 12; 10 B. & C. 44.

In contemplation of a dissolution of partnership between A. & B., a warrant of attorney is given by C. to A., to secure a debt owing from C. to A. & B. Before the partnership is actually dissolved, C. commits an act of bankruptcy. A sum paid by C. to A., after the dissolution of partnership, on account of the debt, and a further sum levied under an execution against C.'s goods, is money received by both A. and B. to the use of the assignees of C. *Biggs v. Fellows*, 2 M. & R. 450; 8 B. & C. 402.

A., whilst he is solvent, and resident at Calcutta, directs B., at Bombay, to remit certain proceeds to C., in England, who is in the habit of accepting certain bills for A. This order is exe-

cuted by B., without fraud; but after an act of bankruptcy committed by A., C. has a lien on the sum received for his balance. *Jamieson v. Hodson*, 2 Rose, 467.

Money paid into court, under the 7 & 8 Geo. 4, c. 71, s. 2, is not a payment to a creditor within the protection of the 6 Geo. 4, c. 16, s. 82. *Ferrall v. Alexander*, 1 Dowl. P. C. 132.

If paid in after an act of bankruptcy, and less than two months before a commission issued, it is not within the protection of 6 Geo. 4, c. 16, s. 81. *Id.*

Payment by weekly instalments, in discharge of a debt for goods sold to the bankrupt, was not a payment "in the usual and ordinary course of trade and dealing," so as to be protected by the 19 Geo. 2, c. 32, s. 1. *Bolton v. Jager*, R. & M. 265—Abbott.

A., being a trader, before any act of bankruptcy, directed his broker who had authority to disburse for rents due to him, to pay a certain sum to B. in satisfaction of a debt, and the broker bona fide agreed with B. to pay him as soon as he received the rents, and after this A. became bankrupt:—Held, that the assignees of A. could not recover this sum from the broker, though he did not in fact pay it over to B. till after the commission issued. *Bedford v. Perkins*, 3 C. & P. 90—Tenterden.

#### 10. *Payments to Bankrupts.*

Payment of bills to support the credit of a declining trader, without notice of any act of bankruptcy, is not fraudulent. *Foxcroft v. Devonshire*, 2 Burr. 931; 1 W. Black. 193.

If a person intrusted with value trusts his creditor with that which may become productive of value, the first becoming bankrupt, the second may retain his debt out of the proceeds of the thing intrusted to him, and only pay the balance. *Oliver v. Smith*, 5 Taunt. 56.

A bill given in payment to a person who becomes bankrupt, is a good payment, although the bill does not become payable till after the bankruptcy, if the party giving it did not know the insolvency of the bankrupt at the time. *Ben-nett v. Spackman*, 1 C. & P. 274—Best.

A factor gave his acceptance to his principal for the amount of goods sold on account, after a secret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy, the factor paid his acceptance to the holder of the bill:—Held, that the payment was protected by 1 Jac. 1, c. 15, s. 14. *Wilkins v. Casey*, 7 T. R. 711.

Bankers having accepted bills for the accommodation of a trader, he, after committing an act of bankruptcy, but before a commission was sued out, lodged money with them to take up the bills, which did not become due till after a commission was sued out, and were then regularly paid by the acceptors:—Held, that they were bound to refund this money to the assignees, and that they neither had a right of set-off under 5 Geo. 2, c. 30, nor could protect themselves under 19 Geo. 2, c. 32, as having received the money in payment

of bills of exchange in the ordinary course of trade. *Tumplin v. Diggins*, 2 Camp. 312—Ellenborough.

B., a manufacturer in Staffordshire, makes goods to the order of A., a merchant in London, and forwards them thither, having previously committed an act of bankruptcy. Before the shipment, but after the act of bankruptcy, B. draws upon A. a bill exceeding in amount the price of the goods, which A., being ignorant of the act of bankruptcy, accepts. The goods having got into the possession of A., and B. being declared a bankrupt:—Held, that the property in the goods never passed to A.; that his acceptance of the bill was not a payment "by a debtor of the bankrupt," within the meaning of the 1 Jac. 1, c. 15, s. 14; and consequently that the assignees of B. might maintain trover against him for the goods. *Bishop v. Crawshaw*, 5 D. & R. 279; 3 B. & C. 415.

If A. fraudulently procure a bill from B., and afterwards become a bankrupt, and his assignees receive the money for the bill, B. may recover it from them in an action for money had and received. *Harrison v. Walker*, Peake, 111—Ken.

Two several banking firms, carrying on business respectively in the same country town, were in the habit of exchanging notes and securities with each other, and settling their balances by a prescribed mode. One of the firms became bankrupt, and, at the time of the act of bankruptcy, each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignees of the bankrupt firm being apprized of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly at the house of their agents in London, who did not know the situation in which the parties stood:—Held, that the solvent firm might recover the amount of the notes from the provisional assignees, in an action for money had and received. *Edmonds v. Newman*, 2 D. & R. 568; 1 B. & C. 418.

#### 11. *Partnership Transactions.*

A payment by a partner, who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy, to a creditor who has notice of the act of bankruptcy, is not protected by 6 Geo. 4, c. 16, s. 82. *Craven v. Edmondson*, 6 Bing. 734; 4 M. & P. 623.

Where two partners have stopped payment, and a commission of bankruptcy is taken out against one of them, a debtor to the firm, who knows of the stoppage, cannot refuse to pay money due to them, on the ground that the other may have committed an act of bankruptcy; in which case his assignees might call upon the debtor to pay a moiety of the money a second time. *Prickett v. Doon*, 3 Camp. 131; 1 Ross. 294—Ellenborough.

A., B., C. and D. were partners in a banking-house at Liverpool, and C. and D. also carried on a separate mercantile concern in London; J. & S. having accepted bills payable at the house of C. and D., employed A., B., C. and D. to get them



paid accordingly, and agreed to deposit with them good bills, indorsed by him, for the purpose of enabling them so to do. A., B., C. & D. debited J. S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A., B., C. & D., upon the general account between the two houses; and before any of the acceptances of J. S. became due, both houses failed, and J. S. was obliged to pay his own acceptances:—Held, that the assignees of C. & D. were entitled to retain against J. S. the bills remitted to them by A., B., C. & D.:—Held also, that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of C. & D., though sent by A., B., C. & D. before that event. *Bolton v. Fuller*, 1 B. & P. 539.

What transaction of an absconding partner in favour of a partnership creditor will be fraudulent and void, and prevent such creditor's being entitled to any part of the partnership effects, see *Hague v. Rolleston*, 4 Burr. 2174.

After a secret act of bankruptcy committed by one of two co-partners, the other cannot, by an indorsement in the name of the firm, transfer negotiable securities which existed before the act of bankruptcy. *Ramsbottom v. Lewis*, 1 Camp. 279—Ellenborough.

Where two partners join in an assignment of any property as a security for a debt, one, of whom only has at the time committed an act of bankruptcy, it is void as to a moiety only. *Whitwell v. Thompson*, 1 Esp. 72—Kenyon.

Where one of two partners, who were country bankers, became bankrupt, and the defendants, being holders of their notes, obtained payment of part of them from the London banker, at whose house they were payable, out of the funds in their hands belonging to the country bank, and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to the defendants, in payment of the residue of the notes in their hands, and afterwards became bankrupt, and no fraud was stated:—Held, that the assignees could not recover the money so paid to them by the London banker, nor the proceeds of the bill. *Harvey v. Crickett*, 5 M. & S. 336.

If one of two partners become bankrupt, the solvent partner may, for a valuable consideration and without fraud, dispose of the partnership effects; and if he afterwards fail, the assignees, under a joint commission against both, cannot maintain trover against the bona fide vendee of such partnership effects. *Fox v. Hanbury*, Cowp. 445.

Where one of two partners in trade had, after an act of bankruptcy, accepted a bill in the name of the firm, without the privity of his co-partner:—Held, that in the hands of an innocent indorsee it was an available security. *Lacy v. Woolcott*, 2 D. & R. 458.

Two of three partners affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad,

without his privity, to a creditor at home, and afterwards, by direction of such correspondent, drew a bill in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners, having in the mean time committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being all the time abroad:—Held, that by such indorsement of the bill by the two, after acts of bankruptcy, nothing passed to the creditor; for the bankrupt partners had ceased to have any control over the joint stock, and therefore could not bind the property either of their assignees or of their solvent partner. *Thomason v. Frere*, 10 East, 418.

After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; and afterwards a commission of bankruptcy is taken out against the surviving partner, and his estate assigned to the plaintiffs:—Held, that they are tenants in common with the solvent partner, and after his decease with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, 1 East, 363.

A. & B. being partners in trade, A. committed an act of bankruptcy, a few days after which, B. also committed an act of bankruptcy; between these acts of bankruptcy, a clerk of the house paid to C., a creditor of the house, at his request, 558*l.*, and, after both acts of bankruptcy, 5*l.* more. The assignees, under a joint commission against A. & B., brought an action against C. to recover these sums of money, and declared, first, for money had and received for the use of A. & B. before they became bankrupts; second, for money had and received to their own use as assignees of A. & B.; and third, upon an account stated with them as such assignees:—Held, that under this declaration the assignees were only entitled to recover the 5*l.* paid after the bankruptcy of both partners. *Smith v. Goddard*, 3 B. & P. 465.

Semble, that if they had declared for money had and received to their use, as assignees of A., they might have recovered one moiety of the 558*l.* paid between the two acts of bankruptcy. *Id.*

After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; and afterwards a commission issued against the surviving partner:—Held, that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt, by relation from the act of bankruptcy, which was in the lifetime of the solvent partner, and consequently that the assignees could not maintain trover against such creditor. *Smith v. Orrell*, 1 East, 368.

Money paid by one partner to another, before

the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied, is provable as a debt under the commission of the bankrupt partner, although the solvent partner were not called upon to repay the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt, so paid after the bankruptcy to the joint creditor, notwithstanding the bankrupt has obtained his certificate. *Wright v. Hunter*, 1 East, 20; 5 Ves. jun. 792.

A. engages as a partner in a particular transaction with B, C. & D., who were before partners; B, C. & D. become bankrupts; after which A. pays a debt due from himself and them to a joint creditor:—Held, that these three partners constituted but one debtor to A., and that he might recover from B. the proportion of B, C. & D. towards the joint debt, B. not having pleaded in abatement. *Id.*

#### 12. Other Things.

A debtor being pressed to discharge a debt, gave to her creditor a draft on the executor of a debtor of hers, which draft the executor promised to discharge on receiving assets; this is a good equitable assignment of the debt, and available against the assignees of the debtor. *Ex parte Alderson*, 1 Madd. 53; 2 Rose, 447.

A trader having given an order on the executor of her debtor to pay the debt to a creditor, and the executor having received the order, and retained it until the assets of the testator should enable him to pay simple contract debts, and the trader having become bankrupt before payment, the creditor was declared entitled to receive the amount of the order from the executor, notwithstanding a subsequent arrest of the trader. *Ex parte South*, 3 Swanst. 392.

A release executed by the bankrupt after an act of bankruptcy, to a releasee who knows of the bankrupt's insolvency, is not valid, although executed more than two months before the suing out of the commission. *Moror v. Pyne*, 3 Bing. 285; 11 Moore, 2; 2 C. & P. 91.

### XIV. OPERATION OF EXECUTIONS.

#### 1. Verdict and Judgment before Bankruptcy.

Where a verdict in trover was obtained in vacation against a person, who, after the first day of next term, but before final judgment was signed, became a bankrupt:—Held, that final judgment signed afterwards, but during the same term, related to the first day of term, and that therefore the damages were provable under the commission. *Greenway v. Fisher*, 7 B. & C. 436; 1 M. & R. 330.

And also that the certificate was a bar to a scire facias. *Id.*

A verdict is only prima facie evidence of a debt, which the creditors or the bankrupt are at liberty to impeach, and into the circumstances of which, if impeached, the commissioners are bound to inquire. *Ex parte Butterfell*, 1 Rose, 198.

#### 2. Verdict before and Judgment after Bankruptcy.

A judgment for damages and costs in assumpsit, was a debt contracted within the meaning of the 46 Geo. 3, c. 135, s. 2, and provable, though final judgment was not entered up until after the commission issued. *Ex parte Birch*, 7 D. & R. 436; 4 B. & C. 680.

But if a defendant commit an act of bankruptcy between the time of a verdict in case for unliquidated damages, and final judgment, the damages are not a provable debt. *Ex parte Charles*, 14 East, 197; 16 Ves. jun. 256; S. P. *Buss v. Gilbert*, 2 M. & S. 70; 2 Rose, 157; *Ex parte Todd*, 3 Wils. 270.

Where the verdict is obtained before the act of bankruptcy, and final judgment signed afterwards, but before the issuing of a commission, the debt is provable. *Robinson v. Vale*, 4 D. & R. 430; 2 B. & C. 762.

A plaintiff recovered damages and costs against a defendant in an action of trespass, and signed final judgment on the 29th of January; on the 23d of that month defendant committed an act of bankruptcy, and a commission issued against him on the 31st of the same month, and on the 3d of May he obtained his certificate:—Held, that the damages and costs were a bona fide debt within the meaning of 46 Geo. 3, c. 135, s. 2, and provable under defendant's commission; and he having been arrested on a ca. sa. for the damages and costs, the court discharged him out of custody. *Id.*

Where, in an action for damages on a tort, a verdict has been taken, subject to the award of an arbitrator, and the defendant had become bankrupt between the verdict and the making of the award:—Held, that execution could not be sued out on the judgment, either for the damages or costs, because the plaintiff might have proved the damages recovered under the commission by the production of the record. *Beeeton v. White*, 7 Price, 209.

The fi. fa. was set aside on the terms of the defendant's undertaking to bring no action against the sheriff. *Id.*

A creditor of the bankrupt, previous to the commission, obtained a verdict against him for a nominal sum, in an action for money had and received, subject to a reference. After the issuing of the commission, the award was made, and judgment entered up for the debt and costs awarded; the creditor having proved his debt, took the bankrupt in execution for the costs:—Ordered to discharge him. *Ex parte Haynes*, 1 Glyn & J. 107.

Where, upon an action on a contract, there was a verdict for the plaintiff, subject to a reference before the bankruptcy, by which it was directed that the costs of the action should abide the event of the award, and the award was made in favour of the plaintiff:—after the bankruptcy, the costs were held to be provable. *Ex parte Helm*, 1 Mont. & Mac. 70.

Where a cause and all matters in difference were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the

plaintiff to the defendant, and ordered that sum to be paid to the latter; and between the time of making the order of reference and taxing costs, and signing judgment, the plaintiff became bankrupt:—Held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Haswell v. Thorogood*, 7 B. & C. 705.

Where, in an action upon a contract, the verdict is before, and the judgment after the bankruptcy, the costs are provable. *Ex parte Poucher*, 1 Glyn & J. 385.

But not where, in an action of case for words of the plaintiff in his trade, defendant became bankrupt between verdict and judgment. *Longford v. Ellis*, 1 H. Black. 29, n.

If a plaintiff become bankrupt after verdict found for the defendant, but before judgment signed, the costs are not a debt provable under the commission. *Walker v. Barnes*, 1 Marsh. 346; 5 Taunt. 778; 2 Rose, 279.

And execution for them may issue against him, notwithstanding his certificate. *Id.*

If an action be commenced against a bankrupt after the commission, for work done before the bankruptcy, and he afterwards obtain his certificate, he is discharged from the costs as well as the debt. *Willett v. Pringle*, 2 N. R. 190.

A bankrupt in custody in execution, who has not obtained his certificate until after a judgment, shall be discharged on motion. *Graham v. Benton*, 1 Wils. 41.

A creditor who obtains a verdict before commission against a bankrupt, is entitled to prove his costs, as well as his debt, under the commission, though judgment was not signed till after the commission issued. *Aylett v. Harford*, 2 W. Black. 1317.

So, though judgment be not obtained till after the certificate is allowed. *Bouteflour v. Coates*, Cowp. 25.

Where a debt exists before the bankruptcy, the interests and costs, even of a writ of error, accruing afterwards, are discharged, as well as the debt. *Anon.* 1 Chit. 16, (a); *S. P. Blanford v. Foote*, Cowp. 138.

A creditor was admitted to prove costs taxed after commission, on verdict obtained before. *Ex parte Simpson*, 3 Bro. C. C. 46.

### 3. Both Verdict and Judgment after Bankruptcy.

If the verdict, as well as the judgment, be after the bankruptcy, the costs are not provable, though it seems they are barred by the certificate. *Ex parte Poucher*, 1 Glyn & J. 385.

Where a debt arises before bankruptcy, but a verdict is obtained and costs taxed after, the costs are considered as part of the original debt, and the certificate extends to both, because provable. *Lewis v. Piercy*, 1 H. Black. 29.

Upon a verdict and judgment after bankruptcy, in an action previously brought, whether for an antecedent debt by contract, or mere damages in

tort, the costs could not be proved as a debt under the commission. *Ex parte Hill*, 11 Ves. jun. 646; 2 N. R. 191. But see 6 Geo. 4, c. 16, s. 58.

Money due upon a judgment for mesne profits was not within the 9th section, 49 Geo. 2, c. 121, where the verdict was after the bankruptcy. *Moggeridge v. Davis*, 1 Rose, 120; Wightw. 16.

If the damages be contingent and uncertain, they cannot be proved under a commission: therefore a right of action on a breach of covenant, not secured by a penalty, and where the damages to be recovered are uncertain, is not barred by the certificate of the defendant, who became a bankrupt after the covenant was broken. *Banister v. Scott*, 6 T. R. 489. And see *Parker v. Norton*, 6 T. R. 695.

Where a defendant became bankrupt between plea and verdict, in an action on a bail bond, and obtained his certificate after final judgment:—Held, that the debt should have been proved, and that the certificate was a discharge from both debt and costs. *Dimesdale v. Eames*, 4 Moore, 350; 2 B. & B. 8.

A., in 1808, accepted bills for B.'s accommodation; B. became bankrupt, having paid away the bills, and A. took them up without having received value. A. (the debt not being provable under the commission), brought an action against B., and recovered his principal, interest, and costs: he then sold his debt, and assigned the judgment. The assignee of the judgment was, under stat. 49 Geo. 3, c. 121, s. 8, entitled to prove the original debt under the bankrupt's commission, and to receive a proportionate dividend; and the judgment debt, though greater than the original, was barred by the certificate. *Ex parte Lloyd*, 1 Rose, 4.

Upon the bankrupt's petition to supersede, an action was directed to be brought by the bankrupt against the assignee, to try the validity of the commission, the petitioning creditors to defend the action; and it was ordered that the proceedings under the commission should be stayed until further order, and all further directions in the matter of the petition were reserved until after the trial, with liberty to apply. The bankrupt having failed in the action, was taken in execution for the costs; and, upon his petition, he was ordered to be discharged from that arrest. *Ex parte Gregory*, 1 Glyn & J. 177.

Under the stat. 5 Geo. 2, c. 30, an execution against the goods of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the Chancellor, is valid. *Callen v. Meyrick*, 1 T. R. 361.

And where a defendant was taken in execution under similar circumstances, and paid the debt and costs to the sheriff, the court of K. B. refused to order the sheriff to return the amount to him. *Neatly v. Eagleton*, 2 Tidd's Prac. 1049; 3 Dougl. 409.

If a fi. fa., issued against a bankrupt before certificate obtained, be not executed till after, the court of C. P. will order the goods to be restored; even though he has not pleaded the certificate according to the stat. 5 Geo. 2, c. 30, s. 7; but if

any thing be alleged to invalidate the effect of the certificate, that court will direct a trial on a plea of bankruptcy. *Lister v. Mundell*, 1 B. & P. 427.

A bankrupt obtained his certificate on the same day a *fi. fa.* was executed on his goods: the court refused the bankrupt relief on motion. *Hanson v. Blakey*, 4 Bing. 493; 1 M. & P. 261.

#### 4. Judgment by Default or Confession.

By 6 Geo. 4, c. 16, s. 108, *no creditor though, for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors.*

The 6 Geo. 4, c. 16, s. 81, is no repeal of stat. 3 Geo. 4, c. 39, s. 2, by which executions on warrants of attorney, which are not filed within a certain time after execution, are declared void as against assignees of a bankrupt, under a commission afterwards issued. *Wilson v. Whitaker*, M. & M. 8—Abbott.

Sect. 108 comprises every species of judgment, except judgment after verdict, trial by the record, and on demurrer. *Cumming v. Welesford*, 6 Bing. 501; S. C. nom. *Cuming v. Heale*, 4 M. & P. 238.

It extends to an execution on a final judgment by default. *Id.*

An execution sued out upon a final judgment, after a judgment by nil dicit, falls within the proviso of the 108th section, which comprises all judgments by default, and cannot be restrained to judgments by default by the consent or collusion of the parties. *Id.*

The words "obtained by default, confession, or nil dicit," apply to a judgment obtained before, as well as after, the passing of the act. *Id.*

The stat. 1 Will. 4, c. 7, s. 7, *exempts judgments on cognovit, and by default, confession, or nil dicit, in any action commenced adversely and without collusion, from the operation of s. 108 of the bankrupt act*, 6 Geo. 4, c. 16.

This statute does not extend to judgments on warrant of attorney, though given without collusion or fraudulent preference; and a sheriff having seized and sold the goods on an execution issued upon such judgment, and paying over the proceeds after notice of an act of bankruptcy committed by the defendant, is answerable to the assignees for money had and received. *Crossfield v. Stanley*, 4 B. & Adol. 87.

Judgment was entered up on a warrant of attorney given by two joint traders; and a *fi. fa.* issued, returnable on the 2d of May. On the 1st of that month, the sheriff's officer received from the defendants the money directed to be levied. On the 2d of May one of them committed an act of bankruptcy, and the other on the 5th. On the 11th, a commission of bankruptcy issued; and on the 19th the sheriff paid over the money to the execution creditor. In an action by the assignees:—Held, that the creditor was entitled to retain it, not being a creditor having a security at the time of the bankruptcy. *Morland v. Pellatt*, 8 B. & C. 722; 2 M. & R. 411.

A plaintiff in execution, upon a judgment by confession, ceases to be a creditor having security for his debt, within the meaning of the stat. 6 Geo. 4, c. 16, s. 108, when the goods seized under that execution are sold, even though an act of bankruptcy be committed before the return of the writ. *Higgins v. M'Adam*, 3 Y. & J. 1.

The acts of a special bailiff appointed by a plaintiff in execution, who indemnifies the sheriff, are equivalent to the acts of the plaintiff himself; and therefore, where a plaintiff in execution upon a judgment by confession appointed a special bailiff, who seized and sold the goods during two days, for part of which he received the money, and for the rest gave credit, before an act of bankruptcy was committed by the defendant, it was held, that the plaintiff was entitled to retain the proceeds of those sales against the assignees, although the *fi. fa.* was not returnable before the act of bankruptcy. *Id.*

A warrant of attorney was given to secure a debt in 1819, judgment was entered up, a *fi. fa.* issued, and goods seized, which were assigned over to plaintiff in 1825, about a fortnight previous to bankruptcy:—Held, that the assignees were not authorized by the 6 Geo. 4, c. 16, s. 108, in taking possession of the goods taken in execution. *Wymer v. Kamble*, 6 B. & C. 479; 9 D. & R. 511.

A judgment and execution on a cognovit, not filed according to the provisions of the 3 Geo. 4, c. 39, are not absolutely void, but only inoperative against the assignees of a bankrupt. *Green v. Gray*, 1 Dowl. P. C. 350.

The court has not, by 6 Geo. 4, c. 16, s. 108, jurisdiction against the execution creditor who does not prove. *Ex parte Botcherley*, 2 Glyn & J. 367.

The court will not set aside an execution issued upon a judgment obtained by default, confession, or nil dicit, and served and levied by seizure upon the property of a bankrupt before his bankruptcy, the stat. 6 Geo. 4, c. 16, s. 108, not rendering the execution in such case void, but merely enacting that the plaintiff in such execution shall share rateably with the other creditors. *Taylor v. Taylor*, 5 B. & C. 392; 8 D. & R. 159.

Where a creditor obtains judgment by nil dicit against his debtor, whose goods are seized by the sheriff before his bankruptcy, but not sold till after it, the court will not compel the sheriff to pay over the proceeds of the sale to the assignees, although the validity of the commission be not impeached. *Re Washbourn*, 2 M. & R. 374; 8 B. & C. 444.

Under a *fi. fa.* upon a judgment founded on a warrant of attorney, the sheriff seized at eleven o'clock on the 13th of August; a commission of bankruptcy issued against the debtor at a later hour on the 13th of October in the same year; the sale took place subsequently to the issuing of the commission:—It was held, that as more than two months had elapsed between the seizure and the issuing of the commission, the execution was not

within the 108th section. *Godson v. Sanctuary*, 1 Nev. & M. 52; 4 B. & Adol. 255.

#### 5. Proceedings by Assignees.

If a sheriff take goods of a bankrupt in execution, after the act of bankruptcy and before the commission issued, and sells them after the commission, trover will lie against him. *Cooper v. Chitty*, 1 W. Black. 65; 1 Burr. 20.

If a sheriff legally take goods in execution, the proprietor whereof afterwards becomes a bankrupt, and the sheriff sells at one time, after the bankruptcy, enough to satisfy that, as well as another execution delivered to him after the bankruptcy, such sale is void, and the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution. *Stead v. Gascoigne*, 8 Taunt. 527.

Where, after a secret act of bankruptcy, the sheriff took in execution the goods of a trader under a fi. fa., and removed them to a broker's, and the assignees of the bankrupt afterwards served a notice upon him not to sell them; for which reason they were allowed to remain unsold at the broker's:—Held, that the sheriff was liable to an action of trover at the suit of the assignees, without any demand of the goods. *Wyatt v. Blades*, 3 Camp. 396—Ellenborough.

The assignees of a bankrupt should bring trover, and not trespass, against a sheriff for taking the goods of the bankrupt in execution after an act of bankruptcy and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell. *Smith v. Miles*, 1 T. R. 475.

If a creditor accompany the sheriff's officer in levying an execution, which is afterwards avoided by a commission of bankruptcy, trover may be maintained against him by the assignees, though he has never received the goods, or their value from the sheriff. *Menham v. Edmonson*, 1 B. & P. 369.

The sheriff seized the goods of a defendant under a fi. fa., and sold and delivered them to the judgment creditor, in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him:—Held, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignees subsequently chosen. *Balme v. Hutton*, 3 M. & Scott, 1; 9 Bing. 471; 1 C. & M. 262; 2 Tyr. 620; reversing *S. C.* 2 Tyr. 17; 2 C. & J. 19; 2 Y. & J. 101—Held by seven judges of K. B. and C. P. (Gaselee, J., dissentient.)

Trover lies against the sheriff for goods seized by him after an act of bankruptcy, without notice; and his assenting to some of the goods being packed up and sent to him, to secure the payment of his poundage, is evidence of conversion. *Carlisle v. Esland*, 5 Moore, 109; 7 Bing. 296.

Trover will lie against a sheriff who takes in execution the goods of a bankrupt, although he has no notice of the bankruptcy, and a commission has not been sued out at the time of execution. *Price v. Helyar*, 4 Bing. 597; 1 M. & P. 541; *S. P. Potter v. Starkie*, 4 M. & S. 260.

Where a trader committed an act of bankruptcy on the 9th November, and the sheriff took his goods in execution on the 15th, and sold them on the 21st December, and a commission was issued on the 23d, and an assignment made on the 6th January following:—Held, that the assignees might maintain trover against the sheriff, although he had sold before the assignment was made, as the bankrupt's property vested in them by such assignment, from the act of bankruptcy by relation. *Lasarus v. Weithman*, 5 Moore, 313.

If a sheriff levy goods under an execution after an act of bankruptcy committed by the party against whom the execution is sued out, the sheriff is liable to the assignees in an action of trover, although the sheriff had no notice of the act of bankruptcy. *Jacobs v. Latour*, 2 M. & P. 20; 5 Bing. 130.

The sheriff sold goods under a fi. fa. after a secret act of bankruptcy committed by the debtor, and, after notice of the act of bankruptcy, paid over the proceeds to the execution creditor, under an indemnity:—Held, that the assignees might recover the amount from the sheriff in an action for money had and received. *Young v. Marshall*, 1 M. & Scott, 110; 8 Bing. 43.

A sheriff seizing under a fi. fa., and afterwards selling the goods of a person who has committed an act of bankruptcy, is liable in trover to the assignees (under a commission issued within two months), though it do not appear that at the time of seizure, or when the sale began, the sheriff knew of the act of bankruptcy. *Dillon v. Langley*, 2 B. & Adol. 131.

If a sheriff sell goods which he has seized, after notice of an act of bankruptcy, and sell by bill of sale to the execution creditor, who sells to a stranger, and such stranger afterwards becomes one of the assignees under the commission, the assignees may maintain trover against the sheriff. *Vaughan v. Wilkins*, 1 B. & Adol. 370.

Assumpsit for money had and received will lie for the assignees of a bankrupt, against a creditor who has levied his debt by fi. fa. subsequently to the act of bankruptcy. *Hitchin v. Campbell*, 2 W. Black. 627; 3 Wils. 304; Lofft, 208.

A. having money due to him from B., who was also indebted to other persons, took a warrant of attorney for the whole amount of the several debts in the usual terms. A. afterwards assigned his interest in the warrant of attorney to C. for a valuable consideration, who entered up judgment, and took out execution against B.'s effects; and the money was levied by the sheriff, who paid it over to B.'s assignees (he becoming bankrupt): it seems that assumpsit for money had and received to his use would lie at the suit of C. against the assignees. *Cooper v. Wrensh*, 1 D. & R. 469.

The assignees of a bankrupt may recover as

for money had and received against the defendant who took the goods of the bankrupt in execution, after an act of bankruptcy, and then took the goods under a bill of sale from the sheriff, although no money was actually paid. *Reed v. James*, 2 Rose, 465.

Where the goods of a bankrupt taken in execution are discharged by payment of the sum to be levied by a creditor after a docket struck, the assignees subsequently chosen cannot, by repaying that sum, maintain an action for money had and received against the sheriff. *Bucker v. Booth*, M. & M. 518—Parke.

But quære, if a sheriff, whilst he has goods unsold in his hands, taken under a fi. fa., receives notice of a commission of bankruptcy having issued against the defendant, but notwithstanding sells the same, and pays the proceeds to the plaintiff, whether such sale is wrongful, and will support an action of trover? *Nolley v. Buck*, 2 M. & R. 68; 6 B. & C. 160.

Quære, whether a sheriff is justified in selling the goods of a bankrupt after notice of the bankruptcy? *Id.*

Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a fi. fa., under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution creditor:—Held, that he was not justified in paying over the money, and was liable to be sued for it by the assignees, in an action for money had and received. *Id.*

The court refused to stay proceedings in an action of trespass by the assignees of a bankrupt, against a sheriff, for an execution, where the assignees brought the action in their own names, and the goods seized had been some time in the possession of the assignees, and were part of additional goods bought by the assignees, though the bankruptcy was disputed. *Bernasconi v. Fairbrother*, 7 B. & C. 379.

A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor and the sheriff for monies levied under an execution upon a judgment by nil dict. *Mitchell v. Knott*, 1 Sim. 497; 2 Glyn & J. 293.

#### 6. Costs.

*Statute.*—By 6 Geo. 4, c. 16, s. 58, if any plaintiff, in any action at law or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order, against any person who shall thereafter have become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, he shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.

Verdict for defendant in July; commission of bankruptcy against plaintiff in August; judgment

against him, and certificate under the commission for him in Michaelmas term ensuing:—Held, that he was liable to an execution for costs notwithstanding sect. 58. *Bire v. Moreau*, 4 Bing. 57; 12 Moore, 226.

*Proof of.*—Where plaintiffs sued defendant for a debt before the bankruptcy of defendant, and went on with the suit after his bankruptcy, and had judgment, and defendant obtained his certificate, and afterwards brought a writ of error, which was nonprossed, and costs of nonpross in error awarded against him:—Held, that the defendant was discharged by his certificate from these costs. *Scott v. Ambrose*, 3 M. & S. 326; 2 Rose, 435.

So, in case of sci. fa. *Phillips v. Brown*, 6 T. R. 282.

If A. recover a judgment against B. before the bankruptcy of B., and revive it by scire facias after the bankruptcy, the costs of the scire facias relate back to the judgment, and may be proved under the commission. *Id.*

Costs of a nonsuit are not a provable debt under a commission of bankruptcy issued before signing judgment, although the judgment relates back to a time previous to the commission issuing. *Brough v. Adcock*, 1 Dowl. P. C. 231; S. C. nom. *Brough v. Hancock*, 5 M. & P. 678; 7 Bing. 650.

If a plaintiff become a bankrupt after he is consulted, and before the taxation of costs, the costs of the nonsuit are a debt provable under the commission. *Hurst v. Mead*, 5 T. R. 365.

So, if he become bankrupt before judgment of nonsuit signed. *Watts v. Hart*, 1 B. & P. 124.

So, costs of a nonsuit, in an action against commissioners under a commission which had been superseded, are provable under a second commission sued out on the same act of bankruptcy, but after the nonsuit. *Holding v. Impey*, 1 Bing. 189; 7 Moore, 614.

Where, after a recovery in ejectment, and before an action of trespass for mesne profits, the defendant became bankrupt, and the jury did not include the costs of the ejectment in their verdict on executing a writ of inquiry in the action for mesne profits, the court refused to set aside the inquisition, because the plaintiff might have proved the costs as a debt under the defendant's commission of bankruptcy. *Gulliver v. Drinkwater*, 2 T. R. 261.

The costs of a suit in Chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission; but the bankrupt remains liable to be attached for the amount under the award made a rule of court. *Re v. Davis*, 9 East, 318.

#### 7. Other Things.

The sheriff seized goods under a writ of fi. fa. on the 16th June, and remained in possession, taking no steps to effect a sale, though urged so to do by the plaintiff's attorney. On the 5th of

October a commission of bankruptcy was sued out against the debtor, and the goods were delivered up by the sheriff to the assignees under an indemnity, and nulla bona returned to the *fi. fa.* Quære, whether, under these circumstances, the sheriff is not liable to an action on the case at the suit of the execution creditor, for the loss of the fruits of his judgment? *Aireton v. Davis*, 3 M. & Scott, 138.

Joint creditors who have taken joint effects in execution subsequently to an act of bankruptcy by one of the partners, cannot retain them against the assignees under a separate commission afterwards issued by another joint creditor against that partner. *In re Wait*, 1 J. & W. 605.

If the goods of a trader are taken in execution after an act of bankruptcy, and the money arising from the sale paid over by the sheriff two months before a commission is sued out, the bankruptcy will reach the execution, notwithstanding 46 Geo. 3, c. 135, which protects all bona fide payments and transactions by or with the bankrupt more than two calendar months before the date of the commission. *Blogg v. Phillips*, 2 Camp. 129—Ellenborough.

Nulla bona is a good return to a *fi. fa.* sued out against a trader's goods, returnable within two months, but not actually returned till after he had lain in prison two months, and thereby become bankrupt. *Coppendale v. Bridges*, 2 Burr. 814; 2 Ld. Ken. 542.

The court enlarged a rule for time for the sheriff to return the writ, though there was only an affidavit that a commission of bankruptcy had issued, and that the sheriff was fearful the act of bankruptcy was before the levy. *Anon.* 2 Chit. 204.

A bond and warrant of attorney to confess judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt was contracted before. *Birch v. Sherland*, 1 T. R. 715.

A cognovit is not discharged by bankruptcy and certificate. *Wyborne v. Ross*, 2 Taunt. 68; 1 Rose, 112.

But a cognovit given for a debt, interest, and costs, incurred after a secret act of bankruptcy, is discharged by bankruptcy and certificate. *Van Sandau v. Corbie*, 1 Chit. 16.

### 8. Partial Satisfaction.

A creditor having shortly before the commission seized the effects of the bankrupt in execution, and having after the commission satisfied part of his debt by sale of the effects, was admitted to prove for the residue. *Ex parte Hopley*, 1 Glyn & J. 63; 2 J. & W. 220.

A petition to stay the certificate, on the ground of the rejection of a debt, having been served on the bankrupt only one day before the petition day, was dismissed with costs. *Id.*

An application by a creditor whose debt exceeded the whole amount of the other debts, and who held in his hands goods of the bankrupt

taken in execution shortly before the commission issued, to be allowed to prove the difference between the debt and the value of the goods, was refused. *Ex parte Hopley*, 1 J. & W. 423.

### XV. OPERATION ON CROWN PROCESS.

A penalty for not paying the excise duties, incurred before a bankruptcy, but not substantially by conviction till after, continues a lien upon the estate in the hands of the assignees, and may be distrained for. *Stacey v. Hulse*, 2 Dougl. 411; *S. P. Att. Gen. v. Semer*, and *Rex v. Fowler*, 2 Dougl. 416, n.

If a soap-maker, having incurred a forfeiture for concealing soap, contrary to 1 Geo. 1, c. 2, s. 36, become bankrupt, and a provisional assignment of his estate be made, after which the soap is condemned, and the bankrupt convicted, and thereupon a warrant issues to levy the penalty on his goods generally, such a warrant is bad, and cannot justify a seizure of the soap in the hands of the assignees. *Austin v. Whitehead*, 6 T. R. 436.

Personal estate was seized under the crown's extent, which was afterwards set aside for irregularity, and the effects ordered to be delivered up to the assignees of the debtor, duly appointed under a commission of bankruptcy sued out after the teste of the extent; a second extent, tested the day the first was set aside, and subsequently to the assignment, was issued, and delivered to the sheriff, before the execution of the order for delivery of the goods to the assignees, the sheriff still holding them in his custody: Held, that the property in the effects had been changed and transferred by the assignment; that the crown had no lien thereon, and consequently that the assignees were entitled to reduce them into possession; and the regularity of the commission and assignment having been found by the inquiry on the second extent, on the evidence produced, the court refused to put the assignees to claim property, on a suggestion of infirmity in the commission, without an affidavit. *Rex v. Marsh, McClell. & Y.* 250.

Where defendant's effects have been sold under a venditioni exponas on an extent, in default of claim, it does not conclude his assignees under a commission of bankruptcy; and they will be allowed, on application, to enter their claim, and plead in a proper case, where the proceedings have gone so far, on payment of costs of the sale and the application, and putting the prosecutors of the extent in the same situation as if they had claimed and pleaded in due time. A short delay (as a month) is not laches in the case of assignees. *Rex v. Adam*, 5 Price, 39.

Although a warrant of the commissioners of the land-tax is not equal to an extent, so as to bind the goods of a bankrupt from the date, yet if a collector become bankrupt, and his goods be afterwards seized under a warrant from the commissioners before the actual execution of the assignment, the king's debt must be satisfied. *Rex v. Jones*, 8 Price, 108.

A. and B., bankers in London, had, at the time of their bankruptcy, cash and short bills belonging to C. and D., bankers in the country. The cash was the excise duties received and remitted by the country to the London bankers, and against which they had given to the commissioners the latter's acceptances. In respect of these, an extent had issued:—Held, that the crown had a right to elect against what securities they would go, and, on the consent of the attorney-general, the short bills were ordered to be delivered up. *Ex parte Rowton*, 1 Rose, 15.

A debt to the crown was preferred to the creditors under a bankruptcy where the sheriff was in possession under several extents, one of which, for part of the debt, was tested the day the provisional bargain and sale and assignment were executed, the others having issued subsequently. *Rogers v. Mackenzie*, 4 Ves. jun. 752.

## XVI. SET-OFF AND MUTUAL DEBTS.

### 1. Generally.

By 6 Geo. 4, c. 16, s. 50, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners are to state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy before the credit given to, or the debt contracted by, the bankrupt; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand which is proveable against the estate may also be set off against the estate, provided the person claiming the benefit of such set-off had not, when such credit was given, notice of any act of bankruptcy.

The statutes of set-off extend to assignees under a commission of bankruptcy. *Ridout v. Brough*, Cowp. 133; *S. P. Anon. Loft*, 608. But see *Ryall v. Larkin*, 1 Wils. 155.

A mutual credit may be constituted, though the parties do not mean particularly to trust each other. *Hankey v. Smith*, 3 T. R. 507, n.

In order to constitute a mutual credit within the 5 Geo. 2, c. 30, s. 28, it must be confined to pecuniary demands on such credits as in their nature will terminate in a debt. *Rose v. Hart*, 2 Moore, 547; 8 Taunt. 499.

Therefore a guarantie, being merely a contract to indemnify against contingent damages, cannot form the subject of a mutual credit. *Sampson v. Burton*, 4 Moore, 515; 2 B. & B. 89.

A. having given defendant his acceptance for 20l., defendant, in consideration thereof, undertook that he would indorse to A. a bill drawn by him (defendant) on E. E., payable to defendant's order. He gave the bill, but would not indorse it. On assumpsit brought by the assignees of A., who had become bankrupt, and whose acceptance was dishonoured:—Held, that the contract to indorse was not a subject of "mutual credit" within 6 Geo. 4, c. 16, s. 50, and could not have been set

off by the assignees against the 20l. due from A. to the defendant. *Rose v. Sims*, 1 B. & Adol. 521.

A creditor of a partnership having made further advances on the security of a bill deposited with him for that purpose by the partners, and having undertaken to receive the amount when due and return the surplus, the bill having been dishonoured and remaining in his hands unpaid, is not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill. *Ex parte Flint*, 1 Swans. 30.

The doctrine of set-off and mutual credit, under the statute, is the same at law and in equity. *Id.*

A debt from a bankrupt to a married woman *dum sola* cannot be set off against a debt from her husband to the bankrupt. *Ex parte Blagden*, 19 Ves. jun. 465.

Where a loss attaches upon a policy of insurance after the bankruptcy of the insured, it constitutes a cause of action in the assignees, not an interest in the bankrupt admitting a set-off. *Ex parte Herbert*, 2 Rose, 249.

If bankers receive any pay-money on account of a bankrupt, after notice of an act of bankruptcy, all the sums received are to the use of the estate; and they cannot set off the payments made, or be allowed to come in as creditors, and claim dividends on debts paid, which were owing before the act of bankruptcy. *Hankey v. Vernon*, 3 Bro. C. C. 313.

The bankrupt, at the time of his bankruptcy, was indebted to P. W. in respect of monies received by him as agent, and misapplied, and P. W. had purchased of the bankrupt an annuity for her life, in consideration of a sum payable at her death, and died after the bankruptcy:—Held, that the representatives of P. W. were not entitled to set off the consideration of the annuity against the debt due from the bankrupt. *Whittaker v. Hall*, 1 Glyn & J. 213; *S. C. nom. Ex parte Whittaker*, 1 Rose, 301.

A. purchases an annuity of 200l. for 2000l., to be paid after her death. The grantor becomes bankrupt, and is indebted to her in 2275l. 5s. 9d. The annuitant is not entitled to set off the 2000l. against the 2275l. 5s. 9d.; for, as she could not be compelled to pay in advance, the bankrupt ought not to be compelled to take in advance. *Id.*

There could not be a case of mutual debt or credit within the 5 Geo. 2, c. 30, s. 28, unless the balance could be ascertained by computation. *Id.*

If a demand be payable at all events, though at a future day, it may be proved under a commission against the debtor, or set off in an action brought by his assignees; but if it rest in contingency whether it will be paid or not, it cannot be so proved or set off, unless it be secured by a penalty, which is forfeited at law. *Hancock v. Entwistle*, 3 T. R. 435.

To enable the holder of a bankrupt's acceptances to avail himself of them in an action by the assignees against himself on his own accep-



tance, by way either of set-off or of mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bill so set off subsisted before the bankruptcy, or that there was a mutual credit created in the origin of the bill. *Ouchterlony v. Easterby*, 4 Taunt. 888; 2 Rose, 272.

## 2. Agents.

Before 6 Geo. 4, c. 16, s. 50, assignees might recover from the factor of a bankrupt all monies received by him from the bankrupt within two months before the issuing of the commission; and the factor could not set off debts incurred by the bankrupt to him within the same time, although the factor had acted *bonâ fide* and in ignorance of the act of bankruptcy. *Kinder v. Butterworth*, 9 D. & R. 47; 6 B. & C. 42.

A. was the agent of the grantor and grantee of certain annuities; all payments on account of the annuities passed through his hands, and he charged the grantee a commission upon all such payments. A. delivered to the grantee an account, and gave him credit for half a year's annuity, describing it "as money not yet received," and debited him with commission upon the same: in fact, it had not been received by A., and he having afterwards become bankrupt, it was held, that his assignees were entitled to be allowed that sum in account by the grantee. *Shaw v. Dartnall*, 6 B. & C. 56; 9 D. & R. 54. And see *Shaw v. Woodcock*, 7 B. & C. 73, and *Shaw v. Pictou*, 7 D. & R. 201; 4 B. & C. 715.

So, where, in one account, credit was given to the grantee for certain sums, as money actually received by A., and they had never been received; and in another account subsequently delivered, the same sums were placed to the debit of the grantee with his assent; it was held that the assignees of A. were entitled to be allowed those sums in account. *Id.*

If goods specifically pledged remain in the possession of the bailee, and in the mean time the owner becomes insolvent (having committed acts of bankruptcy before the original pledge was entirely redeemed by the repayment of the money secured by it,) should other advances be then made to him by them, it was not a case of mutual credit within the 5 Geo. 2, c. 30, s. 28, and the assignees of the bankrupt might recover the goods in trover. *Birdwood, v. Hart*, 5 Price, 593.

Where a regimental agent had received monies from the paymaster-general of the forces, under the authority of a warrant of attorney from the colonel, and then became bankrupt:—Held, in an action by the assignees for goods sold and delivered by the agent for the use of the regiment, that the colonel might set off the money which the agent had received from the paymaster-general remaining unaccounted for, in reduction of the demand. *Knobles v. Maitland*, 6 D. & R. 312; 4 B. & C. 173.

Where D. and another purchased goods of two London houses, and shipped them upon speculation to a foreign port in the name of C., and not wishing to appear as principals in the transaction, represented to the London houses, and to the

consignees abroad, that C. was the principal, and that they acted merely as his agents; and after the shipment, the London houses made advances to D. and his partner, as the agents of C., on account of the goods, the proceeds of which remained in the hands of the consignees abroad; and C. also advanced money to D. and his partner, who afterwards became bankrupts, and at the date of the commission were indebted to C. for such advances:—Held, in an action by the assignees for money had and received, that C. had a right to retain the proceeds of the goods as a set-off for money advanced to the bankrupts, it being a case of mutual credit within the statute 5 Geo. 2, c. 30, s. 28. *Easum v. Cato*, 1 D. & R. 530; 5 B. & A. 861.

## 3. Bills and Notes.

To an action by assignees for a debt due to the bankrupt's estate, the defendant may set off notes in his possession issued by the bankrupt before the bankruptcy. *Moore v. Wright*, 2 Rose, 470; 2 Marsh. 209; 6 Taunt. 517.

Banker's notes bought by a debtor after the banker has stopped payment, and before an act of bankruptcy is committed, may be set off in an action by the assignees. *Hawkins v. Whitten*, 10 B. & C. 217.

A party has a right to set off notes of a firm of bankers, taken by him after he knew that they had stopped payment, but before he knew that either of the partners had committed an act of bankruptcy; but he is not entitled to set off notes of such bankers taken by him after he knew that either of the partners of the bank had committed an act of bankruptcy. *Dixon v. Cass*, 1 B. & Adol. 343.

The defendant cannot set off cash notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy, unless he shows further that such notes came to his hands before the bankruptcy. *Dickson v. Eeans*, 6 T. R. 57.

A petitioner being a creditor of the bankrupt on a cash balance, and being under acceptances for the bankrupt's accommodation, which were not paid at the bankruptcy, and having received from the bankrupt bills and notes to a larger amount than the cash balance, which were negotiated by the petitioner, was not allowed to prove the cash balance on the principle of excluding the dishonoured paper on both sides, or otherwise. *Ex parte Read*, 1 Glyn & J. 224.

Defendant kept cash with M. and W. bankers, and accepted a bill drawn by one of the partners in the house, and indorsed by that partner to the house, who discounted and afterwards indorsed it for value to S. Before the bill became due, M. and W. were bankrupts, having funds in the hands of S. more than sufficient to pay the bill, and having in their hands money belonging to defendant. When the bill became due, S. presented it for payment to defendant, who having refused payment, S. paid himself out of the funds of M. and W. remaining in his hands, and delivered the bill to their assignees:—Held, in an action brought by the assignees

against defendant as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and defendant, and that the latter was entitled to set off against the sum due to the bankrupts on the bill, the debt due to him from M. and W. at the time of their bankruptcy. *Bolland v. Nash*, 8 B. & C. 105; 2 M. & R. 189.

At the time of the bankruptcy, Harrison was a creditor of the bankrupts for the sum of 1500*l.* on a cash balance, and the bankrupts had in their hands two bills drawn by Harrison on Hoppins for the sum of 1338*l.* 7*s.* 9*d.*, which Hoppins had accepted for the accommodation of Harrison, and which Harrison had discounted with the bankrupts, and which were not due at the bankruptcy. On the petition of Hoppins and Harrison, the court ordered the bill to be delivered up to Harrison in part discharge of the cash balance, with liberty to prove for the difference. *Ex parte Hoppins & Harrison*, 2 Glyn & J. 93.

Acceptances not due till after the bankruptcy of the acceptor may be set off. *Ex parte Wagstaff*, 13 Ves. jun. 65.

If a debtor to a bankrupt's estate acquire a bill with the bankrupt's name upon it, which he knows forms no demand upon the bankrupt's estate, after notice of the bankrupt's insolvency, and with a view to set off, he is not a bonâ fide holder. *Ex parte Stone*, 1 Glyn & J. 191.

#### 4. Joint or separate Debts.

Set-off is allowed of a separate debt due from the estate against a joint debt due to it, and liberty given to prove the balance. *Ex parte Hanson*, 12 Ves. jun. 346.

Set-off is allowed of a debt of the bankrupts to one partner separately, against a joint debt of him and his partner, on their bond to secure the separate debt of the former. *Ex parte Hanson*, 18 Ves. jun. 233; 1 Rose, 156.

A, entering into partnership with B, applies to his bankers for a loan to constitute his capital; they consent, upon condition that B. shall join in a security for the repayment of the loan, which is complied with. The partnership open an account with the bankers, who also continue the private bankers of A. On the bankruptcy of the bankers, the balance on the joint account, arising from this loan, is against A. and B., but A.'s private account is in his favour. A. and B. were allowed to set off this private balance against the joint debt, it being but a security for the separate debt. A. and B., soon after the partnership commenced, took in another partner, but it was understood that the account with the bankers was to continue as before. This partner drew checks in the partnership name, and paid them into his private account. The assignees were held not entitled to charge the checks so transferred against the partnership account. *Id.*

A debtor by bond to the separate estate of a deceased partner is not allowed in equity to set off his bond-debt in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a

joint commission of bankruptcy. *Addis v. Knight*, 2 Mer. 117.

Three partners, A., B., and C., deliver bills to D. for a special purpose. A. and B. become bankrupts. In an action by their assignees against D. for the proceeds of the bill:—Held, that C. not having been made bankrupt, this was not a case of mutual credit within 5 Geo. 2, c. 30, s. 18, so as to entitle the defendant to set off the bills against a debt due to him from A., B., and C. *Staniforth v. Fellowes*, 1 Marsh. 184; 2 Rose, 151.

Part-owners of a ship cannot set off their proportions of a debt due to the bankrupt on that account against the debts due by the bankrupt to them severally. *Ex parte Christie*, 10 Ves. jun. 105.

Under a separate commission, relief in the nature of set-off was refused against a separate creditor of the bankrupt indebted to the partnership to a greater amount. *Ex parte Tweedgood*, 11 Ves. jun. 517.

A. proved a debt of 424*l.* against the separate estate of B., and died before B. had obtained his certificate, having bequeathed to B. a legacy of 200*l.*:—Ordered, on the petition of the assignee, that the sum of 200*l.* should be deducted from the proof of 424*l.* made by A. *Ex parte Man*, 1 Mont. & Mac. 210.

#### 5. Insurance Cases.

The benefit of a policy of insurance made previous to the bankruptcy of the insured, upon a loss after it, passes to the assignees, and gives a right of action to them, which is not capable of being set-off against a debt from the bankrupt. *Ex parte Blagden*, 19 Ves. jun. 465.

In an action by the assignees of a bankrupt underwriter against a broker, for premiums due to the bankrupt; semble, that the broker cannot set off a loss on a policy effected by him as agent, without a commission del credere, where there has been no adjustment, though the loss took place before the bankruptcy. *Baker v. Langhorn*, 2 Marsh. 215; 6 Taunt. 519; 4 Camp. 396; 2 Rose, 471.

Where a bankrupt has underwritten a policy to a broker acting under a del credere commission, and a loss upon the policy happens before, but is not adjusted till after the bankruptcy, the broker may deduct the amount of the loss from the debt which he owes to the bankrupt's estate. *Bize v. Dickson*, 1 T. R. 285.

Where brokers effected policies on goods on account of their principals, in their own names, and accepted bills on account of the goods which were consigned to them and lost before arrival:—Held, that they might set off such losses in an action brought by the assignees of the underwriter for premiums, although they had not any del credere commission, and the losses were not adjusted. *Parker v. Beasley*, 2 M. & S. 423.

A broker with a commission del credere may set off under the general issue, a loss upon a policy happening before a bankruptcy, to an action by the assignees of the bankrupt for premiums

upon various policies underwritten by him, and for which he had debited the broker; but such a loss cannot be proved under a notice of set-off. *Greve v. Dubois*, 1 T. R. 112.

Where a broker effected a policy of insurance in the name of his principal, under a *del credere* commission, and guaranteed the solvency of the underwriters in the body of the policy, which was left in the custody of the assured until the broker had paid the loss, according to the terms of the guarantee:—Held, that a loss having happened before the bankruptcy of one of the underwriters, and been adjusted afterwards, could not be set off by the broker in an action brought against him by the assignees, to recover premiums due to the bankrupt, either as constituting a mutual debt or mutual credit, although the broker had accounted for such loss with the assured before the bankruptcy. *Peele v. Northcote*, 1 Moore, 178; 7 Taunt. 478.

Where defendants, insurance brokers, effected several policies of insurance, some in the name and on account of their own firm, others in the name of their own firm, but on account of their principals, and others in the name and on account of their principals, for which principals they acted under a *del credere* commission, without the knowledge of the underwriters:—Held, that in an action brought against them for premiums, by the assignees of one of the underwriters upon those policies, who had become bankrupt, the defendants might set off losses and returns due on all such of those policies as were effected in the name of their own firm, but not on such as were effected in the names of their principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had not been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which adjustments the defendants had given their principals credit for the amount. *Koster v. Eason*, 2 M. & S. 112.

A broker, who is indebted to assignees for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy, is not entitled to set off returns of premium due upon the arrival of ships which have arrived since the bankruptcy. *Goldschmidt v. Lyon*, 4 Taunt. 534.

An insurance-broker who is indebted to the assignees of a bankrupt underwriter for premiums, cannot, without an especial authority, set off against that debt sums due from the underwriter for returns of premium, whether the returns became due before the bankruptcy or after the bankruptcy. *Minett v. Forrester*, 4 Taunt. 541.

If a person intrusted with value, trust his creditor with that which may become productive of value, the first becoming bankrupt, the second may retain his debt out of the proceeds of the things intrusted to him, and only pay the balance. A., a merchant, employed B., a broker, to effect policies and sell goods, and trusted him with the possession of the policies; A., being indebted to B. for premiums of insurance, and

having obtained an advance of money upon a pledge of goods placed in B.'s hands for sale, but not on those goods, to the exclusion of A.'s general creditors, became bankrupt: afterwards a loss happened, and B. received it from the underwriters:—Held, that this was a mutual credit within the stat. 30 Geo. 2, c. 5, and that B. might retain the sum received for the loss, in liquidation of his advances, as well as of the balance due for premiums. *Olive v. Smith*, 5 Taunt. 56; 2 Rose, 122.

Where a broker adjusted a loss with an underwriter, and the name of the latter was afterwards struck out of the policy and adjustment, and the broker became bankrupt within a month after the making of such adjustment:—Held, that the underwriter could not set off as against the assured, the balance due to him from the broker, at the time of adjusting the policy, although such balance might exceed the amount of the loss. *Todd v. Reed*, 3 Stark. 16—Abbott.

An underwriter cannot set off, as a mutual credit, against a loss accruing after the bankruptcy of the assured, premiums of the same and other policies due before the bankruptcy from the assured, who was himself his own insurance-broker in effecting those policies. *Glennie v. Edmunds*, 4 Taunt. 775.

Neither can he set off returns of premium upon voyages not complete before the bankruptcy, although the underwriter must, upon the conclusion of the adventure, necessarily become debtor to the assured, either for a loss, or a return of premium. *Id.*

An underwriter is entitled (where the assured has become bankrupt after the policy of insurance was effected) to deduct what was due to him before the bankruptcy, on a balance of account between the assured and himself, from out of the amount of his subscription to the policy, in the event of a loss subsequent to the bankruptcy, under the 5 Geo. 2, c. 30; the statute 19 Geo. 2, c. 32, s. 2, suspending the effect of a bankruptcy in the case of an assured and the underwriter on both sides, so as to let in the former statute, till the result of the voyage shall have been ascertained, and the accounts stated; because the 19 Geo. 2, c. 32, (admitting persons assured to claim losses against bankrupt underwriters, although happening after the bankruptcy,) is in *pari materia*, and the two statutes are to be construed with reference to each other, so as to make them mutually beneficial; and therefore it was held, that a set-off must be allowed to a solvent underwriter against the assignees of a bankrupt assured, under the 5 Geo. 2, c. 30. *Graham v. Russell*, 3 Price, 227; 5 M. & S. 498; 2 Marsh. 561.

#### 6. Created by Contract.

If, after a secret act of bankruptcy, a trader sell goods to a person who is surety for him, upon an agreement that the price of the goods shall be set off against the liability, and the trader become a bankrupt, such set-off is not valid. *Carter v. Breton*, 6 Bing. 621; 4 M. & P. 424.

A. & Co., merchants at Liverpool, remitted a bill to B. & Co. in London, with directions to get it discounted, and apply the proceeds in a particular way; B. & Co. did not get the bill discounted, but received the money when it became due. Before that time, A. & Co. had stopped payment and desired to have the bill returned to them. A commission of bankruptcy having been issued against them before the money was received on the bill by B. & Co.:—Held, that the latter were liable to be sued for the amount by the assignees of A. & Co. for money received to their use; and that B. & Co. could not set off a debt due to them from A. & Co. *Buchanan v. Findley*, 9 B. & C. 738; 4 M. & R. 593.

A tradesman undertook to do work upon an article delivered to him, for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt:—Held, that the act 6 Geo. 4, c. 16, s. 50, (which provides for the setting off of cross demands where there has been mutual credit between the bankrupt and a party claiming on his estate,) did not, in this case, render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand. *Clarke v. Fell*, 4 B. & Adol. 404; 1 Nev. & M. 244.

An equitable set-off was allowed under circumstances, as there could be none at law, where bankers, directed to lay out money in navy annuities, instead of doing so represented that they had, and made entries and accounted for the dividends accordingly, and took a joint promissory note from the party and her brother, under the supposition to secure a debt from him to them, upon which the assignees under their bankruptcy sued him alone. *Ex parte Stephens*, 11 Ves. jun. 24.

An order was made for proof of the balance setting off the debt upon the note. *Id.*

#### 7. *Proceedings by Assignees.*

A sale of the property of a bankrupt, after an act of bankruptcy, but more than two months before the commission issued, is, since the 46 Geo. 3, c. 101, s. 1, a sale by the bankrupt, and not by the assignee; and a creditor of the bankrupt having become a purchaser, was holden (in an action brought by the assignee for the value of the goods,) to be entitled to set off against such claim the debt due to him from the bankrupt; this constituting a mutual credit between the bankrupt and such creditor within that statute, s. 3. *Southwood v. Taylor*, 1 B. & A. 471.

If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt. *Smith v. Hodson*, 4 T. R. 211.

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the

defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same under the words "mutual credit," in the 5 Geo. 2, c. 30, s. 28. *Smith v. Hodson*, 4 T. R. 211.

Where a person, previous to his bankruptcy, deposited a bill of exchange with the defendant for the purpose of raising money thereon, and an advance was accordingly made:—Held, that the assignees of such bankrupt were entitled to recover the bill in an action of trover, on having tendered the money advanced, although a balance remained due from the bankrupt to the defendant on a general account; and that this, therefore, was not a case of mutual trust or credit, within the statute 5 Geo. 2, c. 30, s. 28. *Key v. Flint*, 1 Moore, 451; 8 Taunt. 21.

A. first purchased one and afterwards another parcel of goods of B., each at six months' credit: when the first sum became due, A. lodged in B.'s hands a bill of exchange for a larger amount than the value of the goods in order to pay for them, B. engaging to return to A. the overplus when the bill should be paid; B. received the amount of the bill, and then A. became a bankrupt, not having paid for the second parcel of goods:—Held, in an action brought by A.'s assignees for the surplus of the bill, that B. might retain it to satisfy his demand on A. for the second parcel of goods. *Atkinson v. Elliott*, 7 T. R. 378.

Third persons, holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months (before which time the trader's acceptance would be due,) but without communicating to the trader that they were the holders of his acceptance:—Held, that the trader having become bankrupt, and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons. *Fair v. M'foer*, 16 East, 130.

A., at Hamburg, had dealings with B. & Co. in London, and previous to their bankruptcy drew a bill on them for 400*l.*, which they accepted. No debt was then due from them to A., but they were afterwards indebted to him in 236*l.* 1*l.* 3*d.*, when they drew on him for 163*l.* 8*s.* 9*d.*, being the balance due from A. in case the bill for 400*l.* had been paid. This bill was drawn on the 16th of February, and on the same day sold by them to the defendant for its full value, to be paid for on the 20th of the same month, on which day B. & Co. committed an act of bankruptcy, and requested the defendant to keep the bill at the disposal of A., by whom the bill for 400*l.* was drawn. On the 23d of February, A. accepted the bill without knowledge of the bankruptcy, and paid the amount of it, when it became due, to the defendant, on an agreement that he should resist the claims of

the assignees. At that time the bill for 400*l.* was over due and unpaid in the hands of A., and B. & Co. were indebted to him upon it in more than the amount of the bill in question:—Held, that the plaintiffs, as assignees, could not recover against the defendant, as he stood in the place of A. who was a creditor of the estate of B. & Co., and that this, therefore, was a case of mutual credit between him and the bankrupts before the bankruptcy. *Sheldon v. Rothschild*, 2 Moore, 43.

### 8. Other Debts.

Executors were allowed to set off a moiety of a legacy given by their testator to the wife of the bankrupt against a debt due from the bankrupt to their testator. *Ex parte O'Ferrall*, 1 Glyn & J. 348.

Assumpsit by the assignees of R., a bankrupt, on a note drawn by defendant, payable to G. or order, and by him indorsed to the bankrupt before the bankruptcy. It appeared that, in October, 1825, G. applied to the bankrupt to discount the note, and took as part payment the proceeds of a bill accepted by the bankrupt, payable to G.'s order. G. indorsed this bill for value to the defendant, and he got it discounted by H., who was the holder when it became due. A commission of bankruptcy issued against R. on the 23d of December, and the bill became due on the 24th, when it was presented and dishonoured. On the 26th, H. received the amount from the defendant, and returned the bill to him:—Held, that he had a right to set off the bill against the demand of the assignees on the promissory note. *Collins v. Jones*, 10 B. & C. 777.

A. and B. entered into partnership as brewers, A. bringing in as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. A. retired from the business, which was continued by B. alone, who agreed to take the brewhouse, &c. at a valuation; but the amount was not to be paid till the mortgages were satisfied. B. became bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of A.'s debt, paid off the mortgages:—Held, that the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to A. from B. at the time of his bankruptcy. *Rowe v. Anderson*, 4 Sim. 267.

The defendant and one C. purchased a string of pearls with money advanced by the defendant, and agreed that the profit and loss thereon should be equally divided, C. paying his share of interest till the pearls were sold. C. became bankrupt being indebted at that time to defendant. The pearls were afterwards sold, and the money received by the defendant. In an action by the assignees of C. for his share of the money received, it was held that the defendant was entitled to set off the debt due from C. to himself, this being a case of mutual credit within the statute 5 Geo. 2, c. 30, s. 28. *French v. Fenn*, 3 Dougl. 257.

### 9. Proof of Set-off.

In an action by assignees, it is not sufficient proof of a set-off, that the commissioners permitted the defendant to prove the debt proposed to be set off. *Pirie v. Menett*, 3 Camp. 279; 1 Rose, 359—Ellenborough.

Where, to an action by assignees for a debt due to the bankrupt's estate, the defendant set off notes in his possession, issued by the bankrupt before the bankruptcy; proof that notes to the amount of the set-off came into his hands three or four weeks before the bankruptcy, was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced. *Moore v. Wright*, 2 Marsh. 209; 6 Taunt. 517; 2 Rose, 470.

In such an action the defendant may plead a tender as to part, and give evidence of a set-off as to the remainder, without having pleaded the set-off. *Wells v. Crofts*, 4 C. & P. 332—Tent.

Or such set-off may be so given in evidence as to the whole. *Id.*

### 10. Petition.

Where a creditor has proved a debt, and the assignees have a demand against him, which, if determined in their favour, would give them a lien upon the dividends, they may proceed by a petition in the bankruptcy to enforce that demand. *Ex parte Timbrell*, Buck, 305.

A. and B., partners, gave a joint and several bond to C., who afterwards became indebted to A. B. became bankrupt. C. proved the bond under the commission, and then brought a joint action against A. and B., to which B. pleaded his certificate; A. being by this form of action precluded from setting off his separate debt, applied for and obtained an injunction against C.'s proceedings in the joint action. *Bradley v. Miller*, 1 Rose, 273.

## XVII. DIVIDEND.

### 1. Audit of Accounts.

*Statute.*—By 6 Geo. 4, c. 16, s. 106, the commissioners at the meeting appointed for the last examination are to appoint a meeting, not sooner than four calendar months from the issuing of the commission, nor later than six from such last examination, with twenty-one days' notice; and the assignees are to deliver, upon oath, a statement in writing of their accounts, which the commissioners are to examine, audit, and allow.

Although an audit meeting has closed, and the assignee's accounts are then settled, the commissioner, at any future meeting, has power to examine the assignees as to monies received before and not included in such accounts, and to re-investigate those accounts generally if need be. *In re Applegath*, 2 Deac. & Chit. 101.

### 2. Declaring.

*Statute.*—By 6 Geo. 4, c. 16, s. 107, the com-

missioners are to appoint a public meeting, with twenty-one days' notice, not sooner than four, nor later than six months from the issuing of the commission, to make a dividend, at which meeting creditors may prove: the commissioners are to make an order of dividend; in pursuance of which the assignees are to make the dividend.

If three commissioners were not present when an order of dividend was made, it was invalid. *Ex parte Day and Cooper*, 1 Mont. 213.

It was discretionary in the Lord Chancellor to postpone the dividend beyond the time limited by stat. 5 Geo. 2, c. 30, s. 33; but a petition by creditors of surviving partners, that the dividend might be postponed until those who were also creditors of a deceased partner, and had filed a bill against his representatives for an account of his assets, and payment of their debts, should have gone in under the decree, was dismissed for want of equity. *Ex parte Kendal*, 1 Rose, 71.

*Final.*—By 6 Geo. 4, c. 16, s. 109, the final dividend is to be made in the same manner within eighteen months after the issuing of the commission; unless there is an action or suit depending, or some part of the estate be outstanding, in which case the final dividend is to be made within two months after the estate is converted into money.

### 3. Who entitled.

After a dividend, fresh creditors coming in shall only be paid subsequent dividends, *pari passu* with those who have proved before; but if the assignees have paid other creditors differently, they must let these creditors in for the first dividend. *Ex parte Long*, 2 Bro. C. C. 50.

A surety is entitled to dividends on the debt proved by his satisfied principal. *Ex parte Brook*, 2 Rose, 334.

A surety for indemnity to a limited amount, having paid to the extent of his engagement, is entitled to dividends upon proof by the creditor under the bankruptcy of the principal debtor, subject to a deduction of the proportion of dividend upon the residue of the debt proved beyond that for which the surety was engaged supposing that expunged. *Payley v. Field*, 12 Ves. jun. 435. *And see Ex parte Turner*, 3 Ves. jun. 243.

In 1806, P. proved a debt against the estate of B. and C., bankrupts, on a bill of exchange, and died in 1807, appointing G. his executor; G. became bankrupt in 1816, and obtained his certificate in 1817: but before that time, viz. in the years 1811, 1814, and 1815, G. had, as executor, received three dividends on P.'s debt, and in 1817, 1822, and 1828, he received three other dividends. It afterwards turned out that the bill of exchange was paid by another party in 1807, so that no dividend was ever due. On petition by B. & Co.'s assignees to expunge the proof, and that G. should refund the six dividends:—Held, first, that it being in the nature of a trust, the statute of limitations did not run in favour of G.; but, secondly, that as the first three dividends were paid in error, and were a legal debt against G., and might have been proved under his bank-

ruptcy, the claim as to them was barred by his certificate; the other three received since his bankruptcy, were ordered to be refunded. *Ex parte Bolton*, 1 Deac. & Chit. 556.

The banker appointed under a commission becoming bankrupt, his estate is not entitled to any dividend on a debt proved by him against the other, until full reimbursement of all property of that estate beyond the amount of his dividend. *Ex parte Graham*, 3 Ves. & B. 130; 2 Rose, 74; *S. P. Ex parte Bebb*, 19 Ves. jun. 222.

Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors, as each estate is applicable to its own debts. *Ex parte Eldon*, 3 Ves. jun. 240.

Upon the proof of a joint debt under a separate commission, no dividend can be taken till the separate creditors have received 20s. in the pound. *Ex parte Abell*, 4 Ves. jun. 837.

A joint creditor being the petitioning creditor in a separate commission, is entitled to receive dividends with the separate creditors, not being within the rule excluding the other joint creditors. *Ex parte Ackerman*, 14 Ves. jun. 604.

A. was a creditor of a bankrupt on a bill of exchange, and also on a simple contract debt, and proved both debts under the commission. He afterwards received 20s. in the pound on the bill from the other parties liable thereon:—Held, that he could not take a dividend on his whole debt proved, (although it should not amount to 20s. in the pound on the remaining debt,) but only on the remaining debt. *Ex parte Woodman*, 1 Cox, 201.

A creditor who held a bill with the bankrupt's name upon it, and proved a debt upon a deposition stating that he held the bill as security, and subsequently received 15s. in the pound upon the bill from other parties, and 5s. in the pound upon his proof, was restrained from receiving further dividends on the amount of the bill. *Ex parte Rufford*, 1 Glyn & J. 41.

B., a creditor of the bankrupt, assigns his estate and the debts due to him to trustees, in payment of his creditors, and afterwards proves his debt under the commission:—Held, that the assignees under the commission were not entitled to deduct from the dividend on that proof, a sum due from B. to them for costs, upon the dismissal of a bill filed by B. against them, and dismissed subsequent to the assignment and prior to the proof. *Ex parte Whitehead*, 1 Glyn & J. 38.

Accommodation bills upon the bankruptcy of the drawer were fully paid by the acceptor to the holder, who having a further demand under the commission, proved for the whole including the bills:—Held, that he might take out of the dividend upon the bills, the proportion he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged; and that the rest of the dividend on the bills belonged to the acceptor. *Ex parte Turner*, 3 Ves. jun. 243.

B. and G. carry on business at M., as commission agents under the firm of B. & Co., G. being also a trader on his own separate account

at S., under the firm of G. & Co., and being likewise a partner with J. in London, trading under the firm of J. & Co., and with S. R. at L., trading under the firm of S. R. B. & Co. draw two bills on J. & Co., payable to the order of B. & Co., which J. & Co. accept, and which are afterwards indorsed by B. & Co., G. & Co. and S. R.; and of which W. & Co. become the holders for a valuable consideration, without any knowledge that G. is a partner in the house of B. & Co., or in that of J. & Co. B. and G. and J. severally become bankrupt;—the judges were equally divided on the question whether W. & Co. could prove the amount of the bills, both against the joint estate of B. & G., and the separate estate of G., or whether they must elect:—But held, per tot. cur., that the amount of dividends which had been previously declared, though not received by W. & Co. under the commission against J., must be deducted from such proof. *Ex parte Moult*, 1 Deac. & Chit. 44.

Assignees are not justified in delaying payment of dividends, on the ground that notice has been given them by a third person of a claim upon the dividends, no petition having been presented by such claimant within a reasonable period after such notice of a claim. *Ex parte Alsopp*, 1 Madd. 603.

#### 4. Remedies for.

**Action and Petition.**—By 6 Geo. 4, c. 16, s. 111, no action is to be brought against assignees for a dividend; but if they refuse to pay it, an order for payment with interest and costs may be made on petition.

Before the 49 Geo. 3, c. 121, which contains the same enactment, assumpsit would lie for a dividend. *Brown v. Bullen*, 1 Dougl. 407.

In such action, the proceedings before the commissioners were conclusive evidence of the debt; and the assignees could not set off a debt due from the plaintiff. *Id.*

Upon a petition by a creditor for his dividend, the assignees can only resist the payment upon such ground as they could have defended an action previous to the 49 Geo. 3, c. 121. *Ex parte Hodges*, Buck, 524.

Upon a petition to be paid a dividend, the debt cannot be disputed. *Ex parte Loxley*, Buck, 450.

Under a commission against A., a dividend was declared and repeatedly advertised to be paid to the creditors who had proved. Subsequently to the appointed days for payment, B. and C., the bankers to the commission, in whose hands a sum more than sufficient for the payment of the dividend had been left by the assignees, stopped payment and afterwards became bankrupt:—Held that an order of dividend is to be considered as a separation from the bulk of the estate of the sum to be divided, and that the unpaid dividends were lying in the hands of the bankers at the risk of the creditors, who had neglected to apply for payment. *Ex parte Powell*, 1 Mont. & Mac. 263.

An order for payment of dividends declared upon a creditor's petition for that purpose, raises, like the execution in the action for which the petition is substituted, a personal responsibility against the assignee. *Ex parte Graham*, 1 Rose, 456.

An official assignee cannot resist payment of a dividend. *Ex parte Alexander*, 1 Mont. 503.

An order was made for payment of a dividend in bankruptcy, with interest and costs, on petition under the stat. 49 Geo. 3, c. 121, s. 12, the assignees not being prepared to state their objection. *Ex parte Atkinson*, 3 Ves. & B. 13.

Where assignees had made no dividend, but, thirteen years after the bankruptcy, had from the produce of the property accumulated enough to give 15s. in the pound, a sale and distribution were ordered on petition of one creditor. *Ex parte Goring*, 1 Ves. jun. 168.

If an application for payment of a dividend is not made until after the statute of limitations has run; quære, if it is not lapsed? *Ex parte Burgess*, 1 Mont. & Bligh, 415.

Half of the dividends upon proof of 500*l.*, in respect of a legacy to the wife of the bankrupt, was ordered to be paid to her without a reference. *Ex parte Newham*, 1 Glyn & J. 40.

Where a bankrupt trustee had suffered the trust fund to be misappropriated the court directed that the son of the cestui que trust might prove for the amount, retaining the dividends till further order. *Ex parte Vine*, 1 Deac. & Chit. 357.

A surviving assignee is liable for the payment of dividends, if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many years; and unless it can be proved that the creditor has received them, the onus of the proof of payment lies on the assignee; and this notwithstanding there is no sufficient fund left of the bankrupt's estate to pay the creditors. *Ex parte Healey*, 1 Deac. & Chit. 361.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to A. B., the assignees are justified in paying subsequent dividends to A. B., until they have notice from the creditor that he has revoked A. B.'s authority. *Ex parte Bright*, 2 Deac. & Chit. 8.

Interest is payable on a dividend at 5 per cent. *Ex parte Loxley*, 1 Glyn & J. 345.

On a petition for payment of dividend, which is unsuccessfully opposed by the assignees, interest at 5 per cent., and costs, are of course against the assignees, who, if they act *bonâ fide*, may reimburse themselves out of the estate. *Ex parte Harrison*, 1 Mont. 250.

**Course in Court of Bankruptcy.**—When a dividend has been, or may be declared, and when any part of the bankrupt's estate shall have been paid into the Bank of England by any official assignee, to the credit of the accountant-general of the high court of Chancery and of such bankrupt's estate, any one of the judges of the court may, by order under his hand, direct the sum

ordered to be divided, on such part thereof as may be required, to be carried over from such account, to an account to be opened in the books of the Bank of England, in the name of the same estate, to be intitled "the dividend account," in which order shall be specified the names of the chief registrar of the court of bankruptcy for the time being, and of the official assignee appointed to such estate; and the judge shall execute two parts of his said order, one part of which shall be filed and remain of record with the proceedings in such bankruptcy, and the other part shall be delivered by the official assignee to the accountant general, who shall thereupon by his certificate direct the sum specified in the judge's order to be carried over as aforesaid, and shall in such certificate state the names of the chief registrar and official assignee mentioned in the judge's order, and shall direct the cashiers of the Bank to pay the money so carried over to the drafts of the official assignee, countersigned by the chief or other registrar duly authorized to countersign the same, and such transfer shall be made accordingly, and the cashiers of the Bank shall, out of the monies so carried over, pay all drafts so drawn and countersigned as aforesaid. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. c.*

When any such order of dividend shall have been made, the solicitor to the commission shall forthwith make out a list of the creditors, and shall place in separate columns, after the name of each creditor, the amount of his debt, and the sum which he is entitled to receive in respect thereof, by virtue of such order of dividend, leaving another column in blank for the purpose hereinafter mentioned, and shall to each name prefix a number in regular series, and shall sign such list, and lay it before the assignees chosen by the creditors, who shall examine and sign the same, and the solicitor shall then deliver the list to the official assignee, who shall examine and sign the same if correct, and shall take a copy thereof, and shall deliver the original to the chief registrar. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. d.*

And the chief registrar shall immediately upon the receipt of the said list, deliver to the official assignee books containing as many blank drafts and receipts as may be necessary, and in such form as shall from time to time be prescribed by the court, and the official assignee shall number and fill up a draft for each dividend, by inserting in each draft the name of the creditor, to which the number of such draft is prefixed in the list, and the dividend payable to him; and the official assignee shall take the draft book so filled up to the chief registrar, who shall compare the same with the list in his possession, and shall sign all such drafts as he shall find correctly drawn, and in case of any error shall cancel such drafts as are incorrectly drawn, and fill up and sign others in lieu thereof, and shall return the draft book so signed to the official assignee for the purposes hereinafter mentioned, who shall thereupon number and fill up the receipts to correspond with the drafts so signed.

*Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. e.*

When any creditor, or any person duly authorized under his hand to receive his dividend, shall apply for payment, the official assignee shall require the production of such securities (if any) as the creditor may hold for his debt; and if satisfied that the amount of the said dividend still remains due, shall fill up the date in the draft and receipt; and upon the creditor, or such other person authorized as aforesaid, signing the receipt for such dividend, the official assignee shall mark the securities (if any) with the amount of that dividend, and shall sign and deliver the draft for the same; provided that no dividend shall be paid to any creditor holding any security for his debt until such security shall be produced, without the special directions of the commissioner in that behalf. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. e.*

If, after such list shall have been so made and signed, it shall from any cause seem expedient and just to the commissioner that such list shall be altered, the said commissioner may make such alterations as to him shall seem just, or may direct a new list to be made, and may thereupon cancel all such drafts (if any) as shall be thereby rendered useless, and direct other drafts to be drawn corresponding with the amended or new list, (as the case may be,) and the registrar and official assignee shall thereupon fill up and sign such new drafts, and pay the same to the several creditors as hereinbefore directed; provided that every such alteration in the amount of a dividend shall be inserted in the blank column of such list, and shall be signed by such commissioner and official assignee before any draft shall be drawn in pursuance thereof. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxxii. e.*

Where any part of the money so transferred by the accountant-general shall become and remain unappropriated to the payment of any such dividend, the commissioner may, by order under his hand, direct such residue to be carried back to the account from which it was originally transferred, and the same shall be thereupon carried back accordingly, and a certificate of such transfer shall be sent to the office of the said accountant-general. *Reg. Gen. March 28, 1832, 1 Deac. & Chit. xxx. f.*

### 5. Unclaimed Dividends.

By 6 Geo. 4. c. 16, s. 110, assignees are to file an account of unclaimed dividends amounting in the whole to 50*l.*; and a power is given of investing such dividends, and after three years dividing the same among the other creditors.

An order was made to divide unclaimed dividends among the other creditors. *Es parte Donaldson, 1 Deac. & Chit. 110.*

An order is nisi only in the first instance, when made for the distribution of unclaimed dividends. *Es parte Robinson, 1 Deac. & Chit. 542.*



## XVIII. INTEREST ON DEBTS.

By 6 Geo. 4, c. 16, s. 132, the surplus is not to be paid to the bankrupt, until all the creditors who have proved shall have received interest upon their debts in the following manner, viz. creditors, whose debts by law carry interest in the first instance, according to the rate by law payable, to be calculated from the date of the commission; and then all other creditors who have proved at the rate of 4 per cent. from the date of the commission.

This section allowing interest to simple contract creditors is not retrospective. *Ex parte Shepard*, 1 Mont. & Mac. 67.

In bankruptcy, interest stops at the date of the commission, unless there is a surplus; and in that case, before the statute, only creditors having debts bearing interest received subsequent interest. *Butcher v. Churchill*, 14 Ves. jun. 573.

Interest subsequent to the commission could not be charged upon the estate, directly or indirectly, except in case of surplus. *Ex parte Paton*, 1 Glyn & J. 332.

Where there was a surplus, creditors were entitled to interest upon their debts. *Ex parte Gering*, 1 Ves. jun. 170.

But not unless it had been provided for by contract, either express or implied; and upon bonds not beyond the penalty. *Ex parte Williams*, 1 Rose, 399; *S. P. Ex parte Hankey*, 3 Bro. C. C. 584; *Ex parte Boyd*, 1 Glyn & J. 285.

The rule, that, on a written undertaking to pay money on a day certain or on demand, interest shall run from the day or demand, without a contract for it, did not extend to the case of a surplus in bankruptcy: interest, therefore, subsequent to the commission, was confined to debts carrying interest by contract. *Ex parte Koch*, 1 Ves. & B. 342.

But interest was allowed, whether the contract appeared either on the face of the security, or by extrinsic evidence. *Ex parte Mills*, 2 Ves. jun. 295.

As where, by course of trading and settling accounts, interest was allowed after a certain credit. *Ex parte Champion*, 3 Bro. C. C. 436.

The estate, if sufficient, was to pay interest for debts which carried it, but not if it broke in upon the allowance. *Ex parte Morris*, 3 Bro. C. C. 79.

Interest out of the surplus was refused upon the bankrupt's notes payable upon demand, as not being debts carrying interest, either by contract or on the face of them. *Ex parte Cocks*, 1 Rose, 317.

A separate creditor is not entitled to interest from the surplus, until joint creditors shall have been paid in full. *Ex parte Minchin*, 2 Glyn & J. 287; *S. P. Ex parte Clarke*, 4 Ves. jun. 677.

A surety paying after the bankruptcy to a creditor who has proved, can only stand in his place upon the bankrupt's estate; and, in case of a surplus, can claim no interest which the creditor could not have claimed. *Ex parte Houston & Boyd*, 2 Glyn & J. 36.

There being a surplus, after dividing to the

amount of the whole principal, with interest to the suing out the commission, subsequent interest was ordered on petition of bond creditors, saving just allowances; and the commissioners might give it without order, and need stop at nothing but want of assets; but no compound interest was allowed. *Ex parte Morris*, 1 Ves. jun. 132.

Under a joint commission, the right of the creditors to interest subsequent to the date of the commission in the case of a surplus, was preferred to a debt due from the separate to the joint estate, upon the principle that neither the partnership nor the individual debtor could claim in competition with the creditors. *Ex parte Reeve*, 9 Ves. jun. 589.

When there is a surplus upon an estate of three, which is indebted to two, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two. *Ex parte Ogle*, 1 Mont. 350.

Interest out of a surplus is given to a judgment creditor, from the date of the commission to the time when the principal sums were paid, notwithstanding the securities were at the time delivered up to the assignees, with receipts in full indorsed on them, the creditors apprehending the estates would not produce a surplus, which proved to be a mistake. *Ex parte Dey*, 2 Rose, 148.

Interest in case of a surplus, under the 6 Geo. 4, c. 16, s. 132, is to be calculated on the whole debt up to the first dividend, then upon the principal money unpaid, after deducting the amount of the dividend, up to the second dividend, and so on. *Ex parte Haynes*, 2 Glyn & J. 123.

## XIX. BANKRUPT.

1. Surrender, Examination, and Commitment.  
(a) Statutes.

By 6 Geo. 4, c. 16, s. 36, the commissioners, by writing under their hands, may summon the bankrupt before them, whether he shall have obtained his certificate or not; and if he shall not come at the time appointed, (having no lawful impediment made known to and allowed by them,) they may, by warrant under their hands and seals, authorize and direct any person they shall think fit to apprehend and arrest the bankrupt, and bring him before them; and upon his appearance, either voluntarily or compulsorily, they may examine him upon oath, either by word of mouth or by interrogatories, touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and may reduce his answers into writing, which examination the bankrupt is to sign and subscribe; and if the bankrupt shall refuse to be sworn, or to answer any questions put to him by the commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the commissioners any such questions, (not having any lawful objection, allowed by them,) the commissioners may, by warrant under their hands and

seals, commit him to such prison as they shall think fit, without bail, until he shall submit.

By s. 37, the commissioners may, in like manner, summon and examine the bankrupt's wife.

By s. 38, there is a penalty of 500*l.* for permitting the escape of a committed bankrupt.

By s. 112, the bankrupt must surrender before three o'clock on the forty-second day after notice in writing of the commission left at his usual place of abode, or personally served if in prison, and notice in the Gazette; and sign his surrender, and submit to be examined by the commissioners on oath.

By s. 115, bankrupts apprehended by warrant of the commissioners shall, if within the time allowed for surrender they submit to be examined, and in all things conform, have the same benefit as if they had voluntarily surrendered.

Under the former statute, 5 Geo. 2, c. 30, s. 14, when the bankrupt was apprehended under a judge's warrant, the commissioners had the power of examining him, although the time for his surrender had expired; and if his answers were satisfactory, he was discharged, unless indicted: if not, the commissioners had the same power of committing as on other examinations. *Ex parte Hunt*, 2 J. & W. 560.

#### (b) When in Custody.

By 6 Geo. 4, c. 16, s. 119, when the bankrupt is in prison or in custody, the commissioners may, by warrant directed to the jailer, cause him to be brought before them at any meeting, either public or private; and if he is desirous of surrender, he may be so brought up at the expense of his estate.

Before the statute, a bankrupt in prison for debt was entitled to be carried before the commissioners, that he might surrender himself at the expense of the estate, notwithstanding he might, upon a summary application, have obtained his discharge. *Ex parte Emery*, Buck, 527.

The 49 Geo. 3, c. 121, s. 13, empowered the commissioners to bring before them "every bankrupt being in custody charged in execution at the time of his last examination," to be examined by them in the same manner as was theretofore in practice with respect to bankrupts in custody on *meane process*:—Held, that this being a remedial clause, the words "last examination" did not mean the last day of examination, but that the power of the commissioners to compel the bankrupt to appear before them, extended to every day on which he was to be examined touching the disclosure of his estate and effects. *Spence v. Jones*, 1 D. & R. 377; 5 B. & A. 705.

#### (c) Enlargement of Time.

In what cases allowed.]—By 6 Geo. 4, c. 16, s. 113, the chancellor may, as often as he thinks fit, from time to time enlarge the time for the bankrupt's surrender, so as every order for the purpose be made six days at least before the day on which the bankrupt was to surrender.

Where a bankrupt omits to surrender within

the time given, the court of Review will, under some circumstances, appoint a fresh meeting to take his surrender. *Ex parte Jeffreys*, 2 Deac. & Chit. 86.

Where the bankrupt, after attending the last meeting before the commissioners, inadvertently absented himself without passing his last examination, the court, on his petition, ordered a fresh meeting for that purpose, on payment of costs. *Ex parte Dixon*, 1 Deac. & Chit. 351.

A bankrupt was permitted to surrender under circumstances of innocent omission, although the assignees opposed. *Ex parte Shiles*, 2 Rose, 381; 1 Madd. 248. And see *Ex parte Higginson*, 12 Ves. jun. 496.

So, where his omission to surrender arose from apprehension of a prosecution. *Ex parte Berryman*, 1 Glyn & J. 223.

A bankrupt's petition for a meeting to take his surrender, where he had been prevented from surrendering by illness, was allowed. *Ex parte Bould*, 2 Bro. C. C. 49.

So, where the bankrupt had been committed. *Ex parte Graham*, 2 Bro. C. C. 48.

But where he had gone abroad, where he swore he was detained by illness, his petition was dismissed, it being sworn on the other side that he was apparently well. *Ex parte White*, 2 Bro. C. C. 47.

When the bankrupt is abroad, the time for his surrender will be enlarged. *Ex parte Dodds*, 1 Deac. & Chit. 76.

If the assignees desire the bankrupt to stay abroad to get in his effects, it is no ground to induce the court to appoint a new time for his surrender, which is only done in cases of surprise or accident. *Ex parte Dawson*, 2 Cox, 48.

Manner and Terms of granting.]—The commissioners cannot apply for an enlargement of the time to surrender. *Ex parte Hall*, 1 Mont. 3.

An order to enlarge the time can be obtained only on the application of the bankrupt himself, or the assignees, by affidavit. *Fuller's case*, 10 Ves. jun. 183.

It is irregular in the assignees to obtain an *ex parte* order to enlarge the time for the last examination of a bankrupt who is ready to attend. *Ex parte Dayrie*, 1 Glyn & J. 281.

Upon application six days before the day appointed for surrender, an order to enlarge the time is of course, as well since as before the 6 Geo. 4, c. 16, s. 113. *Ex parte Rose*, 1 Mont. & Bligh, 268; 1 Deac. & Chit. 37.

Under the old law, the order must have been made before the expiration of the forty-second day. *Ex parte Du Fresne*, 1 Rose, 311.

A bankrupt obtaining leave to surrender, after the time for surrendering is expired, pays the costs. *Ex parte Carter*, 4 Madd. 394.

A bankrupt being prevented from surrendering because the commissioners did not attend at the day, on petition of the commissioners another day was appointed. The court blamed their con-

duct, and said the petition ought to have been by the bankrupt. *Ex parte Grey*, 1 Ves. jun. 195.

An order for enlarging the time for a bankrupt who had omitted to finish his examination would not discharge a prosecution for the felony. *Ex parte Rickells*, 6 Ves. jun. 445.

Under stat. 5 Geo. 2, c. 30, s. 5, if the bankrupt surrender within the forty-two days after notice, &c. the commissioners may, by their own authority, afterwards enlarge the time for taking his examination. *Davis v. Trotter*, 8 T. R. 475; 3 Esp. 40.

But they were not authorized to enlarge the time for the disclosure of a bankrupt's estate and effects beyond the time mentioned in the third section of that statute, still less for an indefinite or unlimited period. *Cloughton v. Leigh*, 2 D. & R. 831; 1 B. & C. 652. And see *Arding v. Flower*, 8 T. R. 534.

(d) Proceedings to examine.

It seems more expedient to refer the examination of a bankrupt to the Subdivision Court rather than to the court of Review. *Ex parte Feaks*, 1 Mont. & Bligh, 217; 2 Deac. & Chit. 226.

Quære, whether the court of Review can commit for an insufficient examination? *Id.*

Seemle, the court of Review has no power to Commit on an adjourned examination from before one commissioner. *In re Heath*, 2 Deac. & Chit. 214; 1 Mont. & Bligh. 187.

The Lord Chancellor would not make an order upon the commissioners how to conduct the examination of the bankrupt. *Ex parte Cridland*, 3 Ves. & B. 95; 2 Rose, 164.

There was jurisdiction in bankruptcy to enforce the commissioners' order for the attendance of the bankrupt, who had passed his examination and obtained his certificate. *Anon.* 14 Ves. jun. 449.

The commissioners had no power to delegate their authority to examine the bankrupt. *Cassidy's case*, 19 Ves. jun. 324; 2 Rose, 218.

It appearing on the bankrupt's examination, that he had lost more than 5*l.* at play at one time, this cannot be expunged from the examination, though consented to by the creditor at whose instance it was inserted. *Ex parte Bartlett*, 2 Cox, 49.

(e) Cause of Commitment.

*Unsatisfactory Answers.*—A bankrupt's not answering a question respecting the disposition of his estate and effects to the satisfaction of the commissioners, was held good cause of commitment by them. *Rex v. Perrot*, 2 Burr. 1122.

A bankrupt committed for not answering to the satisfaction of the commissioners, was remanded by the court of Chancery, and again remanded by the court of K. B. *Rex v. Perrot*, 2 Burr. 1215.

If commissioners think that the bankrupt has not answered satisfactorily upon his examination, they are bound to commit him; but he may be discharged, either upon his answering satisfactorily to them at a subsequent time, or upon his answer already given being deemed satisfactory by such other jurisdiction as he shall be brought before by habeas corpus. *Ex parte Oliver*, 1 Rose, 407; 2 Ves. & B. 244.

Where a bankrupt, after repeated examinations, was finally committed for unsatisfactory answers, the court granted a mandamus conditionally to the commissioners, to issue their warrant for a further examination, on a suggestion that the bankrupt was desirous of making a full disclosure. *In re Bromley*, 3 D. & R. 310.

A bankrupt may be committed by the commissioners, though swearing positively, if his answers are not reasonably satisfactory. *Taylor's case*, 8 Ves. jun. 328; *S. P. Ex parte Oliver*, 2 Ves. & B. 244; 1 Rose, 407; *Crowley's case*, Buck, 264; 2 Swans. 75.

If, upon the examination of a bankrupt touching the disposition of his property, he swear to an account of the same, which appears to be incredible, the commissioners may commit him to prison. *Ex parte Nowlan*, 6 T. R. 118.

The commissioners cannot commit a bankrupt for misbehaviour only, or any act or omission not comprised in the statute giving them authority. *Miller v. Searc*, 2 W. Black. 1141.

A general answer by a bankrupt under examination, that he has lost 1886*l.* by selling goods under prime cost, is not satisfactory, especially if falsified by subsequent confessions of the disposal of different sums for other purposes. *Langhorn's case*, 2 W. Black. 919. And see *Miller's case*, 3 Wils. 427; 2 W. Black. 881.

A bankrupt, to a question whether he had not within six months previous to the commission executed two conveyances of his estate and effects, or part thereof, to his son, answered, "Not to my knowledge." This answer held to be satisfactory, no further questions having been put. *Norris's case*, 2 J. & W. 437.

A bankrupt, on his examination, answering a question which embodies a statement of the acts or sayings of himself, or of a third person, without denying or qualifying, is understood to admit the statement. *Crowley's case*, 2 Swans. 75; Buck, 264.

Quære, whether, for the purpose of determining that the answers of a bankrupt on his examination are unsatisfactory, the commissioners can resort to the evidence of third persons? *Crowley's case*, 2 Swans. 1; Buck. 264.

The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witness. *In re Goodwin*, 1 Mont. 304.

*What lawful Questions.*—Quære, whether a bankrupt can be compelled to criminate himself?

*In re Heath*, 1 Mont. & Bligh, 184; 2 Deac. & Chit. 214. See *Ex parte Peaks*, 1 Mont. & Bligh, 219; 2 Deac. & Chit. 226.

Semble, a bankrupt is bound to disclose his property, although an indictment is pending against him for concealing it, &c., and although his answers may tend to criminate himself. *Cross*, J. dubit. *Id.*

A bankrupt is bound to answer touching his estate, although his answer may tend to convict him of perjury on a former occasion, and of concealing his effects. *In re Smith*, 2 Deac. & Chit. 230; 1 Mont. & Bligh, 203.

Quere, whether, after a bankrupt has passed his last examination, he can be examined as to concealment? *Id.*

The bankrupt must answer every lawful question; and although he is not bound to criminate himself, yet, if he refuses to account for any part of his effects, his refusal subjects him to commitment. *Ex parte Oliver*, 1 Rose, 407; 2 Ves. & B. 244.

That his answer tends to criminate another is no objection. *Id.*

A bankrupt cannot refuse to discover the particulars relating to his estate and effects, although such information may tend to show that he has committed a criminal act; but if the question put to him be whether or not he has done an act clearly of a criminal nature, he may refuse to answer it. So, where a petition prayed that the creditors might be at liberty to examine the bankrupt, whether he, or any person in trust for him or for his benefit, have received, or are to receive, any sum of money or other valuable consideration for his having resigned, or as an inducement to resign, the office of town-clerk of the city of Bristol, it was dismissed. *Ex parte Cossens*, Buck, 531.

A commitment upon the following question and answer held to be invalid:—Question: “You have stated to the commissioners, that if you were out of prison, you could find the persons named by you as debtors to your estate: and being directed to communicate to your assignee how or where such persons could be found, and your assignee having called upon you, and seen you in the Fleet prison for that purpose, have you given him any such information; and if not, why not?” Answer: “I have not, and can give no reason why.” *Ex parte Cassidy*, 2 Rose, 218; 19 Ves. jun. 324.

A bankrupt under examination being asked whether the statements contained in a written paper, and shown to him, were true statements, demurred to the question, on the ground that his answer might expose him to a criminal prosecution, and was committed for not answering:—Held, under the circumstances of the case, that the bankrupt was entitled to demur to a question in so general a form. Commissioners of bankrupt are not empowered to dispense with the rule of law by which a party is protected from criminating himself. *Ex parte Kirby*, 1 Mont. & Mac. 212.

*Statement in writing.*—It seems that under

49 Geo. 3, c. 121, s. 13, the bankrupt was bound to render to the commissioners an account in writing of his estate and effects, if required to do so. *Davie v. Milford*, 4 B. & A. 356.

Where a bankrupt, on the day appointed by the commissioners for his last examination before them, promised to produce a balance sheet, if further time were allowed him, and several adjournments took place during a period of ten months, at which adjournments he represented an account in writing to be necessary, in order to make the discovery required of his estate and effects, and promised from time to time to produce the balance sheet; on his not doing so at the last adjournment, and assigning no sufficient reason for not doing so, the commissioners were justified in committing him. *Id.*

Where the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account, as the only mode of explaining his trade and dealings, and the last adjournment was made upon his assurance that he would produce such account if further time was given:—Held, that such account not being produced, nor any satisfactory reason given for not producing it on the day to which the adjournment was made, the commissioners were justified in committing. *Stanley Goddard's case*, 1 Glyn & J. 45.

*Production of Books.*—The great seal had jurisdiction, after the bankrupt had passed his examination, to compel him to deliver up papers in his possession belonging to the estate, and to attend before the commissioners. *Ex parte Bradley*, 1 Rose, 202.

Where the commissioners refused to proceed in the bankrupt's examination, unless he produced his books, &c., which were in the office of a master of the court of Chancery in Ireland, or copies of them, an order was made, declaring that such books, or copies of them, must, if required, be produced at the expense of the estate. *Ex parte Cridland*, 2 Rose, 164; 3 Ves. & B. 103.

Where a bankrupt was required by the assignees, on his last examination, to deliver to them his books of account, which he did:—Held, that he must be deemed to have delivered them on compulsion; and it being afterwards found that he was not a trader, and that a commission had improperly issued, that he might support an action of trover against such assignees without any previous demand of such books. *Summerett v. Jarvis*, 6 Moore, 56; 3 B. & B. 2.

#### (f) *Warrant of Commitment.*

*By* 6 Geo. 4, c. 16, s. 39, if any person be committed for refusing to answer, or for not fully answering any question, the commissioners are to specify every such question in their warrant.

In determining whether they would issue their warrant, the commissioners must have been acting together; but it was not necessary that all of them should be present when each of them signed it. *Battye v. Gresley*, 8 East, 319.

Where a warrant of commitment by commis-

sioners, after setting out the issuing of the commission, and the adjudication, &c. stated, as the ground of commitment, that the bankrupt being brought before them, and they having proposed to administer an oath to him, he refused to be sworn, or to give an account of his property:—Held, that such warrant was legal, and that it was not necessary in it to set out any specific question in such case; for this was a refusal to answer all possible questions which could be suggested:—Held also, that after the issuing of the writ of habeas corpus, and before the return of it, the commissioners may, if necessary, make a fresh warrant, stating more fully the cause for detaining the bankrupt in custody, and that such warrant may by words of reference, incorporate the formal parts of the first warrant:—Held also, that if both warrants are defective in form, the court will, if a substantial cause of commitment appear, recommit the bankrupt ex officio:—Held also that a commitment by a justice of the peace, under 6 Geo. 2, c. 30, s. 14, of the bankrupt, “until he should be discharged by due course of law,” was bad. *Ex parte Page*, 1 B. & A. 568.

Where a bankrupt refused to be sworn before the commissioners until his attorney arrived:—Held, that a warrant, issued for his commitment by them, stating generally the refusal of the bankrupt to be sworn, was sufficient, without assigning the reason for such refusal:—Held also, that the warrant committing him until such time as he should submit himself to the commissioners, and full answer make to the questions which might be put to him by virtue of the said commission, sufficiently pursued the terms of the oath to be taken by the bankrupt, by virtue of the 16th section of the stat. 5 Geo. 2, c. 30, as it must be intended that the questions which might be put by the commissioners would be legal questions. And where the bankrupt was committed to Newgate under a judge's warrant, granted on the certificate of the commissioners for not appearing to their summons, and was afterwards brought before them by warrant, to make a disclosure of his estate, and he refused to be sworn and examined as to such estate:—Held, that the commissioners might commit him under the 14th section of that statute: as, when he was brought before them, the warrant and authority of the judge were at an end and determined. *Nobes v. Mountain*, 7 Moore, 39; 3 B. & B. 233.

A bankrupt being committed by the commissioners for not answering, it appeared that in the questions put to him the commissioners had stated facts of which they were informed by the deposition of the messenger, but the deposition was not set forth in the warrant, nor did it appear thereby to have been read to the bankrupt at the time of his examination:—Held, that the commitment was substantially insufficient, and that the court could not commit the bankrupt under 5 Geo. 2, c. 30, s. 17. *Crowley's case*, Buck, 264; 2 Swans. 1.

If, in committing a bankrupt for not answering satisfactorily, the commissioners are influenced by intrinsic evidence, quære the validity of the commitment? *Id.*

It is no objection to a warrant of commitment, which recites several examinations, that it omits to mention that the bankrupt who had been committed was discharged at the conclusion of one of the examinations. *Bromley's case*, 2 J. & W. 453.

It is no objection to a commitment of a bankrupt by the commissioners, that the order of commitment was made in the absence of the bankrupt, and that it bore date the day the examination took place, though made some days afterwards. *Salt's case*, 13 Ves. jun. 361.

The warrant of commitment of a bankrupt, being by mistake dated the 2d of March, instead of the 2d of February:—Held, that this is not such an error as can be amended under the 5 Geo. 2, c. 30, s. 18. *Ex parte McGee*, 6 Madd. 206.

The concluding words of a warrant of commitment must be so limited as to have direct reference to the offence imputed in the preceding part; and therefore, where a commitment, after reciting that the bankrupt had surrendered, and that the commissioners examined him touching his trade, &c., and caused such examination to be reduced into writing and read over to him, to which examination the bankrupt did refuse to sign his name, (not having a reasonable objection to the wording thereof or otherwise,) required the jailor to detain the bankrupt in custody until such time as he should submit himself, and full answer make to the satisfaction of the commissioners, to all such questions as should be put to him, and sign and subscribe to such examination as aforesaid, was holden to be void. *Ex parte Leake*, 9 B. & C. 234; 3 Y. & J. 46.

The warrant of commitment of a bankrupt, for not signing his examination, need not set out the examination—*Vaughan*, B. diss. *Id.*

A commitment for an unsatisfactory answer of the bankrupt is illegal, if the recital of the previous examination do not correctly state the admissions upon which the question was founded. *Ex parte Hiams*, 18 Ves. jun. 237.

Commissioners make a warrant for the commitment of a bankrupt, for refusing to be examined, the bankrupt being already confined in the King's Bench under previous process. Semble, that the issuing of the warrant by the commissioners does not amount to an imprisonment by them till the warrant is in some way operative to the detention of the party, independently of the other process. But if the warrant operate to the confinement of the party within narrower bounds, it is an imprisonment by the commissioners. *Crowley v. Impey*, 2 Stark. 261—*Ellenborough*. And see *Wall v. M'Namara*, 1 T. R. 536, and cases cited.

#### (g) Re-examination.

A bankrupt may be brought up for re-examination, although he is also in custody under a surrender by his bail. *Ex parte Hiams*, 18 Ves. jun. 237.

Where a party committed by commissioners of bankrupt for not answering to their satisfaction, wishes to be again brought before them, he must

bear the expense of that proceeding, and cannot throw it on the estate. *Ex parte Baxter*, 8 B. & C. 344; *S. C. nom. Ex parte Bagster*, 2 M. & R. 467; 1 Mont. & Mac. 16.

Where an order is made on the application of a bankrupt committed, to bring him again before the commissioners, if there are no effects, the fees are to be paid out of future effects, if any; and, if recommitted, he would find it difficult to obtain another order. *Ex parte Cohen*, 2 Rose, 443.

Where a bankrupt committed by commissioners is again brought before them, and is remanded, there ought to be a warrant of recommitment or detainer stating the cause of recommitment. *Coombes' case*, 2 Rose, 396; *S. P. Brown's case*, 2 Rose, 400.

#### (h) Habeas Corpus.

By 6 Geo. 4, c. 16, s. 39, if persons committed shall bring a habeas corpus, and any insufficiency in the form of the warrant shall appear on the return, which would authorize a discharge, the court or judge are to commit to the same prison until the party shall conform, unless it shall appear that he has fully answered all lawful questions, or had a sufficient reason for not being sworn, or for refusing to sign the examination; provided that the court may look at the whole of the examination, if it shall not have been set out in the warrant.

The mode of reviewing the judgment of the commissioners in committing the bankrupt for not answering satisfactorily, is by habeas corpus. *Ex parte King*, 11 Ves. jun. 425.

And not by petition. *Ex parte Tomkinson*, 10 Ves. jun. 106. *But see Ex parte Hiams*, 18 Ves. jun. 237.

The Vice-Chancellor seems in one case to have discharged on habeas corpus. *Ex parte McGee*, 6 Madd. 206.

The Lord Chancellor can issue the common law writ of habeas corpus in the vacation time. *Crowley's case*, Buck, 264; 2 Swans. 1.

In deciding the validity of a commitment by commissioners, the court cannot travel out of the return. *Crowley's case*, 2 Swans. 75; Buck, 264.

The court before which the writ is brought must, on the return, have the same means of judgment as the commissioners had. *Id.*

Where a return is defective in not fully stating the warrant, the judge may ask the jailor in court whether the warrant is or is not fully set forth; or the whole of the warrant may be set forth by the affidavit of those who oppose the prisoner's discharge. *In re Power*, 2 Russ. 584.

Where a bankrupt, committed by the commissioners, is brought up by habeas corpus, notice must be given to the assignees; and notice on Saturday afternoon, for Monday, unless his right to be discharged is perfectly clear, is not sufficient. *Bromley's case*, 2 J. & W. 453.

A party committed for not answering satisfactorily before commissioners of bankrupt, may have a habeas corpus to bring him before the commissioners for further examination. *Ex parte*

*Bagster*, 2 M. & R. 467; 1 Mont. & Mac. 16; *S. C. nom. Ex parte Baxter*, 8 B. & C. 344.

Obedience to the writ of habeas corpus may be enforced by process of contempt. *Crowley's case*, 2 Swans. 73; Buck, 264.

#### 2. Privilege from Arrest.

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Statute 6 Geo. 4.]—By 6 Geo. 4, c. 16, s. 117, the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after surrender, during the time allowed for examination, provided he was not in custody at the time of the surrender; and, if arrested, shall, on production of the summons to the officer, be discharged, under a penalty of 5*l.* per day for detention.

By s. 118, the commissioners may adjourn the last examination sine die; and the bankrupt shall be free from arrest for such time, not exceeding three months, as they shall appoint.

The bankrupt, during the forty days allowed for his examination, is, for the benefit of his creditors, privileged from arrest, even upon a *capias* utlagatum. *Ex parte Helsby*, 1 Deac. & Chit. 16; 1 Mont. 355.

But semble, that bankruptcy and certificate are not grounds for discharging a prisoner in custody on an *utlagatum capias*. *Beaucamp v. Tompkins*, 3 Taunt. 141.

A bankrupt who has been waived (or outlawed,) and her person arrested and goods taken by the sheriff under a writ of *capias* utlagatum, is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which the action was commenced for the balance. *Summervil v. Watkins*, 14 East, 536.

A bankrupt having surrendered, has his protection from arrest by the statute, independently of the commissioner's certificate. *Ex parte Leigh*, 1 Glyn & J. 264.

A bankrupt's privilege from arrest, on attending the commissioners, is independent of the stat. 5 Geo. 2. *Ex parte King*, 7 Ves. jun. 314.

Time enlarged.]—Under the 5 Geo. 2, c. 30, s. 5, the bankrupt was privileged from arrest during the enlarged time for his examination. *Davis v. Trotter*, 8 T. R. 475; 3 Esp. 40.

Though the commissioners had omitted to indorse the adjournment on his summons. *Priest's case*, 3 Ves. & B. 23; 2 Rose, 266.

Where one who was a bankrupt came from Holland with the intent to surrender himself on the forty-second day; but hearing that his time was enlarged, resolved not to surrender till the enlarged day, and in the mean time was arrested; the court held, that he should not be discharged, for, till actual surrender, the stat. 5 Geo. 2, meant to protect a bankrupt only during such time as it might be reasonable and convenient for him to

come in and submit himself to the commission. *Kenny v. Solomon*, Cowp. 156.

Where a bankrupt surrendered to his commission on the 4th of February, and the commissioners, on his prayer, enlarged the time generally in writing for him to make a full discovery of his estate and effects, and verbally fixed the adjournment day for the first of April following, and, in the interval, the bankrupt having surrendered in discharge of his bail, was detained at the suit of a creditor; the court refused to discharge him out of custody, he not being protected from arrest by the commissioners' order, as they could not give him a protection for an unlimited period of time. *Cloughton v. Leigh*, 2 D. & R. 831; 1 B. & C. 652.

Where the last examination is adjourned sine die, the bankrupt is not protected from arrest. *Ex parte Wood*, 1 Glyn & J. 75.

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If the time for the bankrupt's last examination be enlarged, that statute protected him from arrest during the whole of the last day of examination. *Stimpen's case*, Buck, 424.

*What Attendance.*—A bankrupt, whose last examination had been adjourned sine die at a meeting under his commission for a distinct purpose, gave his voluntary attendance before commissioners in order to be examined, and was there arrested:—Held, that he was entitled to his discharge on general law principles, and ordered so to be, with his reasonable and necessary charges to be paid by the solicitor and the officer. *Ex parte Ross*, 1 Rose, 260.

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deviation bona fide for the purpose of examination before the commissioners. *Ogle's case*, 11 Ves. jun. 556.

The acceptor of a bill, which becomes due and is paid by him after the bankruptcy of the drawer, could not arrest the drawer during the time allowed him by 5 Geo. 2, c. 30, s. 5, for attending the commissioners to be examined. *Dorby v. Baughan* 5 T. R. 209.

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If a bankrupt be committed without a protection, a detainer may be lodged against him by the assignee between the time of applying to be re-examined and his examination. *Ex parte Weight*, 2 Glyn & J. 202.

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The privilege of a bankrupt from arrests during his examination extends to an attachment for not paying money under an award made a rule of court. *Ex parte Parker*, 3 Ves. jun. 554.

A bankrupt having escaped out of the custody of the marshal, and being at large, surrendered to a commission subsequently issued, and received the protection conferred by 5 Geo. 2, c. 30, s. 5:—Held, that he might notwithstanding be retaken, and detained in custody by the marshal. *Anderson v. Hampton*, 1 B. & A. 308.

*Crown Process.*—The crown not being bound by the statutes of bankruptcy, the protection of a bankrupt from an extent is limited to actual attendance, upon the common law privilege of a witness or party, and does not extend through the intervals of adjournment by the statute. *Ex parte Temple*, 2 Ves. & B. 391; 2 Rose, 22.

And the exception seems to include a fair allowance of time for going and returning. *Id.*

A bankrupt attending commissioners, in obedience to their summons, is arrested under an extent at the suit of the crown:—Held, that although the crown is not within the bankrupt statutes, the bankrupt is entitled to his discharge; on the principle of the common law pro-

bear the expense of that proceeding, and cannot throw it on the estate. *Ex parte Baxter*, 8 B. & C. 344; *S. C. nom. Ex parte Bagster*, 2 M. & R. 467; 1 Mont. & Mac. 16.

Where an order is made on the application of a bankrupt committed, to bring him again before the commissioners, if there are no effects, the fees are to be paid out of future effects, if any; and, if recommitted, he would find it difficult to obtain another order. *Ex parte Cohen*, 2 Rose, 443.

Where a bankrupt committed by commissioners is again brought before them, and is remanded, there ought to be a warrant of recommitment or detainer stating the cause of recommitment. *Coombes' case*, 2 Rose, 396; *S. P. Brown's case*, 2 Rose, 400.

#### (h) Habeas Corpus.

By 6 Geo. 4, c. 16, s. 39, if persons committed shall bring a habeas corpus, and any insufficiency in the form of the warrant shall appear on the return, which would authorize a discharge, the court or judge are to commit to the same prison until the party shall conform, unless it shall appear that he has fully answered all lawful questions, or had a sufficient reason for not being sworn, or for refusing to sign the examination; provided that the court may look at the whole of the examination, if it shall not have been set out in the warrant.

The mode of reviewing the judgment of the commissioners in committing the bankrupt for not answering satisfactorily, is by habeas corpus. *Ex parte King*, 11 Ves. jun. 425.

And not by petition. *Ex parte Tomkinson*, 10 Ves. jun. 106. *But see Ex parte Hiams*, 18 Ves. jun. 237.

The Vice-Chancellor seems in one case to have discharged on habeas corpus. *Ex parte M'Gee*, 6 Madd. 206.

The Lord Chancellor can issue the common law writ of habeas corpus in the vacation time. *Crowley's case*, Buck, 264; 2 Swana. 1.

In deciding the validity of a commitment by commissioners, the court cannot travel out of the return. *Crowley's case*, 2 Swana. 75; Buck, 264.

The court before which the writ is brought must, on the return, have the same means of judgment as the commissioners had. *Id.*

Where a return is defective in not fully stating the warrant, the judge may ask the jailor in court whether the warrant is or is not fully set forth; or the whole of the warrant may be set forth by the affidavit of those who oppose the prisoner's discharge. *In re Pover*, 2 Russ. 584.

Where a bankrupt, committed by the commissioners, is brought up by habeas corpus, notice must be given to the assignees; and notice on Saturday afternoon, for Monday, unless his right to be discharged is perfectly clear, is not sufficient. *Bromley's case*, 2 J. & W. 453.

A party committed for not answering satisfactorily before commissioners of bankrupt, may have a habeas corpus to bring him before the commissioners for further examination. *Ex parte*

*Bagster*, 2 M. & R. 467; 1 Mont. & Mac. 16; *S. C. nom. Ex parte Baxter*, 8 B. & C. 344.

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tecting witnesses attending for examination under regular process for that purpose: and the crown being creditor, the order was made on the jailor. *Ex parte Russell*, 1 Rose, 278; 19 Ves. jun. 163.

(b) *After Certificate.*

*Generally.*—By 6 Geo. 4, c. 16, s. 126, if a bankrupt, after his certificate shall have been allowed, shall be arrested, or have any action brought against him for any debt, claim, or demand which was proveable, he shall be discharged on common bail.

Where a debt is due before the bankruptcy, and consequently proveable under the commission, the court will in general discharge the bankrupt out of custody. *Holding v. Impey*, 7 Moore, 614; 1 Bing. 189; *S. P. Robinson v. Vale*, 4 D. & R. 340; 2 B. & C. 769.

Unless it appear that the was certificate obtained by fraud. *Vincent v. Brady*, 2 H. Black. 1.

Or that it is seriously meant to be disputed. *Stacey v. Frederici*, 2 B. & P. 390.

Or the commission appears to be grossly fraudulent. *Sowley v. Jones*, 2 W. Black. 725.

The court will not discharge a certificated bankrupt, out of custody, without giving the party at whose instance the attachment is issued time to show that the certificate was fraudulently obtained. *Nowers v. Colman*, Buck, 5.

Where an attorney was made a bankrupt, and described in the Gazette as a "dealer and chapman," and obtained his certificate; and the plaintiff afterwards arrested him as the acceptor of a bill of exchange, payable before the commission issued; the court of C. P. discharged him on filing common bail, although the plaintiff swore that he did not know that the defendant was the person mentioned in the Gazette, and that he intended to dispute the validity of the commission on the ground of fraud: he should have stated the nature of such fraud; and when he discovered its existence. *Kemp v. Neville*, 5 Moore, 21.

*Debt revived by new Promise.*—Generally, neither a bankrupt nor an insolvent debtor can be arrested on a promise to pay debts from which they have been discharged. *Anon.* 1. Chit. 274, n.

A bankrupt may be held to bail in an action against him, grounded on the demand revived by a subsequent promise; because, as it becomes a good debt recoverable at law, it must have all the incidents of a legal debt, and all the ordinary modes of proceeding to recover it are open to the creditor. *Blackburn v. Ogle*, 8 Price, 526; *S. P. Drew v. Jefferies*, 8 Price, 531, n.

A defendant, arrested for a debt contracted partly before and partly after his bankruptcy and certificate, was discharged out of custody, on filing common bail, although he made a subsequent promise to pay the former part of such a debt. *Poore v. Gadderer*, 2 D. & R. 240; 1 B. & C. 116.

A certificated bankrupt, who promised payment, when he should be able, of the balance of an account, due at the time of his bankruptcy, to a

creditor who did not come in under the commission, was discharged on common bail. *Bailey v. Dillon*, 2 Burr. 736; 2 Ld. Ken. 426.

*Other Cases.*—The court of C. P. will not discharge a defendant out of custody on a common appearance, on the ground of a commission having been sued out against him by the plaintiff, as petitioning creditor, upon the same debt as that on which the arrest is founded. *Percy v. Powell*, 3 B. & P. 6.

The court of C. P. will not order a common appearance to be entered, on the ground of the plaintiff's being chosen an assignee under a commission against the defendant, and having proved his debt. *Hill v. Reeves*, 1 B. & P. 424.

So, in K. B.; but that court will suspend the execution of a rule on the sheriff to bring in the body, in order to give the defendant time to apply to the Chancellor. *Oliver v. Ames*, 8 T. R. 364.

And where a commission was sued out against the defendant, who was in custody under a commission, and the plaintiff, in order to prove his debt, discharged him from an execution issued against him at his suit; and the commission being afterwards superseded, the plaintiff retook the defendant in execution:—The court of C. P. refused to discharge the defendant on motion, it appearing that the commission and supersedeas had been fraudulently obtained. *Baker v. Ridgway*, 9 Moore, 114; 2 Bing. 41.

Where separate commissions were issued against three of four partners, to which they conformed, and passed their examinations, and an order was made for allowing the joint creditors to prove their debts under the commission of one of the three, under which commission the plaintiffs proved their joint debt, and afterwards sued all the partners for the same debt, and arrested one of the other two under whose commission they had not proved:—Held that he was not entitled to be discharged out of custody. *Young v. Hunter*, 2 Rose, 120; 16 East, 251; 4 Taunt. 52.

(c) *Discharge when in Custody.*

By 6 Geo. 4, c. 16, s. 126, if a bankrupt shall be taken in execution, or detained in prison for a debt, claim, or demand, proveable under the commission, when judgment has been obtained before the allowance of the certificate, he shall be discharged out of custody.

The court of C. P. has no power to discharge a defendant out of execution, on the ground of a commission having since been sued out against him by the plaintiff; they thought the jurisdiction lay in the court of Chancery. *Atwater v. Kell*, 1 B. & P. 302.

Nor where the commission has been sued out previously to the arrest. *Percy v. Powell*, 3 B. & P. 6.

A creditor having the bankrupt in custody, and presenting a petition to prove and stay the certificate, or to stay the certificate until the petitioner has had a reasonable time to ascertain the amount of his debt and to prove it, must do

charge the bankrupt. *Ex parte Blaydes*, 1 Glyn & J. 179.

Quære, whether his presenting the petition for that purpose is not a resort to the commission, within the 49 Geo. 3, c. 121, s. 14? *Ex parte Lord*, 2 Rose, 421.

Where a debtor is in custody, and a detainer is lodged against him, he is not discharged at law from the detainer, until his bail justify, and a judge's order is made for his discharge; and where such detaining creditor proved under a commission against the debtor:—Held, that an order of court was necessary for his discharge. *Ex parte Cross*, 2 Glyn & J. 100.

A bankrupt at large on bail, and not in custody, is within the meaning of the exception in the 5 Geo. 2, c. 30, s. 5. *Ex parte Leigh*, 1 Glyn & J. 264.

The court of C. P. will not stay proceedings in an action for the escape of a certificated bankrupt taken in execution, and released by the sheriff upon the mere production of his certificate. *Sherwood v. Benson*, 4 Taunt. 631; 2 Rose, 276.

#### (d) Proceedings to Discharge.

A bankrupt arrested in returning from commissioners, to whom he had surrendered at a private meeting, cannot be discharged on motion. Secus, if he had been taken under any circumstances amounting to a contempt of court; but leave was given to apply by petition immediately. *In re* —, 1 Rose, 230.

The court of Exchequer refused to cancel a bail bond, given by a debtor, who had been arrested at the suit of a creditor, on whose petition a commission of bankruptcy had been sued out against him, pending a petition to the Lord Chancellor, praying to be discharged from the arrest; but they allowed two day's time after the petition should be heard, to give notice of bail, and ordered the proceedings in the mean time to be stayed. *Wise v. Frouse*, 9 Price, 391.

Although a certificated bankrupt is entitled to be discharged; if the validity of the commission is disputed, the court will direct it to be tried on a feigned issue, notwithstanding the certificate, before they will discharge him. *Yes v. Allen*, 1 Tidd's Prac. 211; 3 Dougl. 214.

Upon an application by a bankrupt prisoner to be discharged from an illegal arrest, the court cannot impose terms, nor order the costs to be paid out of the estate. *Ex parte Helsby*, 1 Mont. & Bligh, 79.

### 3. Allowance.

#### (a) During Examination.

By 6 Geo. 4, c. 16, s. 114, the commissioners before the choice, and the assignees after, with their approbation in writing, may make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and family.

Formerly a bankrupt was not entitled to any maintenance out of his effects during his examination. *Thompson v. Council*, 1 T. R. 157.

#### (b) Out of Estate.

**Amount allowed.**—By 6 Geo. 4, c. 16, s. 128, certificated bankrupts are allowed 5 per cent. out of the net produce of their estates, provided the allowance does not exceed 400*l.*, if the estates pay the creditors who have proved 10*s.* in the pound; 7*l.* 10*s.* per cent. not exceeding 500*l.*, if 12*s.* 6*d.* in the pound; and 10*l.* per cent., not exceeding 600*l.*, if 15*s.* or upwards in the pound; but if 10*s.* in the pound is not paid, only so much as the assignees and commissioners shall think fit, not exceeding 3*l.* per cent., and 300*l.*

Whether the allowance is payable where the net produce is only 10*s.* in the pound, quære? *Ex parte Pave*, 2 Glyn & J. 358.

Where a bankrupt's estate is exactly sufficient to pay 10*s.* in the pound, he is not entitled to 5 per cent. allowance; and a dividend being declared he cannot claim any allowance out of it. *Ex parte Petheridge*, 2 Deac. & Chit. 137; 3 C. nom. *Ex parte Petheridge*, 1 Mont. & Bligh, 161.

Upon a second bankruptcy there is no allowance to the bankrupt if the estate does not pay 15*s.* in the pound. *Ex parte Gregg*, 6 Ves. jun. 238.

Where the bankrupt's right to an allowance vested before the 1st of September, 1825—Held, that he was only entitled to the amount directed to be paid by the 5 Geo. 2, c. 30, s. 7. *Ex parte Ruck*, 1 Mont. & Mac. 297.

**When allowed.**—The right to allowance does not apply to dividends declared before the present statute came into operation. *Awen*, 1 Mont. 10.

A bankrupt could not call on his assignees for his allowance under stat. 5 Geo. 5, c. 30, s. 7, (his estate paying 10*s.* in the pound), if his certificate was not allowed before payment of the dividends. *Groome v. Potts*, 6 T. R. 548; 1 Esp. 396.

The bankrupt had no right to his allowance until the certificate had been confirmed by the Chancellor. *Ex parte Pave*, 2 Glyn & J. 358.

The bankrupt is not entitled to claim his allowance until after a final dividend has been made. *Ex parte Minchin*, 1 Mont. & Mac. 135; 3 P. *Ex parte Surridge*, 1 Mont. & Mac. 287.

Quære, whether any allowance before final dividend? *Ex parte Gibbs*, 1 Mont. 105.

The right to the allowance vests on the payment of the dividend; and if the bankrupt be then dead, it vests in his representatives. *Ex parte Safford*, 2 Glyn & J. 128.

Where a commission had issued in 1815, and it was stated in the petition that a final dividend had been advertised in June, 1827, the bankrupt's allowance was ordered to be paid, although it was admitted at the bar that there was still some reversionary property, but of small amount, to be realized. *Ex parte Davis*, 1 Mont. & Mac. 26.

**Recovery and Forfeiture.**—An action does not lie by a bankrupt against his assignees for his allowance. *Groome v. Potts*, 1 Esp. 396; 6 T. R. 548.

By s. 130, the right to allowance is forfeited by gaming, stock-jobbing, altering books and accounts, or making false entries, concealing property, and being privy to the proof of false debts.

(c) *Where joint and several Estates.*

*Under present Statute.*—By 6 Geo. 4, c. 16, s. 139, in joint commissions, under which a partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner, he shall be entitled to his allowance, although his partner may not.

A partner is entitled to an allowance, although his separate estate does not contribute to the joint estate, so as to form the statutable amount for allowance. *Ex parte Morris*, 1 Mont. 505; 1 Deac. & Chit. 526; *S. P. Ex parte Gilbe*, 1 Mont. 105.

A., B., and C. are bankrupts; their joint estate pays 9s. in the pound; the separate assets of A. and B. contribute sufficient to make a dividend of 15s. in the pound; but C.'s separate estate contributes nothing:—Held, nevertheless, that he was entitled to an allowance. *Id.*

Where A., being one of three partners, had paid 20s. in the pound on the separate estate, and 12s. 6d. in the pound had been paid on the joint estate, but on the separate estates of the two other partners a sufficient dividend had not been paid:—Held, that under the 6 Geo. 4, c. 16, A. was entitled to an allowance, for his sole use, of 5 per cent. not exceeding 400l. *Ex parte Minchin*, 1 Mont. & Mac. 135.

*Under previous Acts.*—The bankrupt's allowance was, in the case of partners, divided between them in the proportion in which their respective effects had contributed to the payment of the debts. *Ex parte Bate*, 1 Bro. C. C. 452.

Under a commission against one of a partnership, and the usual order for keeping distinct accounts, the joint estate paid 18s. in the pound, and the separate estate 2s.:—Held, that the bankrupt was entitled to no allowance, the payment to the joint creditors being not a payment under the bankruptcy, but under the order in the nature of a decree upon a bill for an account in equity. *Ex parte Farlow*, 1 Rose, 421; 2 Ves. & B. 209.

If one partner only had obtained his certificate, no allowance was given to him, as it was considered that the allowance was only jointly claimable. *Ex parte Powell*, 2 Rose, 449; 1 Madd. 68.

A bankrupt under a joint commission was not entitled to an allowance, though the joint estate paid 10s. in the pound, unless both joint and separate creditors, who have proved, were paid 10s. in the pound. *Id.*

The allowance being only jointly claimable. *Id.*

The usual order having been obtained to take the accounts of the joint and separate estate under a separate commission, the joint estate paid 17s., and was sufficient to pay the 3s. in the pound, leaving a surplus in the hands of the as-

signees; upon taking the partnership accounts, a balance appeared in favour of the solvent partners. The separate estate had paid 3s. in the pound:—Held, first, that the bankrupt was not entitled to an allowance under 5 Geo. 2, c. 30, s. 7; 2dly, that the surplus of the joint estate was to be paid to the solvent partners, and if it proved insufficient, they were to be at liberty to prove against the separate estate for the difference. *Ex parte Terrell*, Buck, 345.

A bankrupt paying 20s. out of his separate estate was not entitled to his allowance, against the right which his joint creditors had to the surplus. *Ex parte Holmes*, 2 Rose, 95; 3 Ves. & B. 137.

The bankrupt was not entitled to allowance, unless a sufficient dividend was paid upon both the joint and the separate estate. *Ex parte Goodall*, 2 Glyn & J. 281.

4. *Duty of Bankrupt.*

By 6 Geo. 4, c. 16, s. 116, the bankrupt, after the choice of assignees, (if required,) must deliver up to them, on oath, all books of account, papers, and writings relating to his estate in his custody or power, and discover such as are in the custody or power of any other person; and shall at all times, after surrender, when not in custody or prison, attend the assignees, upon reasonable notice in writing, and assist them in making out the accounts; and he may at all reasonable times, during the time allowed for examination, inspect his books, papers, and writings, in the presence of his assignees, or any person appointed by them, and bring with him any two persons to assist him; and after the bankrupt has obtained his certificate, he shall, upon demand in writing, attend the assignees to settle any accounts, or any court of record to give evidence, for which he shall be allowed 5s. per day; and if he shall refuse, he may be committed.

By s. 119, the assignees may appoint a person to attend the bankrupt, when in custody, with his books and papers, in order to prepare a statement of his affairs.

5. *Rights of Bankrupt.*

(a) *Surplus.*

By 6 Geo. 4, c. 16, s. 132, the assignees are, upon request by the bankrupt, to declare how they have disposed of the estate, and pay the surplus, if any, to him, his executors, administrators, or assigns; and the bankrupt, after the creditors who have proved shall have been paid, may recover the remainder of the debts due to him.

A surplus being shown, a bankrupt was permitted on petition to sue in the name of one assignee, the other assignee, who had been a trustee under a prior trust deed, having been restrained from setting up his character of assignee. *Ex parte Archer*, 2 Glyn & J. 110.

If a commission issue against three, and the joint estate is insufficient, and one partner pay the deficiency from his private estate, and there is a surplus on the separate estate of each of the others, the partner who paid the deficiency is en-

titled to such surplus before interest is paid to the separate creditors. *Ex parte Rix*, 1 Mont. 237.

Under a separate commission against one of two partners, the bankrupt having paid 20s. in the pound to all his creditors, obtained an order for the payment of the surplus to him, and the same was accordingly paid to him:—Held, that his partner was entitled to apply by petition in the bankruptcy for an account of such surplus, and for payment of his proportion of it, and that the court had jurisdiction to make the order required. *Ex parte Lanfear*, 1 Rose, 442.

Under a separate commission of bankruptcy, the joint property is administered as if both partners were bankrupts, viz. the satisfaction of the joint debts, in the first instance, in order to ascertain the surplus, which alone constitutes the separate interest. *Everett v. Backhouse*, 10 Ves. jun. 98.

A joint commission issued against A. and B., A. being a dormant partner; the joint creditors resorted to the separate estate of B., thereby diminishing that separate estate, and exonerating the joint estate of A. and B., so as to produce a surplus of it:—Held, that the separate creditors of B. had a lien upon that surplus to the extent which their funds had been diminished by the resort of the joint creditors. *Ex parte Reid*, 1 Rose, 84.

Where a man is partner in separate firms, each of which becomes bankrupt, the surplus of his separate estate shall be applied in discharging the joint debts of the firms, in proportion to the whole amount of debts proved against each firm respectively. *Ex parte Franklyn*, Buck, 332.

#### (b) Future Property.

An uncertificated bankrupt can have no right to property as against his assignees. *Chambers v. Bernasconi*, 6 Bing. 501; 4 M. & P. 278—Per Tindal.

Property acquired by an uncertificated bankrupt, after an act of bankruptcy committed by him, does not vest absolutely in his assignees, although they have a right to claim it; for if they remain passive, and do not make any claim, the bankrupt has a right to such property as against all other persons. *Drayton v. Dale*, 3 D. & R. 534; 2 B. & C. 293.

An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and may maintain trover for them against a stranger. *Webb v. Fox*, 7 T. R. 391.

If an order for the delivery of goods in the hands of a third person be given to an uncertificated bankrupt, in payment of a debt accrued subsequent to his bankruptcy, he may maintain trover for them. *Fowler v. Down*, 1 B. & P. 44.

The after acquired goods of a certificated bankrupt having been taken in execution, for a debt which might have been proved under the commission, the court, on motion, set aside the *fi. fa.*, and refused to put the bankrupt to an *audita querela*, though it was stated on behalf of the

creditor that the bankruptcy was collusive, and that in an action by the assignees, a jury had found against the plaintiffs as to the fact of trading. *Barrow v. Poile*, 1 B. & Adol. 629.

It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay them the money claimed by the plaintiff; and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in that behalf, and that the commissioners had made no new assignment of the said notes and money: for the general assignment of the commissioners passes to the assignees of the bankrupt all his after-acquired as well as his present personal property and debts. *Kitchen v. Bartsh*, 7 East, 53; 3 Smith, 58.

If an uncertificated bankrupt carry on trade, and sell a vessel, of which he is the ostensible owner, to A., A. has a good title against all persons but the assignees. *Laroche v. Wakeman*, Peake, 140—Kenyon.

An uncertificated bankrupt, in general, can acquire property only for the creditors. Therefore, having entered into a trade, in partnership, the creditors of that partnership have no equity against the assignees for an account and application to their debts of the property used or acquired in that partnership. *Everett v. Backhouse*, 10 Ves. jun. 94.

The 6 Geo. 4, c. 16, s. 121, enacts that a bankrupt shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands, thereby made proveable under the commission, in case he shall obtain his certificate:—Held, that the goods as well as the person are protected by this section; therefore, goods of a certificated bankrupt, acquired after the bankruptcy, being seized under a *fieri facias*, issued upon a judgment in respect of a debt due before the bankruptcy, the court on motion set aside the *fieri facias*. *Davis v. Shapley*, 1 B. & Adol. 54.

An uncertificated bankrupt may maintain an action for work and labour for his personal services, and for materials found, as well as for the mere work and labour. *Silk v. Osborn*, 1 Esp. 140—Kenyon.

And for money lent. *Evans v. Brown*, 1 Esp. 170—Kenyon.

Unless his assignees interfere to prevent him. *Chippendale v. Tomlinson*, 7 East, 57, n.; 4 Dougl. 318.

If the assignees of a bankrupt manufacturer, employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time, this is evidence of such a contract between him and his assignees as will enable him to recover from them a reasonable compensation for his work and labour. *Coles v. Barrow*, 4 Taunt. 754; 2 Rose, 277.

So, he may sue as a trustee for his assignees, and the defendant cannot object to the action,

unless they interpose. *Cumming v. Reebuck*, Holt, 172—Gibbs.

Though he is also a cestui que trust under the same instrument. *Webster v. Scales*, 4 Dougl. 7.

Seem, that the assignees are not entitled to a debt which accrued to a bankrupt in respect of his personal labour. *Crofton v. Peale*, 1 B. & Adol. 568.

Plaintiff, a furniture broker, and uncertificated bankrupt, was employed by defendant to remove his goods, in the course of which business he employed several men and vans, supplied packing cases, repaired furniture, and provided materials for this purpose, and other articles to a trifling amount:—Held, that the debt which thereby accrued to the plaintiff was not in respect of personal labour, but was claimable by the assignees. *Id.*

If, after an uncertificated bankrupt has sued out a latitat, the defendant, before declaration, pay the debt to the assignees, this payment may be given in evidence under the general issue. *Id.*

An uncertificated bankrupt hires a shop; goods are supplied in the name of his son, but principally upon the father's guarantee:—Held, that his assignees were liable to an action of trespass at the suit of the son, for seizing them as the goods of the bankrupt. *Davis v. Living*, Holt, 375—Gibbs.

Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had allowed the bankrupt to remain in the possession of his furniture, but which, notwithstanding, they afterwards seized:—Held, that they were warranted in so doing, on the ground that an uncertificated bankrupt cannot acquire property for himself, nor is he entitled to retain any property against his assignees. *Niss v. Adamson*, 3 B. & A. 225.

An uncertificated bankrupt cannot maintain an action of trespass against subsequent creditors for breaking open his house, and seizing his after-acquired property, although the assignees do not ratify the seizure, and although they were unknown to the defendants until after the commencement of the action. *Hull v. Pickersgill*, 3 Moore, 612; 1 B. & B. 282.

### (c) *Rights after Bankruptcy.*

The assignees having sold the good-will and interest of the bankrupt's trade, does not preclude him from setting it up again, provided he does not hold himself out as carrying on the same trade which has been the subject of purchase, the benefits which he derives from his commission (as his certificate, &c.) not being a sufficient consideration to raise an implied undertaking on his part that he will not resume it. If there be an express covenant or fraud, the court will not interfere; but publishing advertisements and hand-bills, that he is reinstated in his business, and soliciting the old customers, is not a sufficient ground: an injunction therefore refused. *Cruikshank v. Lye*, 1 Rose, 128.

Quære, how far the purchasers can be held to these contracts? *Id.*

### 6. *Liability on new Promise.*

By 6 Geo. 4, c. 16, s. 131, no certificated bankrupt is liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by his certificate, or any part thereof, upon any contract, promise, or agreement made after the issuing of the commission, unless made in writing, signed by the bankrupt, or by some person authorized in writing by him.

A promise in the hand writing of the bankrupt, but bearing no signature, is not sufficient to take a case out of the statute. *Hubert v. Moreau*, 12 Moore, 216; 2 C. & P. 598.

A person after he became bankrupt, and before he had got his certificate, called at the office of his attorney, to whom he was indebted, and wrote there (the attorney not being at home) a letter, promising to pay him a sum of 100*l.* The only signature was a flourish of the pen, which it was contended by the plaintiff formed the letter M, the initial letter of the defendant's name:—Held, that if it was an M, it was not a sufficient signature under the statute. *Id.*

Seem, that if such a letter be without date, the time when it was written cannot be proved by parol evidence. *Id.*

If a debtor, who has become bankrupt, and obtained his certificate, make a promise afterwards to a creditor to pay him a debt, which was due to him before the bankruptcy, at a future day, he revives the debt, and thereby renders himself liable to be sued for its recovery. *Blackburn v. Ogle*, 8 Price, 526; *S. P. Drew v. Jefferies*, 8 Price, 231, n.

Where a bankrupt, after his bankruptcy, and prior to his obtaining his certificate, promised to pay a debt due before the bankruptcy, and indorsed two promissory notes to the plaintiff for that purpose:—Held, that his certificate was no bar to an action brought on these notes, the debt due before the bankruptcy being a good consideration for the promise; and that it would have been available, even if made after such certificate had been obtained. *Briz v. Braken*, 8 Moore, 261; 1 Bing. 281.

If a bankrupt promise to pay a debt to his creditor, before he obtained his certificate under a former commission, such promise revives the debt, and is proveable under a second commission. *Roberts v. Morgan*, 2 Esp. 736—Eyre.

A bankrupt having obtained his certificate, is not liable to pay a former debt, unless the promise be express, distinct, and unequivocal. *Fleming v. Horne*, 1 Stark. 370—Ellenborough; *S. P. Brook v. Wood*, 13 Price, 667.

Therefore, a promise to pay every body 5*0s.* in the pound is not sufficient. *Lynbay v. Wightman*, 5 Esp. 198—Ellenborough.

And if he promise to pay when he is able, is in debtibus assumptum brought on that promise, his ability to pay must be shown. *Beauford v. Saunders*, 2 H. Black. 116. And see *Bailey v. Dillon*, 2 Burr. 736; 2 Ld. Ken. 436.

If a bankrupt promise absolutely to pay a debt barred by his certificate, indebitatus assumpsit lies against him on the original consideration. *Penn v. Bennett*, 4 Camp. 205—Ellenborough: *S. P. Williams v. Dyde*, Peake, 68. And see *Brix v. Braham*, 8 Moore, 261; 1 Bing. 281.

But if he only promise conditionally, the plaintiff must declare specially, and prove the condition performed. *Id.*

But not so, when the promise is absolute *Lang v. Mackenzie*, 4 C. & P. 463—Tindal.

If the bankrupt write to a creditor, and says "by the end of next month I shall have my banker's account, and I shall remit the sum due to you in a draft on them," it has been held that this a sufficient new promise. *Id.*

It must be shown that the debt existed prior to the bankruptcy. *Id.*

A bankrupt, after a commission sued out, may, in consideration of a debt before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor satisfaction in part or for the whole of his debt, by a new undertaking or agreement. *Freeman v. Fenton*, Cowp. 544.

And assumpsit will lie upon such new promise or undertaking. *Id.*

If a bond for the payment of money has been forfeited before a bankruptcy, payment of interest by the bankrupt after the certificate may perhaps render him liable to be sued upon it. *Alepp v. Brown*, 1 Dougl. 192.

A promise by a bankrupt to deliver goods in satisfaction of a debt due before bankruptcy, is not such a promise as will revive the debt after certificate. *Tuttle v. Grimwood*, 11 Moore, 432.

But if a bankrupt, or insolvent, after becoming free from his engagements, having no restraint on his mind, voluntarily give security for a former demand, which is only due in conscience, such a security may be enforced in a court of law. *Cockshott v. Bennett*, 2 T. R. 765.

In an action against a bankrupt on a new promise, proof that the plaintiff petitioned the Lord Chancellor against the allowance of the defendant's certificate, shall be held to be a waiver of the agreement by the bankrupt to pay and answer the action. *Cole v. Lovell*, 1 Esp. 282—Kenyon.

#### 7. Actions by Bankrupts.

An uncertificated bankrupt cannot, in an action to try the validity of the commission, hold his assignees to bail. *Chambers v. Bernasconi*, 6 Bing. 500; 4 M. & P. 278.

A bankrupt had, before his bankruptcy, commenced an action, which was subsequently prosecuted by his assignees and failed, and the bankrupt having obtained his certificate was taken in execution for the costs. An application by the bankrupt for payment of these costs out of the estate was refused, on the ground of the bankrupt having by his wilful misrepresentations induced the assignees to pursue the action. Where a bankrupt has acted fairly, he is entitled to this protection. *Ex parte Seaman*, 1 Glyn & J. 260.

#### 8. Bankrupt's Wife.

The equity of the wife to a provision out of her property attaches for the benefit of herself and her children, in the filing of the bill which gives the court jurisdiction as to that property, whether the bill is filed by the wife or others; but she may waive it even after a decree for a settlement, before its execution. The children held to be entitled to the benefit of that equity, attaching upon a bill filed by an executor, though the wife died before answer. *Steinmetz v. Halkin*, 1 Glyn & J. 64.

A bankrupt's wife has an equity against the assignees of her husband, or their vendee for a settlement of her choses in action. *Basori v. Serra*, 3 Mer. 674.

Assignees must make a provision for a bankrupt's wife out of all her property, which can be obtained in equity only; and a settlement before marriage of part of her property to her separate use does not bar her. *Burdon v. Dean*, 2 Ves. jun. 607.

If the wife insists upon her equity as against the assignees of her husband, it attaches for the benefit of her children, and she cannot afterwards release in favour of her husband. *Barker v. Lea*, 6 Madd. 330.

### XX. CERTIFICATE.

#### 1. Generally.

By 6 Geo. 4, c. 16, s. 122, the certificate must be signed by four-fifths in number and value of the creditors who shall have proved to the amount of 20*l.*, or after six calendar months from the last examination, either by three-fifths in number and value, or by nine-tenths in number of such creditors.

It is a moral obligation on a creditor to sign the certificate, when he is satisfied that the bankrupt has conformed to the provisions of the statute. *Brown v. Carr*, 7 Bing. 508; 2 Russ. 600.

But creditors have an absolute discretion to refuse to sign. *Ex parte Cridland*, 3 Ves. & B. 103; 2 Rose, 164.

The proof of the petitioning creditor, upon opening the commission, does not of itself entitle him to sign the certificate. *Ex parte Davis*, 2 Cox, 398.

A creditor having taken his remedy at law, cannot take a dividend too, but he may assent to, or dissent from, the certificate. *Ex parte Hopkinson*, 1 Ves. jun. 159.

An accountant, who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 1 Russ. & Mylne, 330.

#### 2. Signature of Creditors.

One trustee cannot sign the certificate for himself and co-trustees, without an express authority, *Ex parte Rigby*, 2 Rose, 224; 19 Ves. jun. 463.

One partner may sign a certificate for a joint debt proved under the commission by himself and his co-partner. *Ex parte Mitchell*, 14 Ves.

jun. 507; *S. P. Ex parte Hodgkinson*, 19 Ves. jun. 293; 2 Rose, 172.

Even though the partnership be dissolved at the time of signing. *Ex parte Hale*, 1 Rose, 2; 17 Ves. jun. 62.

A creditor who is the executor of a creditor is only entitled to sign the certificate once. *Ex parte Stracy*, 1 Rose, 66.

An objection to the proof of a debt in point of form is not sustainable against the certificate. *Id.*

Where a creditor who has proved is fully paid by the surety, he cannot afterwards sign the certificate. *Ratcliffe v. Gunson*, 6 Madd. 193.

But the surety, on petition, would be allowed to sign. *Ex parte Gee*, 1 Glyn & J. 330.

A creditor who, after proof, assigns his debt, may sign the certificate. *Ex parte Herbert*, 2 Glyn & J. 66.

But not without the authority of the assignee. *Ex parte Taylor*, 1 Glyn & J. 399.

Quære, whether a person appointed by the court to prove, and receive dividends, can sign the certificate? *Ex parte Shaw*, 1 Glyn & J. 127.

The signature, by power of attorney, to a certificate was admitted, although the power was not strictly formal. *Ex parte Wilkinson*, 1 Mont. & Bligh, 257.

An application to stay the certificate, on the ground that the day of the month and year of the signature of the creditors was not inserted at the time, and that the affidavits of the parties witnessing their signatures did not state the time of such signature, was refused. *Ex parte Laing*, 1 Glyn & J. 348.

And where some creditors, instead of the day of the month, wrote "ditto," and others omitted the year, it was held immaterial. *In re Davis*, 2 Glyn & J. 80.

The commissioner was directed to sign a certificate in one case, although the year was omitted to one of the signatures, when it was preceded and followed by dates subsequent to that of the last examination. *Ex parte Shoults*, 1 Deac. & Chit. 531; *S. C. nom. Ex parte Moutt*, 1 Mont. & Bligh, 262.

Where the date of the signatures of creditors to a certificate had been written by the clerk to the solicitor to the commission, and the names of the creditors signed afterwards, the court permitted it to pass, notwithstanding the general order of the 8th of August, 1809. *Ex parte Reynolds*, 1 Mont. & Bligh, 263; 1 Deac. & Chit. 459.

The certificate ought not to be signed by creditors before the bankrupt has passed his last examination. *Ex parte Cusse*, 2 Glyn & J. 327.

Quære, whether a signature, previously to the last examination, is valid? *Ex parte King*, 11 Ves. jun. 424.

In one case the certificate sent back, creditors having signed before the bankrupt had passed his last examination. *Ex parte Brown*, 1 Rose, 176.

### 3. Execution by Commissioners.

By 6 Geo. 4, c. 16, s. 122, the commissioners

were, by writing under their hands and seals, to certify to the Chancellor that the bankrupt had made a full discovery of his estate and effects, and in all things conformed; and that there did not appear any reason to doubt the truth or fullness of such discovery; and also that the creditors had duly signed.

By s. 124, the commissioners are not to sign unless they have proof by affidavit in writing of the signature of the creditors, or of any person authorized by any creditor, and of such authority; and if any creditor reside abroad, the authority is to be attested by a notary public, British minister, or consul. All these documents were, with the certificate, to be laid before the Chancellor.

The signature and sealing of the certificate by the commissioners must be attested by the solicitor to the commission, or his clerk, or the messenger, or the clerk of the commissioner, in conformity to the general order of August, 1809, or the certificate will be sent back to the commissioners to recertify. *Ex parte Jones*, 1 Glyn & J. 186.

If there is no wilful concealment, the commissioners are bound to sign, and the Lord Chancellor to allow, without regard to conduct previous to the bankruptcy. *Ex parte Joseph*, 18 Ves. jun. 342.

The judicial discretion of the commissioners, as to the certificate, has been held to be not subject to control, either of the Lord Chancellor or of the courts of common law; for the court of K. B. has refused to grant a mandamus to commissioners to certify conformity. *Ex parte King*, 7 East, 92; 15 Ves. jun. 126; 11 Ves. jun. 417; 13 Ves. jun. 181.

A solicitor employed by the bankrupt to procure his certificate, who neglected to obtain the signature of the commissioners to the certificate, which had been long before signed by the proper number of creditors, was ordered to deliver up the certificate and affidavits to the bankrupt, and to pay the costs of the application. *Ex parte Houghton*, 1 Glyn & J. 14.

A bankrupt, who has employed a solicitor to obtain the signatures of creditors to his certificate, if he has ceased to employ him, cannot, by petition, compel the solicitor's clerk to make affidavit of witnessing the signatures, without paying to the solicitor the costs of business done. *Ex parte Shore*, 1 Mont. & Bligh, 268; 1 Deac. & Chit. 509.

### 4. Allowance.

By 6 Geo. 4, c. 16, s. 122, the bankrupt must make oath in writing, that the certificate and consent were obtained without fraud; and the certificate must be allowed by the Chancellor, against which allowance any of the creditors may be heard.

That there is a petition pending to supersede the commission, is no objection to the allowance of the certificate, which, while the commission stands, the bankrupt is entitled to, unless there be objections exclusively attaching upon it. *Ex parte Bonsor*, 2 Rose, 61.

Where the certificate has been stayed at the



instance of creditors, who afterwards withdraw their opposition to it, and appear by counsel to consent to its allowance, the court will allow the certificate, without the usual explanatory affidavit. *In re Holl*, 2 Deac. & Chit. 44.

A joint certificate of the two bankrupts was ordered to be advertised for allowance as to the survivor, where one of the bankrupts died without having made the affidavit of conformity. *Ex parte Cassart*, 1 Glyn & J. 248; *S. P. Ex parte Currie*, 18 Ves. jun. 51.

A certificate was allowed against the objection of creditors in Scotland, that the bankrupt was properly the object of a sequestration, and that the question of sequestration was then depending in the Court of Session. *Ex parte Cockayne*, 2 Rose, 233.

A bankrupt's certificate shall not overreach a legacy left to the bankrupt after the signing, but before the allowance thereof. *Tudway v. Brown*, 2 Burr. 716; 2 Ld. Ken. 423.

Seem, that a certificate has no relation back to any earlier period than its allowance. *Stapleton v. Macbar*, 7 Taunt. 589; *S. P. Walker v. Gibbel*, 2 W. Black. 811.

The certificate of a bankrupt allowed after the filing of the plaintiff's bill, and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 Geo. 2, c. 30, s. 7, viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt. *Harris v. James*, 9 East, 82.

### 5. Staying.

*For what Cause.*—The court would not stay the certificate upon a legal objection, unless it clearly appeared, as it would thereby preclude the validity of it from being ascertained by a trial at law. *Ex parte Kennett*, 1 Rose, 331.

A certificate was stayed, on the ground that the bankrupt, having suffered a fictitious debt to be proved, could not have made a full discovery. *Ex parte Laffert*, 1 Rose, 330.

So, a certificate was stayed, that a creditor, whose debt would turn it, might have an opportunity of assenting or dissenting. *Ex parte Lord*, 2 Rose, 421.

Where, under a separate commission, the separate debts were very small, and the joint creditors resided in Sicily, whither the bankrupt had traded, the court refused to allow the certificate till the joint creditors had an opportunity of coming in under the commission; and, without the usual undertaking to pay the separate creditors, gave them, in the mean time, liberty to make such proof as they might be able, with the offer of a new choice of assignees. *Ex parte Basarro*, 1 Rose, 266.

A petition to stay a certificate, because the commission is concerted, does not lie. *Ex parte Smith*, 1 Mont. 11.

A certificate under a separate commission of bankruptcy, lying before the Lord Chancellor for

allowance, is not stayed by suing out a joint commission. *Ex parte Tobin*, 1 Ves. & B. 308.

A certificate was stayed upon the petition of the partner of the bankrupt, until the partnership accounts should be taken, no want of due diligence being imputable to the petitioner. *Ex parte Hadley*, 1 Glyn & J. 193.

A certificate shall not be stayed, in order to give a person insisting on a right to stop in transitu an opportunity of proving, in case he should fail in his action. *Ex parte Heath*, 6 Ves. jun. 613.

A petition praying that the certificate might be stayed, until the petitioner had had reasonable time for ascertaining the amount of his debt, and proving, was dismissed with costs. *Ex parte Bleydes*, 1 Glyn & J. 179.

A certificate will not be stayed upon matter contained in affidavits in Reply, where the petition and affidavits filed with it do not make a case for staying it. *Ex parte Cundall*, 1 Glyn & J. 37.

Misconduct, to stay a certificate, must be a misconduct under the bankruptcy. *Ex parte Gardener*, 1 Rose, 377; 1 Ves. & B. 45.

A certificate was stayed under circumstances appearing upon the examination, particularly the inconsistency of the statement that the bankrupt had no written documents except a book produced, appearing to have been compiled from other documents. *Ex parte Bangley*, 17 Ves. jun. 117.

*Practice.*—No affidavits can be admitted against the allowance of a certificate, but such as have been filed in the office at the same time with the petition, or are necessarily in reply. *Ex parte Scotland (Bank)*, 1 Rose, 375; 1 Ves. & B. 5.

It is a general rule, that a petition to stay a certificate, if dismissed, is with costs, unless the bankrupt, by misconduct, has forfeited that privilege. *Id.*

The rule is dispensed with, if there has been misconduct in the bankrupt. *Ex parte Gardener*, 1 Rose, 377; 1 Ves. & B. 45.

Where a petition to stay a certificate fails, it is not of course that the petitioner should be ordered to pay the costs. *Ex parte Stevens*, Buck, 389.

If, upon a petition to stay a certificate, the bankrupt do not file his affidavits in answer till after the petition day, the petitioner is entitled to have the petition stand over, that he may have an opportunity of replying to any new matter in the bankrupt's affidavits. *Ex parte Radcliffe*, Buck, 489.

A petition to stay a certificate is an exception to the regular course of proceedings, and may be heard out of its turn. *Ex parte Anderson*, 1 Rose, 93.

Though a bankrupt applies to the court to have a petition to stay his certificate advanced, yet that is not a waiver of his right to be personally served before the petition day. *Ex parte Gross*, Buck, 39.

Seem, a petition to stay a certificate prospectively cannot be supported. *Id.*

Upon a petition to stay a certificate, imputing conduct to the bankrupt, which, if proved, would amount to felony, the court will not direct an issue to try the fact of conformity. *Ex parte Scott*, Buck, 275.

Where a petition is presented to stay certificate, and the petitioner then withdraws his opposition, an affidavit of no collusion is requisite. *Ex parte Cates*, 1 Deac. & Chit. 546.

On a petition to stay the certificate, after an order has been obtained for its allowance, the court will not open the order, unless it appears from the petition, that the debt of the creditor would turn the certificate. *Ex parte Skipp*, 2 Deac. & Chit. 88.

A petition by a creditor to stay certificate, that he might prove a debt, not accounting for not having applied before, will be dismissed. *Ex parte Adams*, 2 Bro. C. C. 48.

A petition to prove, and stay certificate, presented eight months after the issuing of the commission, and the delay not accounted for, was dismissed with costs. *Ex parte Smith*, 1 Glyn & J. 195.

*Petition.*—A mortgagee may petition to stay a certificate. *Ex parte Whitchurch*, 1 Glyn & J. 71; 2 J. & W. 548.

The circumstance of his not having tendered any proof till the third meeting, will not prevent him from presenting such a petition. *Id.*

The court will not stay a certificate upon the petition of a creditor who has not come in under the commission, and who has the means of trying the validity of the certificate at law. *Ex parte Dodson*, Buck, 225.

Where a petition to stay a certificate is not served before the next petition day, the course is for the bankrupt to present a short petition, praying that his certificate may be allowed. *Ex parte Moore*, 1 Glyn & J. 253.

A petition to stay certificate must be served before the petition day. *Ex parte Colburn*, 2 Rose, 187.

A petition to stay a certificate must be personally served on the bankrupt before the petition day. *Ex parte Harford*, Buck, 38.

An admission by the bankrupt of the receipt of the copy of a petition to stay his certificate, is not a waiver of personal service. *Ex parte Furnival*, 1 Glyn & J. 254.

An affidavit of personal service of a petition to stay certificate, sworn but not filed on the day of hearing, was treated under the circumstances, as no affidavit, and the petition was dismissed with costs. *Ex parte Long*, 1 Glyn & J. 351.

The court will not order that service of a petition, to stay a certificate, at the bankrupt's residence, should be good service, unless the application be made before the petition day, except in cases where an earlier application is prevented by the conduct of the bankrupt. *Ex parte Harrison*, 1 Glyn & J. 71.

A petition to stay the certificate, and expunge a creditor's name from it who had signed it on

the ground that he had been previously satisfied his debt, must be served on the creditor. *Ex parte Bostock*, 1 Deac. & Chit. 383.

Where a certificate had been suspended by a petition to stay it, and another petition to stay was presented during its suspension, but after the expiration of three weeks from the notice in the Gazette:—Held, that the latter was not presented in time, and it was dismissed with costs. *Ex parte Wright*, 1 Glyn & J. 352.

The costs of a petition by a bankrupt for his certificate, presented after the petition day, will not be allowed. *Ex parte Birch*, 2 Glyn & J. 306.

Where a creditor does not use due diligence to prove his debt, he is not entitled to petition to stay the bankrupt's certificate, in order to afford him time to do so, with a view of dissenting from its allowance. *Ex parte Bostock*, 1 Deac. & Chit. 383.

An affidavit by the bankrupt in answer to such a petition, filed two days before the hearing, may be read; but if it makes any charge of delay against the petitioner, which he is anxious to explain, the court of Review will give him time for that purpose, more especially if the amount of his debt would turn the certificate. *Id.*

A creditor, by petitioning to stay the certificate, makes his election to come in under the commission for every provable debt which may be owing to him from the bankrupt; and, therefore, the bankrupt must be discharged from any action pending against him by the creditor, in respect of any such debt, before the petition can be proceeded in. *Id.*

By a general order in bankruptcy, affidavits in support of a petition to stay the certificate shall be brought into the office together with the petition except such as shall be necessary in reply to affidavits in answer to it. *Ex parte Bowen*, 11 Ves. jun. 540.

An affidavit in support of a petition to stay a certificate, filed after the petition is presented, cannot be read. *Ex parte Dodson*, Buck, 178.

The assignees cannot be heard on a petition by an individual creditor to stay the certificate, although they may have been served with the petition. *Ex parte Bostock*, 1 Deac. & Chit. 383.

Motions or petitions consented to, or composed, may be brought on at the sitting of the court of Review, before the paper of the day has been gone into; but none which are opposed will be taken until after the paper has been gone into. *Mem.* 1 Deac. & Chit. 396.

A petition to stay a certificate upon an allegation of concealment, sworn to only upon information and belief, was dismissed with costs. *Ex parte Joseph*, 18 Ves. jun. 340; 1 Rose, 184.

A bankrupt, not served with a petition to stay his certificate, on which an attendance had been ordered, is entitled to his certificate; and not bound by taking copies of the affidavits. *Ex parte Kendall*, 1 Ves. & B. 543.

#### 6. Recalling.

A bankrupt's certificate, obtained by imper-

tion practised upon the great seal, would have been revoked, if no injury accrued to persons subsequently dealing with the bankrupt on the faith of it. *Ex parte Tullis*, 1 Rose, 371.

A certificate will be recalled when obtained by fraud. *Ex parte Cawthorn*, 2 Rose, 186; 19 Ves. jun. 280.

A certificate will not be recalled but upon a clear case against the bankrupt. *Ex parte Hood*, 1 Glyn & J. 219.

Where a bankrupt has been long in possession of his certificate, the court will not recall it. *Ex parte Reed*, Buck, 430.

#### 7. When void.

##### (a) Contract for Signature.

[The cases of Void Contracts generally will be found under the title CONTRACT.]

By 6 Geo. 4, c. 16, s. 125, contracts or securities made or given by bankrupts, or other persons, to or in trust for creditors, or for securing the payment of any money due by the bankrupt, as a consideration, or with intent to persuade such creditor to consent to, or sign such certificate, are void, and the money thereby secured or agreed to be paid is not recoverable; and the party sued on such contract or security may plead the general issue, and give the special matter in evidence.

The fourth, amongst several other signatures of creditors to the certificate of a bankrupt, having been obtained by the promise of the bankrupt to pay that creditor his whole debt, such certificate is void by stat. 5 Geo. 2, c. 30, ss. 7, 11; although the creditors who signed before and after the fourth were sufficient in number and value, without reckoning that one; for his example might have induced others to sign it. *Phillips v. Dicus*, 15 East, 248; 1 Rose, 345.

A deed of composition, framed only for the joint creditors of two bankrupts, and which was not signed or accepted by the separate creditors of one of the bankrupts, is not such a compounding with creditors, as will, within the stat. 5 Geo. 2, c. 30, s. 9, limit the effect of the certificate to the protection of the person only, and not the future property of the bankrupt. *Norton v. Shakespear*, 1 Rose, 347; 15 East, 619.

A certificate is void if obtained by money, though without the bankrupt's privity. *Ex parte Butt*, 10 Ves. jun. 359; *S. P. Ex parte Hall*, 17 Ves. jun. 62.

If any one of the creditors, though without the privity of the bankrupt, be induced by money to sign his certificate, it is void. *Holland v. Palmer*, 1 B. & P. 25.

Even though the bankrupt was not aware of it, at the time he made the necessary affidavit in order to obtain the allowance, if he knew of it before the actual allowance was granted. *Robson v. Calse*, 1 Dougl. 228.

##### (b) Gaming.

By 6 Geo. 4, c. 16, s. 130, no bankrupt shall be entitled to his certificate, and, if obtained, it shall be void, if he shall have lost by any sort of

gaming or wagering in one day 20*l.*, or within one year next preceding his bankruptcy 200*l.*; or if he shall within one year have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week, or where the stock was not actually transferred or delivered; or shall after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified any of his books, papers, writings, or securities, or made, or been privy to the making of any false or fraudulent entries in any book of account, or other document, with intent to defraud his creditors; or shall have concealed property to the amount of 10*l.*; or if, any person having proved a false debt, such bankrupt, being privy thereto or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge.

A loss by gaming invalidates a certificate, although the bankrupt on the same day wins more than the sum lost. *Ex parte Newman*, 2 Glyn & J. 329.

The Chancellor will, without an issue, decide the fact of gaming when it is not disputed. *Id.*

Upon a petition to stay a certificate, an issue was directed to try whether the bankrupt had lost 5*l.* at a horse-race. *Ex parte Henderson*, Buck, 557.

Insuring in the lottery was not gaming within stat. 5 Geo. 2, c. 30, s. 12, which would prevent a bankrupt's certificate being allowed. *Lewis v. Piercey*, 1 H. Black. 29.

The clause in the 12th section of stat. 5 Geo. 2, c. 30, depriving a bankrupt of all benefit from his certificate, in the cases of losses at play, was to be considered as a qualification, restraining the operation of the 7th section, which made the certificate a bar; and evidence of such loss might be given in a court of law on the similitur to the general plea of bankruptcy. *Hughes v. Morley*, 1 B. & A. 22; Holt, 520.

The plaintiff must confine his evidence to one act, and elect whether he will give evidence of one loss amounting to 5*l.*, or of several losses, amounting to 100*l.* *Id.*

If the goods of a certificated bankrupt are taken in execution, it seems that the court will not set it aside on motion, if it appear that it may be void by gaming or other misconduct of the bankrupt specified in 6 Geo. 4, c. 16, s. 130. *Barrow v. Poile*, 1 B. & Adol. 633.

##### (c) Other Causes.

It is a good answer to a plea of bankruptcy, that the certificate was obtained by fraud, though the enactment to that effect in 5 Geo. 2, c. 30, s. 7, is not repeated in 6 Geo. 4, c. 16. *Horn v. Ton*, 4 B. & Adol. 78.

Where concealment of property by the bankrupt is positively established, the great seal will refuse the certificate; secus, where the petition alleges merely information and belief as to that fact. *Ex parte Joseph*, 1 Rose, 184; 18 Ves. jun. 340.

An application to stay the certificate, on the ground of concealment of property, where the circumstances of concealment had been disclosed, and the whole property delivered up to the assignees before the signature of the certificate by the commissioners was refused, but without costs. *Ex parte Bryant*, 1 Glyn. & J. 205.

It is no objection in the certificate that the assignees have permitted the bankrupts to carry on business on the same premises and in the same firm, and to continue their houses elegantly furnished, &c., or that the bankrupts have retained in their hands money as assignees under other commissions. *Ex parte Anderson*, 1 Rose, 93.

If assignees sign a certificate, and get a release from the bankrupt merely to get over a technical objection to evidence, it is by no means an improper transaction. *Selby v. Greu*, 2 Anst. 504.

A bankrupt knowingly permitting a fictitious debt to be proved, is not entitled to his certificate. *Freydeburgh's case*, 3 Ves. & B. 142.

### 8. Effect as a Discharge.

#### (a) Generally.

By 6 Geo. 4, c. 16, s. 121, every bankrupt who shall have duly surrendered, and in all things conformed, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands proveable under the commission, in case he shall obtain a certificate of conformity; but such certificate shall not release or discharge any person who was partner with the bankrupt, or who was jointly bound, or had made a joint contract with him.

The certificate protects the goods, as well as the person of the bankrupt from all debts proveable under the commission. *Davis v. Shapley*, 1 B. & Adol. 54.

The defendants being bankrupt, were sued, and suffered judgment by default in Trinity term, and final judgment was entered up, and execution issued thereon in Michaelmas term following; on the 13th November, in that term, the defendants obtained their certificate, and on the same day the sheriff's officer levied, and he, notwithstanding a notice that the defendants certificate had been allowed, being about to sell the goods seized, the defendants paid the amount of the debt and costs into court, under a judge's order to abide the event of a motion. On application by the defendants to have the money paid out to them, the court refused to interfere; but left the parties to their audita querela, although it was insisted by the 6 Geo. 4, c. 16, s. 126, the goods as well as the persons of bankrupts are protected. *Hanson v. Blakey*, 1 M. & P. 261; 4 Bing. 493.

A certificate pending a suit operates in the nature of a release. *Anon. Lofft*, 437.

#### (b) Foreign Discharge.

A discharge under a commission of bankruptcy in a foreign country is no bar to an action against the bankrupt by a subject of this country, for a debt arising here. *Smith v. Buchanan*, 1 East, 6.

A certificate obtained under the Irish bankruptcy act, 11 & 12 Geo. 3, is not pleadable to an action for a debt contracted in England before the commission issued. *Shallcross v. Dyserf*, 2 Glyn & J. 87.

Nor will the courts here discharge a defendant who is holden to bail for a debt contracted in this country out of custody on a common appearance, on an affidavit of his having become a bankrupt in Ireland, and there obtained his certificate; but will put him to plead. *Quin v. Keefe*, 2 H. Black 553.

A bill of exchange, drawn by a defendant in Ireland, and accepted and paid by plaintiffs in England, is a debt contracted in England, and cannot be discharged by a certificate under an Irish commission of bankruptcy. *Lewis v. Owen*, 4 B. & A. 654.

A motion to discharge a defendant out of custody, on the ground of his bankruptcy and certificate in Ireland, must be on affidavit of the effect of the certificate by the laws there. *Anon.* 1 Anst. 80.

Quære, how far the cessio bonorum discharges a debt contracted in Guernsey. *Whittingham v. De la Rieu*, 2 Chit. 53.

The discharge of an insolvent, by cessio bonorum in Scotland, is no bar to an action brought by an English creditor in England for a debt contracted there, though the plaintiff opposed the defendant's discharge in Scotland; unless he sought relief from the Scotch law, by claiming a distributive share of the insolvent's property. *Philips v. Allan*, 2 M. & R. 575; 2 B. & C. 477. But see *Ballantine v. Golding*, Cook's Bkt. Laws, 499, 6th edit.; and *Burrows v. Jemina*, 2 Stra. 733.

A petition by the plaintiff for a sequestration in Scotland against the defendant, is not a sufficient cause for discharging him on common bail. *Carruthers v. Parkin*, 1 Tidd's Prac. 204.

A debt contracted in England by a trader residing in Scotland is barred by a discharge under a sequestration issued in conformity to the 45 Geo. 3, c. 137, in like manner as debts contracted in Scotland. *Sidaway v. Hay*, 3 R. & C. 12; 4 D. & R. 658.

A certificate obtained in Newfoundland, under the 49 Geo. 3, c. 27, s. 8, does not entitle the defendant to be discharged on entering a common appearance, but must be pleaded in bar. *Philpotts v. Read*, 3 Moore, 244; 1 B. & B. 13.

Nor in Bremen, where the debt was contracted. *Earlier v. Langnishe*, 2 Chit. 55.

The court of C. P. will not discharge a defendant on entering a common appearance, on the ground of his having become insolvent and obtained his certificate at Newfoundland, under 49 Geo. 3, c. 27, s. 8, but will leave him to plead such certificate in bar; and such certificate may be pleaded in bar to an action brought in this country, for a debt contracted here previous to the insolvency. *Philpotts v. Read*, 3 Moore, 630; 1 B. & B. 294.

Where the plaintiff gave the defendant in a foreign country, where both were resident, a bill

drawn by the defendant upon a person in England, which was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state:—Held, that such certificate was a bar to an action here upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in England. *Potter v. Brown*, 5 East, 124; 1 Smith, 351.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a concordat, it is not necessary in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the concordat, but they should show that the action is brought with the assent of the commissioners named therein. *Orr v. Browne*, 5 C. & P. 414—Parke.

A bankrupt, who has assigned his property to his assignees under a French commission of bankruptcy, cannot afterwards be sued in a court of justice in the British dominions, by one of his creditors, for a debt proved under it. *Quelin v. Moisson*, 1 Knapp's Priv. Coun. Cases, 266.

Seemle, not even for a debt not proved under it. *Id.*

A certificate obtained under an English commission operates as a discharge of the debts of Scotch creditors proveable under the commission. *Scotland (Bank) v. Stein*, 1 Rose, 462.

A certificate of conformity, obtained under a commission of bankruptcy in England, is a bar to an action for a debt contracted by the bankrupt at Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta. *Edwards v. Ronald*, 1 Knapp's Priv. Coun. Cases, 259.

So, where to a suit instituted in the Dutch colonial court of Demerara, for the recovery of the balance of an account for sugars consigned to and received by the defendant and his partner in London, the defendant pleaded his bankruptcy in England, of which the plaintiffs had notice, but had not proved their debt under it:—Held, that the bankruptcy and certificate were a discharge of the debt. *Odwin v. Forbes*, Buck. 57.

#### (c) Bankrupt an Assignee.

By 6 Geo. 4, c. 16, s. 105, if any assignee indebted to the estate of which he is assignee, in respect of money retained or employed by him, shall become bankrupt, and obtain his certificate, it shall only have the effect of freeing his person from arrest and imprisonment, but his future effects (tools, household goods, and wearing apparel excepted) shall remain liable for so much of his debt to the estate of which he was assignee, as shall not be paid by dividends under his commission, together with lawful interest for the whole debt.

#### (d) How available in Actions.

A certificate granted after plea pleaded, but before the trial, will not avail at law. *Langmead v. Beard*, 9 East, 85, n.—Kenyon.

If a bankrupt is sued upon a cause of action

arising before his bankruptcy, and obtains his certificate pending the suit, he must plead it *puis darrein continuance*: and if he does not, and judgment is obtained, and an action upon that judgment be brought against him, he cannot plead his certificate to that action. *Todd v. Maxfield*, 9 D. & R. 171; 6 B. & C. 105.

If one of two defendants plead a plea of bankruptcy *puis darrein continuance*, the plaintiff cannot, at nisi prius, confess this plea to be true, and go on with the case as to the other defendant. *Pascall v. Horsley*, 3 C. & P. 372—Tent.

A bankrupt, who obtained his certificate after issue and before judgment, having after judgment been rendered in discharge of his bail, was held entitled to be liberated on a summary application, although he had not pleaded his certificate *puis darrein continuance*. *Humphreys v. Knight*, 6 Bing. 569; 4 M. & P. 375.

In an action against a member of parliament on bills of exchange, two persons became sureties in a bond conditioned for the payment of such sums as should be recovered, with costs. The cause proceeded, and notice of trial having been given, the defendant filed a bill in equity and obtained an injunction, pending which, he became bankrupt, obtained his certificate, and allowed a term to elapse without pleading it:—Held, that he could not plead it as of the preceding term, except on the condition of dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client. *Duff v. Campbell*, 3 B. & A. 577.

In assumpsit by several plaintiffs, the bankruptcy of one, and an assignment of his effects, is a good plea in bar. *Marlar v. Hertley*, 4 Dougl. 22, n.

Where the bankrupt pleads his bankruptcy, and relies on the certificate, which the plaintiff contends is void under the stat. 5 Geo. 2, c. 30, the plaintiff can only impeach the certificate, and not the commission. But, if the petitioning creditor signed the certificate, and the debt is bad, it may be impeached, though it may affect the commission. *Bateson v. Hartsink*, 4 Esp. 43—Kenyon.

If a certificated bankrupt apply before judgment for a discharge, the court will, if he has occasioned vexatious delay, order him to pay the costs attendant upon such delay. *Sadler v. Clesver*, 7 Bing. 771.

The court may discharge a certificated bankrupt before judgment. *Id.*

Equity will not restrain by injunction further proceedings at law upon a verdict obtained through the defendant's neglect to produce his certificate in evidence. *Lingard v. Hibbertson*, 1 Rose, 459.

#### 9. Proof of.

A certificate obtained after 6 Geo. 4, c. 16, on a commission of bankruptcy issued before that statute, is proved by the production of the certificate, duly allowed. *Taylor v. Welford*, M. & M. 503—Tindal.

Unless the certificate of conformity be filed,

the court of Review cannot order a copy of it to be delivered. *Ex parte Shore*, 1 Deac. & Chit. 531; 1 Mont. & Bligh, 268.

If a bankrupt pleads his certificate in bar, and the plaintiff relies on its having been obtained by fraud, by allowing persons to prove debts who were not bona fide creditors, such persons may be witnesses to prove the fraud, and should be called. *Edmonstone v. Webb*, 3 Esp. 264—Kenyon.

After notice to produce the former certificate, it is enough if witnesses state that they were employed by him to solicit that certificate, and that, looking at the entries in their books, they have no doubt it was allowed by the Lord Chancellor. *Henry v. Leigh*, 3 Camp. 499; 2 Rose, 144—Ellenborough.

But to prove the allowance of a bankrupt's certificate by the Lord Chancellor, the book kept in the office of the secretary of bankrupts, in which entries are made of the allowance of certificates, is not secondary evidence. *Id.*

## XXI. SUPERSEDEAS AND ANNULLING.

### 1. Jurisdiction and Practice.

By 1 & 2 Will. 4, c. 56, s. 19, the Chancellor may, upon the reversal of any adjudication, or for such other cause as he may think fit, order any fiat to be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission.

By 6 Geo. 4, c. 16, s. 16, joint commissions may be superseded as to one or more persons, without affecting their validity as against the others.

The great seal was in no instance compelled to supersede a commission, except by the imperative language of the statute 5 Geo. 2, c. 30, s. 24, (where a petitioning creditor received from the bankrupt greater security or satisfaction for his debt than the rest of the creditors;) but it was in the habit of exercising a discretionary power of supersedeas, to prevent an abuse of a commission as a process in the nature of an execution, and from analogy to the practice of other courts in this respect. *Ex parte Freeman*, 1 Rose, 380; 1 Ves. & B. 34; *S. P. Ex parte Hodgkinson*, 19 Ves. jun. 291; 2 Rose, 172.

The court of Review will not supersede a commission 30 years old, unless all the creditors consent. *Ex parte Lupton*, 2 Deac. & Chit. 136.

A writ of supersedeas is considered as sealed from the time of its delivery to the messenger. *Ex parte Freeman*, 1 Rose, 280; 1 Ves. & B. 34.

The court may supersede, notwithstanding a verdict in favour of the commission; and, if a new trial is directed, may restrain proceedings for double costs. *Ex parte Eager*, 1 Mont. 85.

A petition to supersede a commission, before any meeting, upon affidavits of the solvency of the bankrupt, that he never committed an act of bankruptcy, and did not owe the petitioning creditor 100*l.*, was refused, nor would the Lord Chancellor direct an issue. *Ex parte Stokes*, 7 Ves. jun. 405.

The Lord Chancellor refused to stay proceedings under a commission not opened, upon the allegation that there was no petitioning creditor's debt, as the commission issues of right under the act of parliament. *Ex parte Lancaster*, 17 Ves. jun. 512.

A petition lies to restrain a bankrupt from proceeding at law to supersedeas and the commission. *Ex parte Hill*, 1 Mont. 9.

A variance between the supersedeas and commission in the names and descriptions of the bankrupt or petitioning creditor, is fatal. *Matthews v. Dickinson*, 1 Moore, 104; 7 Taunt. 399.

It was discretionary in the Lord Chancellor to supersede a commission, although it might be unimpeachable on strictly legal grounds. *Ex parte Dufrene*, 1 Rose, 333; 1 Ves. & B. 54.

If a creditor petition to supersede, or that the assignees be removed, and the supersedeas is refused, but the assignees are removed upon the petitioner's counsel undertaking that the petitioner should prove, the creditor cannot appeal as to the supersedeas. *Ex parte Green*, 1 Mont. & Bligh, 90.

### 2. Defective Proceedings.

Although the requisites to sustain the commission appear on the proceedings to be established, yet, if the court be satisfied, on affidavit, of their insufficiency, it will supersede the commission without an issue. *Ex parte Gallimore*, 2 Rose, 234; 1 Madd. 67.

Where the act of bankruptcy, on the proceedings, was a conveyance of the bankrupt's estate and effects, which, upon the evidence, appeared not to be drawn according to the intention of the bankrupt, the commission was superseded. *Ex parte Norris*, 1 Glyn & J. 233.

A commission will not be superseded for want of an act of bankruptcy previous to striking the docket, the affidavit of belief that the party is a bankrupt at that time not being required by the statute, though according to the practice. *Wydown's case*, 14 Ves. jun. 80.

There not being a sufficient act of bankruptcy appearing on the proceedings, the Lord Chancellor ordered a further affidavit to be laid before him, and, it not being satisfactory, he superseded the commission with costs, having previously suspended the insertion of the advertisement in the Gazette. *Ex parte Foster*, 1 Rose, 49.

On the petition of the bankrupt, a commission was superseded, because the act on which the adjudication was made was invalid, and there was not an affidavit of any other act; it would have been otherwise if there had been such an affidavit. *Ex parte Burgess*, Buck, 233.

A commission, under which the bankrupt has obtained his certificate, is not to be superseded on an objection to the trading; or that debtors to the estate upon that ground refuse to pay the assignees. *Ex parte Crowder*, 2 Rose, 394.

Quære, if the application for that purpose were made by all the creditors under the commission? *Id.*

## 3. Delay in Prosecution.

London commissions were to be prosecuted within 14 days, and country commissions within 28 days, otherwise they were supersedeable. *Order, Lough*, 26 June, 1793, 2 Ves. jun. 190.

Where there is a bona fide intention to prosecute a commission, the general order may be dispensed with, upon accident, sickness of commissioners or witnesses, or adjudication too late for the Gazette; but strict proof required of a bona fide intention to prosecute. *Ex parte Freeman*, 1 Rose, 380; 1 Ves. & B. 34.

A commission issued 23d of May, 1826, and not opened until the 19th of March, 1827, was superseded on the ground of improper delay. *Ex parte Best*, 1 Mont. & Mac. 63.

Where an adjudication was made on Saturday, too late for the Gazette, and on Monday, another solicitor obtained a supersedeas under the general order of 26th June, 1793, and both the bankruptcy and the supersedeas appeared in the Gazette on Tuesday, the supersedeas was quashed, and a procedo was issued. *Ex parte Ellis*, 7 Ves. jun. 135.

Where, in a country commission the bankruptcy was found on the twenty-eighth day, but no notice given of it at the bankruptcy office till two days afterwards, the commission was held to be supersedeable within the order, although, by the course of post from place to place, where the commission was opened, an earlier communication was impossible; the practice being uniform, from the first existence of the order, to supersede on the thirtieth day, upon an application made on the twenty-ninth unless notice had been previously given on the twenty-ninth of the adjudication. *Ex parte Henderson*, 2 Rose, 190; Coop. C. C. 227.

A commission was superseded on the ground of delay in opening it, but the bond not assigned, because that is conclusive at law, and there may be a better remedy by action on the case. *Ex parte Fletcher*, 1 Rose, 454.

Where a commission is not prosecuted so far as to give an interest in it to others, the petitioning creditor may obtain a supersedeas as of course, unless the bankrupt oppose. *Ex parte Prose*, 1 Glyn. & J. 92.

If a person, knowing that a commission supersedeable under the order is to be proceeded in, takes out another, he will be liable for the costs. *Ex parte Sanden*, 1 Rose, 85.

A commission was superseded after a delay of nine months, though the delay was occasioned by the acts of the bankrupt, and was, with the concurrence of the creditors. *Ex parte Luke*, 1 Glyn. & J. 361.

Although a commission, supersedeable for non-prosecution, has been actually superseded, yet a second commission is not, as a matter of absolute right, to be granted to another solicitor; but, under circumstances, the first commission may revive. *Ex parte Freeman*, 1 Rose, 380; 1 Ves. & B. 34.

A commission, supersedeable for want of prosecution under the order, cannot be superseded

by the bankrupt without a petition. *Ex parte Gale*, 1 Glyn. & J. 43.

A commission was superseded for fraud, nothing having been done under it, and the petitioning creditor not to be found. *Ex parte Hartop*, 9 Ves. jun. 109.

## 4. Petitioning Creditor taking Money, &amp;c.

Though a commission may be rendered void, by reason of the petitioning creditor taking money or goods from the bankrupt, it cannot be considered as void in an action at law, but can only be superseded by the Chancellor under the statute. *Garratt v. Biddulph*, 4 Esp. 104—Le Blanc.

A commission relinquished by the petitioning creditor, upon obtaining security, was superseded, and his proof under another commission expunged; and being an assignee, a new choice was directed. *Ex parte Paxton*, 15 Ves. jun. 461.

A bankrupt who had brought an action to try the validity of his commission, and obtained a verdict, and, pending a rule to set it aside, secretly confessed judgment to one of his assignees, who was the petitioning creditor for a sum of money, in discharge of his debt and the costs of the action, in consideration of the petitioning creditor's consenting not to oppose the bankrupt's petition for a supersedeas: the court of C. P. set aside the judgment on the bankrupt's application, on 5 Geo. 2, c. 30, s. 24. *Thomas v. Rhodes*, 3 Taunt. 478; 2 Rose, 104.

But it was considered that the bankrupt himself could not supersede his commission by impeaching the petitioning creditor's debt, on the ground of a security taken privately; the remedy, under the stat. 5 Geo. 2, c. 30, s. 22, being given to some other creditor. *Ex parte Paxton*, 15 Ves. jun. 463.

A creditor is not of right entitled to a supersedeas for want of a good petitioning creditor's debt. *Cross*, diss. *Ex parte Clarke*, 1 Mont. & Bligh. 379.

Where the petitioning creditor may compound. *Ex parte Smith*, 2 Glyn. & J. 291.

The commission of a petitioning creditor, who, with the knowledge of two or three of the creditors received his debt from the bankrupt, was superseded under the stat. 5 Geo. 2, c. 30, s. 24, on the petition of a creditor privy to the transaction. *Ex parte Brine*, Buck. 19.

Quære, whether that creditor will be permitted to sue out a new commission. *Id.*

In an action against a petitioning creditor under a former commission, who illegally compounded with the bankrupt, the supersedeas of the former commission is conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623; 1 M. & P. 597.

A commission is an execution for all creditors; the petitioning creditor, therefore, cannot receive his debt and have the commission superseded while the others are unsatisfied. *Ex parte Stokes*, 7 Ves. jun. 408.

The Chancellor had not jurisdiction to enforce

payment, from the petitioning creditors, of a forfeiture for compounding with the bankrupt. *Ex parte Marshall*, 2 Glyn & J. 265. Sed quære, see *Ex parte Dimmock*, 2 Glyn & J. 261.

#### 5. Acceptance of Composition.

By 6 Geo. 4, c. 16, s. 133, where at a meeting (of which 21 days' notice shall have been given in the Gazette,) after the last examination, the bankrupt, or his friends, shall make an offer of composition, or security for composition, which nine-tenths in number and value of the creditors present shall agree to accept, another meeting for the purpose of deciding on such offer shall be appointed with similar notice: and if, at such second meeting, nine-tenths in number and value of the creditors present shall agree to accept the offer, and testify their acceptance in writing, the commission may be superseded.

By s. 134, creditors below 20*l.* are not to be reckoned in number, but the debts are to be computed in value, and creditors to the amount of 50*l.*, residing out of England, may vote by letter of attorney; and if any creditor agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit his debt, together with such gratuity or composition; and the bankrupt (if required) is to make oath that there has been no such transaction between him or any person with his privity, and any of his creditors, and that he has not used any undue means or influence with any of them to obtain their assent.

This enactment does not interfere with the rights or securities of persons not parties to the agreement. Per Lord Tenterden. *Tuck v. Tooke*, 9 B. & C. 437; 4 M. & R. 393.

Where a commission issues, under which nine-tenths of the creditors assembled at two meetings, called in pursuance of the statute, agree to accept a composition, whereupon the commission is superseded, a creditor, not present at the meetings, and not acceding to the composition, or proving his debt under the commission, is not barred of his action. *Id.*

On a supersedeas by consent, a creditor cannot privately stipulate for better terms than the other creditors. *Ex parte Ridley*, 1 Mont. 131.

A creditor who, upon receiving his debt, had superseded a commission, was ordered to refund. *Ex parte Thompson*, 1 Ves. jun. 157.

Where a bankrupt's creditors have agreed to accept a composition upon the amount of their debts, and consented to the commission being superseded, the court will grant an order for a supersedeas. *Ex parte Osborne*, 1 Deac. & Chit. 37.

#### 6. Consent.

A commission may be superseded at any time after the first meeting, upon consent of all the creditors who have proved. *Ex parte Duckworth*, 16 Ves. jun. 416.

But not before the first meeting, even with

the consent of the petitioning creditor. *Ex parte Law*, 4 Madd. 273.

A commission is not to be superseded without the consent of all the creditors who have proved, certified by the commissioners, and an affidavit of the bankrupt's confirmation of all purchases under the commission: the consent of creditors who had received 20*s.* in the pound is not dispensed with. *Ex parte Milner*, 19 Ves. jun. 204.

Upon supersedeas by consent, a purchaser is entitled to be indemnified against judgments outstanding before the bankruptcy. *Ex parte Lattour*, 1 Mont. & Bligh, 89.

The consent of official assignees to a supersedeas upon consent of creditors is not necessary. *Ex parte Barker*, 1 Mont. & Bligh, 412.

A supersedeas is granted on a certificate by a surviving commissioner of the names of the creditors who had proved. *Ex parte Wallis*, 2 Glyn & J. 25.

Where all the creditors consented to a supersedeas except A., who was abroad, and B. held a power of attorney from A., authorizing him to consent:—Held, that B. was entitled to consent; and an attested copy of the power was ordered to be filed with the proceedings. *Ex parte Hamilton*, 2 Deac. & Chit. 139.

The court of Review refused to supersede a commission upon consent, as one of the bankrupts had not surrendered, but superseded as to the bankrupt who had surrendered. *Anon.* 1 Mont. & Bligh, 416.

Though 20*s.* in the pound have been paid under a commission, and the certificate obtained, the commission cannot be superseded without the consent of the creditors, upon the circumstance that some are abroad and not to be found. *Ex parte Jackson*, 8 Ves. jun. 533.

A commission was superseded where all the creditors had been paid and consented, except two, who could not be found, but their securities were delivered up with receipts upon them, and their signatures proved. *Ex parte King*, 2 Ves. jun. 40.

It is ground for superseding a commission, that a part of the bankrupt's property will satisfy all the debts; taking care to secure that object immediately and effectually. *Ex parte Bryant*, 1 Ves. & B. 211; 2 Rose, 1.

#### 7. Proceedings.

##### (a) Within what Time.

By 6 Geo. 4, c. 16, s. 87, no title to any real or personal estate, sold under any commission or order, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect, unless he shall have commenced proceedings to supersede, and duly prosecute the same within twelve calendar months from the issuing.

A commission cannot be superseded before it is sealed; but the petitioning creditor delaying to seal it, and taking that objection, the time for sealing it was limited to three days. *Ex parte Williams*, 2 Ves. & B. 255; 2 Rose, 142.

A commission was superseded upon a petition



presented on the thirteenth day from the date of the commission, on the ground of fraudulent collusion between the bankrupt and the petitioning creditor. *In re Levy*, 1 Mont. & Mac. 11.

The statute 1 & 2 Will. 4, c. 56, does not prevent a bankrupt from applying to supersede, though two months have elapsed from the date of the fiat. *Ex parte Palmer*, 1 Mont. 497.

To supersede a commission, after certificate allowed, unless the invalidity appear upon the proceedings, a case of fraud must be made out. *Ex parte Levi*, Buck, 75.

A commission may be superseded after the certificate obtained, as where fraudulently taken out at the instance of the bankrupt; but where the application, which might have been made earlier, was delayed five years, and was founded upon objections to the trading and the petitioning creditor's debt, which must have been tried at law, the petition was dismissed. *Ex parte Moule*, 14 Ves. jun. 602.

A petition to supersede a commission, before the adjudication of the bankruptcy, is premature. *Ex parte Hague*, 1 Rose, 150.

#### (b) Petition.

A petition to supersede must contain an allegation that the petitioner is a creditor. *Ex parte Oxley*, 1 Glyn & J. 12.

On a petition by creditors to supersede, if they are styled "creditors" in the title of the petition, there need be no express allegation to that effect. *Ex parte Springett*, 1 Deac. & Chit. 381.

In petitions to annul a fiat, it is not necessary also to pray for a supersedeas. *Anon.* 1 Deac. & Chit. 498.

A single creditor who petitions to supersede a commission, on the ground of fraud and collusion, must also pray that a new fiat may issue; or without petitioning to supersede, he may pray for the removal of the assignees, and for others to be chosen in their room. If his petition is merely to supersede, it will be dismissed with costs. *Ex parte Shum*, 1 Deac. & Chit. 260.

#### (c) Practice.

A petition to supersede, accompanied with all the requisite certificates and signatures of the creditors and the commissioner, need not be served on the assignees. *In re Eastcourt*, 1 Deac. & Chit. 458.

If a person presenting a petition to supersede a commission, himself becomes a bankrupt before the petition is heard, his assignees must present a supplemental petition to have the benefit of that already presented, or it will be dismissed. *Ex parte Birdwood*, Buck, 99.

A commission having been superseded, with costs to be paid by the petitioning creditors, one of them, being a woman, after the costs were taxed, married, her husband was ordered to pay the taxed costs within a fortnight. *Ex parte Eagle*, Buck, 548.

Upon an application by a petitioning creditor,

for liberty to proceed with a commission which had been kept unexecuted pending an arrangement for a composition, or to supersede it and take out another, the Lord Chancellor superseded it without prejudice to the bankrupt's action, and refused to order that the same petitioning creditor should take out another. *Ex parte Smith*, 1 Rose, 332.

Petitions to supersede commissions must be served on the bankrupt. *Ex parte Barber*, Buck, 493.

A petition to supersede a second commission must be served on the assignees under the first. *Ex parte Irvine*, 1 Madd. 74; 2 Rose, 451.

The pendency of an indictment is not a ground for deferring the hearing of a petition to supersede a commission of bankruptcy, if the parties indicted do not object to proceed. *Ex parte Bromley*, 1 Mont. & Mac. 92.

On a petition presented to the Lord Chancellor before the 11th of January, 1832, to supersede, an action at law was directed to try the validity of the commission; and verdict given in favour of the petitioner. A new petition was thereupon presented to the court of Review, and granted:—Held, that the petitioner was entitled to the costs of both petitions, and that the court of Review had no jurisdiction on the question whether the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Thomas*, 1 Deac. & Chit. 443; *Ex parte Billiard*, Buck, 220; *Ex parte Edwards*, Buck, 232; *Ex parte Marks*, 1 Glyn & J. 70.

An affidavit of the petitioning creditor may be read in opposition to a petition to supersede. *Ex parte Lowley*, 1 Deac. & Chit. 460.

Where a petition to supersede was presented to the Lord Chancellor before the 11th of January, 1832, in order to save the expense of a new petition, service of a motion on the assignees that the prayer of the petition may be granted by the court of Review, is sufficient. *Ex parte Embden*, 1 Deac. & Chit. 461.

A bankrupt was permitted to petition against the commission in forma pauperis. *Ex parte Northam*, 2 Ves. & B. 124; 2 Rose, 140.

The court of Review has power to examine the bankrupt viva voce, on his petition to supersede the commission. *Ex parte Palmer*, 1 Deac. & Chit. 375.

On a petition to supersede, notice to produce the proceedings having been given to the assignees, the absence of such proceedings is not ground for ordering a supersedeas eo instanti: the petition must stand over at the costs of the assignees. *Ex parte Clarke*, 1 Deac. & Chit. 548.

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible to show that the commission was fraudulently concerted. *Ex parte Bellwood*, 2 Deac. & Chit. 37.

Costs will not be given against a bankrupt upon petition to annul the fiat. *Ex parte Heath*, 1 Mont. & Bligh, 116.

Where a petition to supersede was filed on the ground of there being no petitioning creditor's

debt, the deposition of the debt referring to an account, which purported to be annexed, but which was not to be found among the proceedings, the respondents were ordered to pay the costs of the day, the court having for this cause adjourned the hearing of the petition. *Ex parte Clarke*, 2 Deac. & Chit. 86.

### 8. Effect.

By 6 Geo. 4, c. 16, s. 94, persons from whom the assignees shall have received any real or personal estate, either by judgment or decree, are discharged in case the commission be afterwards superseded; so are persons who, without action or suit, shall bona fide deliver up possession of any real or personal estate to the assignees, or pay any debt claimed by them, if notice to try the validity had not been given and proceeded with.

Where a commission is superseded, every thing done under it falls with it; therefore, a joint and separate creditor, who sued out a separate commission, and proved under it, is, upon the supersedeas, restored to his right of election to prove against the joint estate. Such a creditor has a right to elect out of which estate he will be paid the costs of the supersedeas. *Ex parte Brown*, 1 Rose, 433.

The supersedeas divests the estates conveyed to the assignees by the bargain and sale of the commissioners. *Ex parte Boulter*, Buck, 262.

Where a commission is superseded, and another issued, though the same assignees are chosen, they have no title whatever under the first commission. *Bartlett v Tuchin*, 1 Marsh. 583; 6 Taunt. 259; 2 Rose, 435.

The assignees of a bankrupt are not bound by a sale under a former superseded commission; but may recover back the property, although the purchase were strictly bona fide. *Gould v. Shoyer*, 4 M. & P. 635; 6 Bing. 738.

The Lord Chancellor's jurisdiction, as to acts done in the bankruptcy, was not determined by the superseding of the commission. *Ex parte Fector*, Buck, 428.

So, after the commission is superseded, a petition will lie on behalf of a purchaser of the estates, put up to sale by the assignees, for the repayment of the deposit. *Id.*

In an action against a petitioning creditor under a former commission, who illegally compounded with the bankrupt, the supersedeas of the former commission is conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623; 1 M. & P. 597.

A commission supersedeable is not actually superseded till the writ of supersedeas issues *Ex parte Layton*, 6 Ves. jun. 434.

Therefore, having been opened, and the bankruptcy adjudged after the order made for the supersedeas, but before the writ sealed, notice of the application having been, according to the practice in the office, sent to the solicitor, the commission was supported. *Ex parte Leicester*, 6 Ves. jun. 429.

A commission superseded, to defeat a prosecution for omitting to surrender under circumstances of erroneous advice, is no fraud. *Ex parte Lavender*, 18 Ves. jun. 19; 1 Rose, 55.

### 9. Procedendo.

The Lord Chancellor might have directed the Vice-Chancellor to hear a petition for a writ of procedendo to issue, where a commission had been superseded on the Vice-Chancellor's order, confirmed by the Lord Chancellor. *Ex parte Hurd*, Buck, 45.

The Vice-Chancellor might certify the propriety of awarding the writ of procedendo in cases where a commission had been superseded upon his certificate. *Ex parte Crump*, Buck, 3.

A writ of supersedeas and a new commission being obtained, without disclosing that an attendance had been ordered upon a petition to compel the attendance of witnesses under the first commission, the writ was quashed, and the second commission superseded. *Ex parte Freeman*, 1 Ves. & B. 34; 1 Rose, 380.

### XXII. ISSUE TO TRY VALIDITY.

By 1 & 2 Will. 4, c. 56, s. 4, the court of Review may direct any issue of fact arising therein to be tried by a jury before one of the judges, or before a judge of assize.

By s. 30, if both parties, before the commissioner or subdivision court, consent to have the validity of any debt in dispute tried by a jury, an issue may be prepared under the direction of the commissioner or subdivision court, and sent for trial before one of the judges.

By s. 33, new trials of such issues may be moved for in, and granted by, the court of Review.

It is the practice of the court to take the assistance of a jury, when there is so much doubt that such assistance is felt to be necessary to the right determination of the case. But it is not the practice for the court to put the parties to the expense of a trial by jury, without first hearing all the evidence read, and the case fully argued, unless the counsel on both sides agree in stating that such must necessarily be the result, if the matter were gone into. Upon this principle the Lord Chancellor heard a petition, upon an appeal from the Vice-Chancellor's order, directing an action to be brought. *Ex parte Heygate*, Buck, 442.

Although the affidavits in support of a petition, and those in opposition to it, are conflicting, yet the court ought to hear them read, and the arguments of counsel, before it sends the parties to try the question at law. Where the trading upon the proceedings was only proved by a single witness, who, in an affidavit filed upon a petition to supersede the commission, contradicted that which he had formerly deposed to before the commissioners, the court superseded the commission. *Ex parte Trustram*, Buck, 550.

Where a bankrupt applies to be discharged out of custody, on the ground that he has obtained

his certificate; if the plaintiff in the action disputes the trading, the court will direct an issue to try that fact. *Yeo v. Allen*, 3 Dougl. 214; 1 Tidd's Prac. 211.

The party who has to sustain the affirmative, is to be plaintiff in an issue, and as such has the choice of the court in which it is to be tried. *Ex parte Malkin*, 2 Rose, 27.

For the form of an issue as to concert, and the practice as to the direction that parties should be examined on the trial of the issue, see *Ex parte Carter and Curry*, 1 Glyn & J. 326.

In directing an issue, the court will not order the examination of persons at the trial, who by the rules of the court at law could not be examined without such order, except sometimes in cases where the facts in dispute rest only on the knowledge of the plaintiff and defendant. *Ex parte Distie*, Buck, 234.

Upon an application for an order to examine the parties to a petition, as witnesses on the trial of an issue to try the validity of the commission, the Lord Chancellor declined to make such order. *In re Christie*, 1 Deac. & Chit. 290.

If, upon a petition to supersede for fraud in concocting a trading and petitioning creditor's debt, and praying costs against several persons, an issue is directed, such directions ought to be given as to give each person interested an opportunity of protecting himself at the trial. *Ex parte Hudson*, 2 Russ. 456.

If, upon hearing a petition to supersede for fraud in concocting a trading and petitioning creditor's debt, the court requires further investigation, and an issue would not do justice to all parties interested, without occasioning great expense and great complexity in the proceedings, the court would prefer a reference to the commissioners. *Id.*

On a petition by a bankrupt to supersede his commission, the court, in a plain case, will order a supersedeas, though the petitioning creditor desires an issue or an action. *Ex parte Gallimore*, 1 Madd. 67; 2 Rose, 234.

Where a separate commission issued against A. who was one of three partners, under which he obtained his certificate, and a joint commission afterwards issued against the three. On an application to supersede the separate commission, and an allegation that the certificate was not fairly obtained, the court directed an inquiry into the circumstances under which the certificate was obtained. *Ex parte Gillam*, 2 Cox, 193.

### XXIII. COMMISSIONERS.

#### 1. Generally.

*Who may be*—By 6 Geo. 4, c. 16, s. 12, the Chancellor had power to appoint such persons as he thought fit as commissioners, who had power and authority to take such order and direction with the bankrupt and his estate, as was given them by the act.

By 1 & 2 Will. 4, c. 56, s. 7, any one or more of the six commissioners thereby created, have, and

may perform and execute, the powers and authorities vested in commissioners of bankruptcy, as if they had been specially appointed.

By s. 14, country fiats are to be directed to certain persons, who must be practising barristers, solicitors, or attorneys, returned by the judges of assize.

By ss. 8 & 15, the oaths to be taken are pointed out, in lieu of those required by 6 Geo. 4, c. 16, s. 21.

The solicitor for a judgment creditor should not act as commissioner. *Ex parte Shum*, 1 Mont. 454.

A creditor ought not to act as a commissioner. *Ex parte Prosser*, 2 Rose, 370.

A creditor of the bankrupt was without his privy named a commissioner under the commission, but declined acting as such, and afterwards was chosen as assignee. On the petition of a creditor, he was restrained from acting as a commissioner. *Ex parte Crundwell*, 2 Madd. 292.

A commission was superseded upon an ex parte application, on the ground that two of the commissioners were creditors. *Ex parte Mathews*, 1 Glyn & J. 164.

A separate commission directed to a joint creditor, who acted under the commission, and permitted his debt to be proved without an order from the Lord Chancellor, was superseded at the costs of the petitioning creditor. *Ex parte Story*, Buck, 70.

When the barristers in a country commission were absent, an order might have been obtained for the others to hold the third meeting. *Ex parte James*, 1 Mont. 454.

The evasion of the order, which required the insertion of the names of two barristers in a country commission, was a ground for superseding. *Ex parte Harbin*, 1 Rose, 58.

A barrister who could not attend for the 20s. allowed by the statute, was not within the order. *Id.*

The commissioners shall sit daily (Sundays and holidays, to be hereinafter named, only excepted,) at 10 o'clock, at the court of Commissioners of bankrupts in Basinghall Street, and shall hold their subdivision courts at the same place, as occasion may require. *Reg. Gen. H. T.* 2 Will. 4, 1 Deac. & Chit. xxv.

By 1 & 2 Will. 4, c. 56, s. 9, registrars, and deputy registrars, were to be appointed.

A deputy registrar shall attend upon each commissioner, to take minutes of, to draw up, and have the charge of all proceedings before him, under the superintendence of the chief registrar. *Reg. Gen. H. T.* 2 Will. 4, 1 Deac. & Chit. xxvi.

*Power and Duty.*—Commissioners were to proceed upon the commission submitted to them, without reference to the existence of any other commission against the same party. *Ex parte Price*, 2 Glyn & J. 161.

A commissioner cannot purchase under the commission, either for himself or another. *Ex parte Bennett*, 10 Ves. jun. 381.

A commissioner, though he had not acted, could not become a purchaser of the bankrupt's estate without the consent of the creditors at a general meeting. *Ex parte Harrison*, Buck, 17.

Commissioners ought not to make affidavits, unless they are served with the petition. *Ex parte Husband*. 1 Glyn & J. 108.

Commissioners ought not to decline to act, and have a petition presented merely to get the opinion of the Lord Chancellor. *Anon.* 13 Ves. jun. 590.

Commissioners may be removed for misconduct, but are not to pay costs. *Ex parte Scarth*, 14 Ves. jun. 204.

Commissioners may be ordered to pay costs, in respect of conduct out of the course of their duty as commissioners. *Ex parte Scarth*, 15 Ves. jun. 293.

A petition to restrain an action by commissioners against the assignees for the costs of defending an action against the commissioners and messenger for false imprisonment, in which the plaintiff was nonsuited, or for a contribution among the creditors, was dismissed. *Ex parte Linthwaite*, 16 Ves. jun. 234.

*Fees.*—By 6 Geo. 4, c. 16, s. 22, the fees to commissioners were formerly regulated.

By 1 & 2 Will. 4, c. 56, s. 58, a penalty is given of 500*l.* against commissioners of the bankruptcy court taking any fees or gratuities.

The solicitor was answerable to the commissioners for their fees. *Ex parte Griffiths*, 2 Rose, 342; 1 Madd. 56.

And if not paid, on petition, he was ordered to pay them. *Id.*

## 2. Examination and Discovery of Property.

### (a) Who may be examined.

By 6 Geo. 4, c. 16, s. 24, the commissioners might summon before them, and examine on oath, any person whom they believed capable of giving any information concerning the trading or act of bankruptcy; and might require them to produce all documents which appeared necessary.

By ss. 33 & 34, the commissioners might in like manner summon and examine persons suspected of having the bankrupt's property in their possession; and might compel them to produce books and documents.

By 1 & 2 Will. 4, c. 56, s. 7, the commissioners, or any one of them, of the bankrupt's court, have the same power, except that no single commissioner can commit.

The commissioners under the stat. 1 Jac. 1, c. 15, s. 10, had authority to examine persons supposed to have or detain a part of the bankrupt's estate, although such persons did not claim to be interested therein. *Ex parte Anderson*, Buck, 397.

The partner of the bankrupt was ordered to attend before the commissioners to be examined, and to produce the partnership books and papers, there being no suggestion of his being indebted to the bankrupt, or having property of the bank-

rupt in his possession. *Ex parte Levett*, 1 Glyn & J. 185.

The solicitor of a purchaser of an estate from the bankrupt was ordered to attend the commissioners, for the purpose of being examined, without prejudice to any question of privilege. *Ex parte Hodgson and Watson*, 2 Glyn & J. 21.

There was authority in the commissioners and the Chancellor in bankruptcy, to compel a discovery even from a purchaser for valuable consideration without notice. *Ex parte Herbert*, 13 Ves. jun. 189.

The commissioners have no power under the 33 & 34 sections of 6 Geo. 4, c. 16, to examine the executors of a debtor to the bankrupt, as to the amount of assets that have come to the hands of such executor. *Ex parte Solarte*, 1 Deac. & Chit. 311.

In 1811, A. and B. entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820, a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in A.'s hands. All the outstanding debts were subsequently settled. In 1830, B. was declared bankrupt, till which time the books were never called for by B.:—Held, that A. and B. nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship; and therefore, although there was no charge of fraud in the settled account, yet the commissioner had jurisdiction to call A. before him, and examine him and the books relative to the former dealings of the bankrupt. *Ex parte Truman*, 1 Deac. & Chit. 464.

A testator by will directs his business to be carried on by his executors, and that when his son B. (the bankrupt) attains twenty-one, he should, on performing certain terms, be admitted to a fourth share. B., at the age of twenty, enters into another business on his own account, and never claims the right under the will, or perform those conditions:—Held, nevertheless, that he had not abandoned the right, and therefore that his assignees have a right to call the executors of the will before the commissioner, and examine them as to the affair of partnership. *Ex parte Marks*, 1 Deac. & Chit. 499.

### (b) What Questions.

By 6 Geo. 4, c. 16, s. 34, if a person summoned shall refuse to be sworn, or to answer lawful questions touching the person, trade, dealings, or estate of the bankrupt, or concerning the act of bankruptcy, or shall not fully answer to the satisfaction of the commissioners, or shall refuse to sign and subscribe his examination reduced into writing, not having any lawful objection allowed by the commissioners, or shall not produce any books, papers, deeds, and writings, or other documents in his custody or power, which he was required to produce, the commissioners may commit him.

The authority of commissioners to commit depends upon the particular act of parliament, to

which they must adhere. *Isaac v. Impey*, 4 C. & P. 120; 10 B. & C. 442.

Commissioners are authorized to examine a witness concerning the person, trade, dealings, estate, and effects of the bankrupt, and, incidentally to this power, they may examine him also respecting other individuals, through whom they may be likely to obtain information on the points; and, therefore, where a witness was asked questions as to when and where he last saw the bankrupt's wife:—Held, that such questions were legal and material, and that the commissioners were justified in committing him for giving unsatisfactory answers to these questions: Held, also, that the true criterion by which to judge as to the propriety of the commitment, was to consider all the questions and answers collectively, and then to say whether the whole examination was satisfactory or not; and therefore, where the commissioners in their warrant set out several questions, to some of which, taken alone, the answers were satisfactory, held also, that this was no objection to a warrant committing the party "till he should full answer make to the questions so put to him as aforesaid." *Ex parte Vogel*, 2 B. & A. 219.

The commissioners have a right to inquire whether one who comes to prove his debt means to proceed at law. *Anon. Loft*, 52.

But they have no right to ask questions, the answers to which may subject the witness to fine or other criminal punishment. *Smith v. Beadnell*, 1 Camp. 30—Ellenborough.

That a man cannot positively recollect a fact, but should rather believe the affirmative, is a full and satisfactory answer by a witness on a commission of bankruptcy. *Miller's case*, 2 W. Black. 881; 3 Wils. 427.

The commissioners may compel the production of a book, to enable them to read the entries—Per Bayley. *Isaac v. Impey*, 10 B. & C. 442; 4 C. & P. 120: *S. P. Ex parte Isaac*, 3 Y. & J. 38.

Commissioners have no authority to commit a witness for refusing to read an entry in a book which he produces. *Id.*

A witness summoned under the statute, being required to read certain entries in a book to which, during his examination, he had referred, but which he had not been called upon to produce, refused to read the entries, whereupon he was committed for refusing to answer the said question:—Held, that the warrant was bad in substance and in form; a request to read not being a question. *Id.*

The witness's speaking of it as a question at the time of his refusal made no difference. *Id.*

The commissioners were liable to an action for false imprisonment, although their only motive was a wish to discharge their duty. *Id.*

On a question on the legality of the commitment of a witness, all the questions and answers must be looked at as forming one examination; and a witness cannot be committed for not answering as to his belief the intention of the bankrupt, unless other parts of his examination show such belief to be material with reference to the

person, trade, dealing or estate of the bankrupt. *Ex parte Bagster*, 1 M. & R. 572: *S. C. nom. Ex parte Baxter*, 7 B. & C. 673.

A commitment by commissioners must be for not satisfactorily answering a material question, and it is not sufficient that the witness, throughout his examination, was unwilling to make a full disclosure. *Id.*

And a question as to the witness's belief of the intention of the bankrupt on a particular occasion, which might have tended to show the bankruptcy was concerted between them, where other questions might have been put to show that, is immaterial. *Id.*

Where a party, brought before commissioners of bankrupt, and examined by them with a view to ascertain whether the bankruptcy had been concerted between him and the bankrupt, and how the stock of the latter had been disposed of, was asked with what intention he believed the bankrupt had come to him on a certain day before the docket was struck; to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief:—Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party. *Id.*

The Court cannot receive affidavits to explain the conduct of, and the circumstances under which a person was committed by commissioners, for not satisfactorily answering questions put to him touching the bankrupt's estate and effects. *In re James*, 2 Chit. 112.

A solicitor summoned as a witness to produce a mortgage-deed of the bankrupt's property, refused to produce such deed, and was committed by them for refusing to answer satisfactorily:—Held, that the warrant was defective in form, and that the commitment ought to have been for not producing. *Ex parte Frowd*, 7 Mont. & Mac. 269.

If a witness refuse to produce his books, or a copy to refresh his memory, so that he may be enabled to answer such questions as, without reference to his books, he cannot answer, he may be committed for not answering satisfactorily. *In re Dale*, 1 Mont. & Mac. 271.

### (c) Compelling Attendance.

By 6 Geo. 4, c. 16, s. 33, commissioners are authorized, by writing under their hands, to summon before them certain persons, and, in case of non-attendance, to cause them to be apprehended by warrant.

Sec. 24, gives them the same power to compel attendance before adjudication.

In order to justify the commissioners in issuing their warrant to apprehend a witness to whom they had directed a summons, it was necessary that a reasonable time should intervene between the service of the summons and the time when the witness was required to attend, and that such reasonable time should be sufficient for the pur-

pose. *Grocock v. Cooper*, 8 B. & C. 211; 2 M. & R. 78.

Seem, that the commissioners are not bound to have information on oath of the service of the summons before they issue their warrant, but that it is sufficient if the summons be actually served. *Id.*

In an action against commissioners for false imprisonment, by a person who had been apprehended under their warrant for not appearing to give evidence before them, the reasonableness of the summons, and of the tender of expenses, is a question of fact for the jury. *Id.*

Commissioners have no authority to commit one suspected to detain effects of the bankrupt, for not attending to be examined on the first summons. *Dyer v. Missing*, 2 W. Black. 1635.

A witness summoned by commissioners is bound to attend, although his expenses may not have been tendered to him; although if he, in fact, be prevented by want of means, it would be an answer to an application for an attachment. Such witness, however, is to have his reasonable costs, to be settled by the commissioners. *Ex parte Benson*, 2 Rose, 75.

All documents required to be produced should be described in the body of the summons, previously to such summons being signed by the commissioners. *Ex parte Froud*, 1 Mont. & Mac. 270.

A witness who had been before summoned was ordered to attend the commissioners, to be examined touching the act of bankruptcy, and leaving the order at the place where the witness resided when served with the summons, was ordered to be good service. *Ex parte Bowler*, Buck, 258.

Under the stat. 1 Jac. 1, c. 15, ss. 10 & 11, it was not necessary, upon summoning a witness before the commissioners to be examined, to tender him the expenses of his journey beforehand; though, if he were in fact without the means of taking the journey, it might be an excuse for not obeying the summons; and consequently, a warrant issued by the commissioners on account of the non-attendance of such witness, without lawful impediment, authorizing his arrest for the purpose of examination, was not legal. *Battye v. Gresley*, 8 East, 319.

It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact, in an action of trespass and false imprisonment brought by him for such arrest, admitting that an inability to bear the expense of the journey is a lawful impediment. *Id.*

Such warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the first summons. *Id.*

The propriety of granting the warrant, being an act of discretion, must be determined upon by the commissioners acting together at the time; and their order to their officer to make out such warrant must be taken to include their direction as to the persons to whom it is to be directed; but the mere act of signing the names of the commissioners to the warrant may be done by them separately. *Id.*

Commissioners, as they cannot issue subpoenas, must, upon questions of fact coming before them collaterally, proceed by affidavit. *Ex parte Thistlewood*, 19 Ves. jun. 250; 1 Rose, 290.

There was jurisdiction in bankruptcy to enforce the commissioners' summons for the attendance of witnesses, to prove the requisites to support the commission, and to commit for contempt by disobedience to an order, though there was no express authority by the general jurisdiction. *Anon.* 14 Ves. jun. 451.

A warrant to arrest a witness might issue at once, on disobedience to their summons, and did not require a second summons. *Ex parte Linthwaite*, 16 Ves. jun. 235.

Persons ordered to attend commissioners to prove the requisites of bankruptcy, having refused obedience to the warrant of the commissioners, on the ground that they were creditors, and therefore incompetent as witnesses; it was held, that if a party is a creditor it is not a preliminary objection to his being examined, as the result of the examination may establish that he is not a creditor. *In re Goodie*, 2 Rose, 330.

#### (d) Expenses of Witnesses.

By 6 Geo. 4, c. 16, s. 35, the commissioners may give such costs and charges as they think fit to any person known or suspected to have any of the bankrupt's estate in his possession, or supposed to be indebted to him, who is summoned; and every witness who is summoned is to have his necessary expenses tendered to him in like manner as upon a subpoena.

A party attending commissioners for the purpose of being examined as to the property of the bankrupt, is not entitled to have his expenses paid or ascertained till his examination is concluded. *Ex parte Roscoe*, 2 Rose, 345; 1 Mer. 189.

Where a party, committed by commissioners of bankrupt for not answering to their satisfaction, wishes to be again brought before them, he must bear the expense of that proceeding. *Ex parte Baxter*, 8 B. & C. 344; 1 Mont. & Mac. 16.

An order was made that a witness, who had been twice committed by commissioners, should be again examined by them, on tendering to the solicitor under the commission the costs of the meeting, and of being brought up. *Id.*

The commissioners may make a verbal order for the payment of expenses to a person whom they have summoned to attend them, and it shall be recovered in assumpsit. *Yarker v. Botham*, 1 Esp. 64—Kenyon.

#### (e) Commitment.

By 6 Geo. 4, c. 16, s. 34, the commissioners had power to commit by warrant.

By 1 & 2 Will. 4, c. 56, s. 7, no single commissioner has power to commit otherwise than to the custody of the messenger or other officer, to be brought up before a subdivision court, or the court of Review, within three days.

Upon a question of discharge from commitment by commissioners, the Lord Chancellor would not go out of the return to the writ of habeas corpus, into the conduct of the bankrupt under the bankruptcy, or into any examination, other than that stated in the return to the writ. *Ex parte Oliver*, 1 Rose, 407.

The Lord Chancellor refused to interfere with the discretion of the commissioners, by an order upon them to enforce answers from a person examined as to the bankrupt's property. *Ex parte Furr*, 9 Ves. jun. 513.

A commitment by two commissioners of the court of bankruptcy is valid: a warrant is sufficient, if enough appear to show that the court has jurisdiction. *In re Smith*, 1 Mont. & Bligh, 418.

Seem, that a commitment which does not set out all the questions, is not bad, if it appear on the warrant that the prisoner did not make any objections to the questions, or that the prisoner has answered all questions put to him. *Ex parte Leake*, 9 B. & C. 236.

The whole of the questions and answers should be set out in the warrant of commitment. *Tomlin's case*, 1 Glyn & J. 373.

The warrant need not state that the questions related to the bankrupt's person, trade, &c., or that they were lawful questions, as it is sufficient if, upon the examinations, they appear so to be. *Ex parte Harrison*, 1 B. & Adol. 410.

The court, on habeas corpus, will look into the examination themselves, to see whether the question were upon a subject within the jurisdiction of the commissioners. *Id.*

A warrant is defective which refers to, without setting out, previous examinations, and without which the court cannot judge of the sufficiency of what appears. *Horton's case*, 2 Glyn & J. 215.

A commitment is defective if the commissioners do not examine with sufficient minuteness. *Id.*

The omission to set out a previous examination does not vitiate a commitment upon a distinct ground. *Atkinson's case*, 2 Glyn. & J. 218.

A warrant of commitment, after reciting an examination of the bankrupt, and that he refused to sign or subscribe such examination, proceeded as follows: "These are therefore to require and authorize you, &c. to receive the said, &c. into your custody, &c., until such time as he shall submit himself to us, &c., and shall sign or subscribe the examination aforesaid, according, &c." —Held, that the submission was properly confined to the refusal to sign, and that the warrant was not informal. *In re Davidson*, 1 Mont. & Mac. 443.

A warrant, stating that various questions had been proposed, and, amongst others, the following, is defective. *Lawrence's case*, 2 Glyn & J. 209.

A warrant is defective which refers to documents in a former examination without setting them forth, so as to enable the judge to decide

upon the same information as the commissioners possessed. *Price's case*, 2 Glyn & J. 211.

A commitment by commissioners renders the bankrupt in custody on criminal process. *In re Taylor*, 3 East, 232. And see *In re Bromley*, 3 D. & R. 310.

For a commitment warrant under the hands and seals of the commissioners is a criminal process. *Id.*

#### (f) Jurisdiction over.

It was in the discretion of the Lord Chancellor to permit or refuse a defendant at law to have copies of his examination before the commissioners upon his petition. The examinations having been laid before the Lord Chancellor, he refused the application. *Ex parte Chater*, Buck, 290.

The court would not restrain commissioners in their examinations, upon an allegation that the object of the examination was to procure evidence against the parties examined as to penalties incurred by gaming. *Ex parte Burlington*, 1 Glyn & J. 30.

The remedy was by an application to the Chancellor to have the examination taken off the file and cancelled. *Stockfleth v. De Tastet*, 2 Rose, 282; 4 Camp. 10—Ellenborough.

An application to compel a creditor taking the benefit of the commission to produce his books, relating to his transactions with the bankrupts, was refused. *Ex parte Woolley*, 1 Glyn & J. 395.

Where the legislature gives authority to commissioners, and not power to punish disobedience to that authority, the great seal will lend its aid; but not where the legislature has given no authority upon the subject. *Id.*

The court will not assume that commissioners are likely to exceed the authority vested in them. Where a mortgagee of the bankrupt's property, who was summoned to attend before the commissioners, petitioned that they might be restrained from requiring the production of the mortgage deed, the petition was dismissed with costs, as being premature. *Ex parte Beeston*, 1 Mont. & Mac. 244.

#### 3. Actions against.

An action for false imprisonment was formerly maintainable against commissioners of bankruptcy for an illegal exercise of their discretion, in improperly committing a bankrupt who had made a satisfactory answer. *Miller v. Sear*, 2 W. Black. 1141; *S. P. Isaac v. Impey*, 10 B. & C. 442; 4 C. & P. 120; *Ex parte Isaac*, 3 Y. & J. 38. And see *Crowley v. Impey*, 2 Stark, 261, and *Perkin v. Proctor*, 2 Wils. 382.

But it would not lie for committing a witness to prison for not satisfactorily answering questions put to him, when under examination before them, touching the estate of a bankrupt, although the questions appeared to the court to have been satisfactorily answered. *Doswell v. Impey*, 2 D. & R. 350; 1 B. & C. 163.

As now the commitment is by a court of judicature, no action will lie, as regards town flats: the law on this head, therefore, applies to county commissioners only.

By 6 Geo. 4, c. 16, s. 40, in actions of false imprisonment, the court may, at the request of the defendants, look at the whole examination of the party committed, even if it be not stated in the warrant.

By s. 41, no writ is to be issued against any commissioner in less than a month after notice of action given.

By s. 42, the plaintiff shall not recover, unless the notice be proved; and no evidence shall be given of any thing not contained in the notice.

By s. 43, tender of amends may be made within the month after notice, and may be pleaded in bar of the action; and may be paid into court before issue joined.

By s. 44, the time for bringing actions is limited to three calendar months after the fact committed: the general issue may be pleaded; and on verdict for the defendants, nonsuit, discontinuance or judgment for defendants on demurrer, the defendants are to have double costs.

#### XXIV. SOLICITOR.

##### 1. Authority and Duty.

By 1 & 2 Will. 4, c. 56, s. 10, all attorneys and solicitors may practise in the court of Bankruptcy upon being admitted therein.

An attorney might sue out and prosecute a commission of bankruptcy, without being admitted a solicitor of the court of chancery. *Wilkinson v. Diggles*, 2 D. & R. 302; 1 B. & C. 158.

And might recover for his fees and disbursements. *Id.*

If a certificated conveyancer induce a creditor of a bankrupt to employ him in investigating the bankrupt's affairs, by representing himself to be an attorney and solicitor, he cannot maintain an action for his trouble, nor for money paid as fees to counsel. *Crammond v. Crouch*, 3 C. & P. 77—Tenterden.

And where, in an action of debt on the stat. 2 Geo. 2, c. 23, for acting as a solicitor in the court of Chancery, (viz. in the matter of T. S. a bankrupt,) the defendant, although a certificated conveyancer, not being a solicitor of the said court: the plaintiff having proved that the defendant had been consulted, and been instrumental in the matter of a petition to the Lord Chancellor by the creditors of T. S. (which petition bore the name of certain admitted solicitors, and was intitled "In bankruptcy,") praying for the taxation of the bill of the solicitor to the commission, was nonsuited; the court of C. P. refused to set it aside. *Ford v. Webb*, 3 B. & B. 241; 7 Moore, 64.

Quære, whether the court of Review has jurisdiction over a solicitor to order him to refund

money, merely because he is a solicitor of the court. *Ex parte Hicks*, 1 Mont. & Bligh, 256.

The solicitor will not be charged with costs, unless guilty of such an abuse as amounts to a contempt, in which case he might even be struck off the roll; but the charges being denied, the creditor must bring an action against him. *Ex parte Heywood*, 13 Ves. jun. 67.

Upon superseding a fraudulent commission, the solicitor may be charged with costs, as well as the other parties, except as to a criminal prosecution not under a direction in bankruptcy, and in which he was not a defendant. *Ex parte Arrowsmith*, 14 Ves. jun. 209.

An application to remove a solicitor from being or acting as a master extraordinary of the court of Chancery, and to strike him off the roll of such court, though it may be properly made by reason of his conduct in a matter of bankruptcy, should not be made in the bankruptcy, but should be addressed to the general jurisdiction of the court. *Ex parte Love*, 1 Glyn & J. 78.

Upon an affidavit being taken off the file for scandal, the solicitor who filed it is liable for all costs and expenses, as between solicitor and client. *Ex parte Wake*, 1 Mont. & Bligh, 259.

The solicitor to a commission cannot purchase under it, either for himself or another. *Ex parte Bennett*, 10 Ves. jun. 381.

A purchase of dividends cannot be made by a solicitor to a commission, for his own benefit. *Ex parte James*, 8 Ves. jun. 337.

Where mortgaged property is sold, and the same solicitor is concerned for the assignees and the mortgagee, a separate solicitor should be appointed for the purposes of the sale. *Ex parte Rolfe*, 1 Deac. & Chit. 77.

The solicitor to a commission was restrained by injunction from negotiating a promissory note that he had received from the bankrupt for his bill of costs in procuring his certificate, where the bankrupt having purchased the debts of many of the creditors, and the solicitor being indebted to the estate in such a sum, the share of it coming to the bankrupt, standing in the place of the creditors, in respect of the debts so purchased by him, would exceed the amount of the promissory note. *Ex parte Harding*, Buck, 24, 37.

A purchase of a bankrupt's estate by the solicitor to the commission was set aside; and the Lord Chancellor would not permit him to bid upon the resale, upon discharging himself from the character of solicitor, without the previous consent of the persons interested, freely given upon full information. *Ex parte James*, 8 Ves. jun. 337.

If a solicitor, not being a bankrupt's solicitor, has in his custody a deed of assignment executed by the bankrupt, he must produce it, if required so to do by the commissioners. *Ex parte Law*, Buck, 110.

##### 2. Bill of Costs.

###### (a) Taxation.

*Proceedings.*—By 6 Geo. 4, c. 16, s. 14, the



commissioners are to tax the costs of the petitioning creditor up to the choice of assignees, and by writing to direct the payment by the assignees; the bill of the solicitor under a commission, for business done after the choice of assignees, is to be settled by the commissioners, except so much as relates to any action or suit, which is to be settled by the proper officer of the court in which the business was transacted, and the same so settled is to be paid by the assignees: provided that any creditor who has paid to the amount of 20l., and is dissatisfied with such settlement, may have the bill taxed by a master in Chancery.

By 1 & 2 Will. 4, c. 56, s. 5, and 3 & 4 Will. 4, c. 47, s. 8, all costs of suit between party and party in the court of Review are in the discretion of the court, and are to be taxed by one of the registrars.

The commissioners are to tax bills of costs from time to time, and are not to wait until the whole business of the commission is concluded. *Ex parte Gore*, 2 Glyn & J. 117.

A bill of costs, by a solicitor, under a commission of bankruptcy, though approved by the commissioners, and stated and allowed in the accounts of the assignees, was held to be taxable under 5 Geo. 2, c. 30, s. 46. *Ex parte Gregson*, 3 Madd. 49.

A master's jurisdiction to tax the bill of costs of the solicitor to a commission under the 5 Geo. 2, c. 30, s. 46, was not conclusive until the master had signed his certificate. *Ex parte Neale*, 2 Glyn & J. 226.

Where a commission is superseded by an arrangement between the bankrupt and his creditors, and the bankrupt pays the solicitor's bill of costs without taxation, the court will afterwards order them to be taxed. *Ex parte Heyden*, 2 Glyn & J. 52.

The provision in the stat. 5 Geo. 2, c. 30, s. 25, for taxation of the petitioning creditor's costs on the day appointed for the choice, was merely directory. *Ex parte Haynes*, 1 Glyn & J. 35.

A bill of costs up to the choice, which had been taxed by the commissioners at 97l. 10s., was ordered to be taxed by the master, on the ground that the commissioners had excluded the parties from attending the taxation. *Ex parte Palmer*, 2 Glyn & J. 34.

An order was made under the act 2 Geo. 2, c. 23, s. 12, to tax a solicitor's bill for striking the docket, and a journey to get an affidavit of debt, being business relating to the bankruptcy, though previous to it. *Ex parte Smith*, 3 Ves. jun. 706.

Where the amount of a solicitor's bill, up to the choice of assignees, is *prima facie* exorbitant, it is of course to refer it to the master to be taxed. *Ex parte Emery*, Buck, 422.

A solicitor's bill of costs, where the charges were *prima facie* exorbitant, ordered to be taxed after payment made, and after the death of the assignee who had paid it. *Ex parte Neale*, Buck, 111.

The rule of taxation of a solicitor's bill adopted in bankruptcy, applies to the bill taxed by the

commissioners. *Ex parte Westall*, 3 Ves. & B. 141.

It is not of course to refer to the master a bill of costs up to the choice of assignees, already taxed by the commissioners; particular objections must be stated; if the solicitor refuses to give a copy of his bill, a reference will be made. *Ex parte Sutton*, 4 Madd. 395.

It is of course upon an *ex parte* application, to have an order to tax a solicitor's bill; if the solicitor wish to modify or discharge the order, he must apply to the court for that purpose. *Ex parte Hewitt*, Buck, 388.

To a petition that the assignees may out of the funds in their hands, pay the solicitor's bill up to the choice, and which had been taxed by the commissioners, it is a sufficient objection that they have allowed charges in which it ought to be expunged. *Ex parte Thelwall*, 1 Rose, 397.

An order in bankruptcy was made for the taxation of a solicitor's bill, for business done in bankruptcy and otherwise. *Ex parte Arrowsmith*, 13 Ves. jun. 124.

*Before bringing an Action.*—An action may be maintained by a solicitor against an assignee for business done under a commission, although the bill had not been taxed by a master in Chancery, under the statute 5 Geo. 2, c. 30, s. 45. *Tara v. Heys*, 1 Stark. 278; Holt, 378, n.—Gibbs.

A solicitor to a commission may maintain an action for the amount of his bill up to the choice of assignees, without having had his bill taxed by the commissioners under s. 24 of the 6 Geo. 4, c. 16, that provision applying only to cases between the assignees and the estate. *Taylor v. McGaugan*, 4 C. & P. 96—*J. Parke v. S. P. Crowder v. Davies*, 3 Y. & J. 433.

An attorney brought an action against the petitioning creditor, under a commission of bankruptcy, for business done previous to the assignment:—Held, that, notwithstanding the statute, he might maintain the action, without proof that his charges had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer. *Fisher v. Filmer*, 5 C. & P. 92—Vaughan.

*Petition.*—Under the statute, where a creditor is dissatisfied with the taxation of the commissioners, he must present a petition for an order of reference to have the bill settled by a master in Chancery; without such order the masters have no authority to retax a bill which has been taxed by the commissioners. *Ex parte Hickman*, 1 Mont. & Mac. 252.

Upon a petition by a creditor under 6 Geo. 4, c. 16, s. 14, to retax a solicitor's bill, it is not necessary to serve the assignees. *Ex parte Payne*, 1 Mont. 455.

A petition to the court of Review to tax a solicitor's bill, must be served on the opposite party. *Ex parte White*, 1 Deac. & Chit. 41.

A petition to tax a bill after payment must

state the objectionable items. *Ex parte Beresford*, 2 Glyn & J. 259.

A petitioner for an order to tax a solicitor's bill of costs up to the choice of assignees, after it has been taxed by the commissioners, will not be granted, unless specific errors are stated. *Ex parte Brereton*, 4 Madd. 479.

An assignee, who is not a creditor, may petition to tax a solicitor's bill. *Ex parte Barlow*, 1 Mont. 87.

A creditor cannot apply to have the solicitor's bill taxed, except on the ground of neglect of duty by the assignees. *Ex parte Walker*, 1 Glyn & J. 95.

A creditor may petition to refer the solicitor's bill, up to the choice of assignees, to the master for retaxation, without stating in his petition the items to which he objects as settled by the commissioners. *Ex parte Key*, 1 Mont. 133.

If the assignees neglect to have a solicitor's bill of costs taxed by the commissioners, the bankrupt may, after having settled with the creditors, apply to the general jurisdiction of the court, and obtain an order to tax the bill. *Ex parte Bayley*, 1 Mont. 208.

A. employs B., a solicitor, to strike a docket against C., which is done, but afterwards is abandoned. Subsequently, A. employs D. to strike a docket, which is regularly followed up:—Held, that A. is not entitled to have B.'s costs taxed under the commission. *Ex parte Neale*, 1 Deac. & Chit. 486.

**Costs of Taxation.**—Where one-sixth of a solicitor's bill has been taxed off upon a reference, and he applies to confirm the report, giving notice to the petitioning creditor, he must pay the costs of the appearance on such application, and of the petition and taxation. *Ex parte Nutting*, 1 Mont. & Bligh, 267; 1 Deac. & Chit. 551.

One-sixth of a bill of costs in bankruptcy delivered to the master to be taxed being taken off, the solicitor was ordered to pay the costs of the taxation. *Ex parte Hatherway*, 2 Madd. 329.

An order in bankruptcy was made, referring a solicitor's bill to a master for taxation, reserving the costs of taxation; and the bill being taxed, and more than one-sixth taken off, the solicitor brought an action for taxed costs, without deducting the costs of taxation: on petition the action was staid, and a reference made to the master to tax the costs of the taxation of costs, and, after deducting the amount thereof from the taxed costs, the same were ordered to be paid to the solicitor. *Ex parte Bellott*, 4 Madd. 379. And see *Hewitt v. Bellott*, 2 B. & A. 745.

A solicitor must pay the costs of the taxation of the bill reduced by the taxation more than one-sixth of the amount, which reduction arose from the master disallowing extra fees paid to the commissioners for travelling expenses. *Ex parte Inman*, Buck, 129.

#### (b) Recovery.

If a person who is not the petitioning creditor, employ an attorney to sue out a commission

where no effects are received under the commission, he is liable to the attorney. *Pocock v. Russell*, M. & M. 358; S. C. nom. *Pocock v. Russell*, 4 C. & P. 14—Tenterden.

A solicitor may sue out a commission upon a debt for costs, without having delivered a bill signed. *Ex parte Howell*, 1 Rose, 312.

The attorney employed by the petitioning creditor before the choice of assignees, and continued by the assignees afterwards, having delivered his bill to the assignees, including all the charges incurred by order of the petitioning creditor in the first instance, and having received a certain sum, on account of his bill generally, from the assignees, is bound, as the assignees themselves were, by the statute, to appropriate the sum so received in reduction of the charges incurred by order of the petitioning creditor, and for which he was originally responsible; and therefore the amount of such charges, covered by the sum so received, cannot be set off by the attorney against a debt due from him to the petitioning creditor on his own account. *Phillips v. Dicus*, 15 East, 248; 1 Rose, 345.

So, an attorney may prove his bill under a commission of bankrupt, without delivering a signed bill. *Eicke v. Nokes*, M. & M. 303—Tenterden. Rule for new trial afterwards obtained. *Id.*

An attorney in bankruptcy is entitled, on petition, to have paid to him a fund in court in part payment of his bill of costs at law and in bankruptcy, relative to the claim under which the money was paid into court, although his client since the money was paid into court, had taken advantage of the insolvent act. *Ex parte Moule*, 5 Madd. 462.

#### 3. Lien for Costs.

A solicitor has a lien upon costs ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Ex parte Bryant*, 2 Rose, 237.

Quære, whether the proceedings under a commission that has been superseded are subject to the solicitor's lien? *Ex parte Shaw*, Jacob, 270.

The petitioning creditor's solicitor has no lien on the proceedings for his bill. *Id.*

#### XXV. MESSENGER.

##### 1. Duty and Authority.

By 6 Geo. 4, c. 16, s. 27, the messenger appointed by the commissioners under their warrant, may break open any house, chamber, shop, warehouse, door, trunk, or chest, of any bankrupt, where such bankrupt or any of his property is reputed to be, and seize upon the body or property of any such bankrupt.

By s. 28, even in Ireland.

By s. 29, the messenger may obtain a search warrant from a justice where property of the bankrupt is sworn to be concealed.

By s. 30, even in Scotland.

By s. 31, no actions are to be brought against persons acting in obedience to the warrant of commissioners, unless demand of a perusal and copy of the warrant has been given, and making the petitioning creditor a defendant.

Messengers, upon taking possession, are forthwith to take an inventory of the bankrupt's effects, but no appraisal shall be made, or other expenses incurred, without the special direction of the commissioner, until after the appointment of the creditor's assignees. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxviii.*

If the messenger show his warrant to a person supposed to be in possession of some bacon, the property of the bankrupt, and the bankrupt says, "I have it not: I have some that came from a shop in Exeter" (which was that of the son and daughter of the bankrupt); and the messenger desire him to take care of it, and not to part with it, as more would be heard about it, and he afterwards suffer it to be removed, this is a conversation. *Hawkes v. Dunn, 1 Tyr. 413; 1 C. & J. 519.*

The 27th section does not give power to break open all houses, &c., where the bankrupt's property is reputed to be, but only any houses, &c., of the bankrupt. *Edge v. Parker, 8 B. & C. 700—Bayley.*

A warrant under s. 29 to search for the goods of a bankrupt in the house of a third person, is not valid, if granted to any one except the messenger under the commission. *Sly v. Stevenson, 2 C. & P. 464—Best.*

There is no jurisdiction in bankruptcy to order goods seized by a messenger to be delivered up to a person claiming them as his. *Ex parte Craggs, 1 Rose, 25.*

The messenger is to enter and seize, at his own hazard, the property of the bankrupt; but if he enters the house, and seizes the property of another, acting under authority, he cannot be turned out, but the party must take his remedy at law. *Ex parte Page, 1 Rose, 1; 17 Ves. jun. 59.*

Obstructing a messenger in the execution of his warrant, is a contempt. *Id.*

And contemptuous language, or force, is a contempt. *Id.*

Quære, whether a messenger, having been in possession under a warrant, and abandoned it, the warrant is not spent? *Id.*

Where the messenger was put out of possession of property on board a ship, by threatening to throw him overboard, the parties also using contemptuous language, they were ordered to give security for answering the bankrupt's interest. *Ex parte Dixon, 8 Ves. jun. 104.*

A messenger having possessed property under a commission which had been superseded, and for which he had not accounted to the assignees under that commission, was ordered to account to the assignees under a subsequent subsisting commission. *Ex parte Shaw, 2 Glyn & J. 73.*

## 2. Fees.

The petitioning creditor is liable to pay the

costs and expenses of a commission until the assignees are chosen. *Finchett v. How, 2 Camp. 275—Ellenborough.*

He is also liable to the messenger under a commission of bankruptcy, for the costs and expenses attending it, notwithstanding such messenger was employed by the solicitor. *Hart v. White, Holt, 376—Gibbs.*

But he is only liable to the messenger for necessary expenses. *Billings v. Waters, 1 Stark. 363—Ellenborough.*

Therefore, he is not liable for the expenses of an unnecessary and fruitless journey to the Isle of Man, unless upon a special contract. *Id.*

The messenger may recover from the petitioning creditor his fees for his services, before the party be declared a bankrupt, though the party was since declared a bankrupt, and the messenger's bill ordered by the commissioners to be paid by the assignees out of the estate. *Burwood v. Kant, 2 C. & P. 123—Abbott.*

A petitioning creditor was ordered to pay the messenger his costs as taxed by the commissioners, and the assignees to pay his subsequent costs, where the commission was supersedeable, and was considered as superseded. *Ex parte Johnson, 1 Glyn & J. 23.*

A petition by the messenger, praying that the solicitor to the petitioning creditor, who was insolvent, might pay the messenger's costs up to the choice of assignees, was dismissed with costs, as the solicitor is not liable to the messenger except upon special contract. *Ex parte Burwood, 2 Glyn & J. 70.*

The solicitor is not liable in the first instance to the messenger whom he nominates for his bill of fees; but if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger. *Hartop v. Jukes, 2 M. & S. 438; 2 Rose, 263.*

The solicitor is an agent merely, and is not to be regarded as a principal as respects the messenger; and, although he makes himself responsible to the messenger, the petitioning creditor will not therefore be exonerated without the express consent of the messenger to discharge him. *Hart v. White, Holt, 376—Gibbs.*

Where a commission was superseded, the petitioning creditor absconding, the messenger, having recovered part of his demand from him, was permitted to bring an action against the solicitor for the residue, and damages and costs in an action against him acting under the commission. *Ex parte Hartop, 12 Ves. jun. 349.*

An assignee is not liable, under the 5 Geo. 2, c. 30, s. 25, to pay the messenger the costs incurred by him previous to the appointment of the assignee. *Burwood v. Felton, 4 D. & R. 621; 3 B. & C. 43.*

It is no objection to an application by a messenger that the assignees may be directed to pay him his bill of fees, that he has neglected to make a demand upon them till after a final dividend; they must be presumed to have known of his having such a claim, and ought not to have

distributed the funds without reserving sufficient to satisfy it. *Ex parte Hartop*, 1 Rose, 449.

There is no doubt of the jurisdiction of the Chancellor sitting in bankruptcy to order assignees to pay a messenger's bill of fees. *Id.*

Messenger's fees fixed. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxviii.*

## XXVI. EVIDENCE IN BANKRUPTCY.

### 1. Generally.

*Proof of fact of Bankruptcy.*—A writ of supersedeas, reciting that a commission issued on a day certain, is evidence to show that such a commission issued on that day. *Gervis v. Grand Western Canal Company*, 5 M. & S. 76.

In an action against a petitioning creditor under a former commission, who illegally compounded with the bankrupt, the supersedeas of the former commission is conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623; 1 M. & P. 597.

In an action by an uncertificated bankrupt for the payment of a sum which the defendant has paid to the assignees, the adjudication of bankruptcy, with the assignment, and proof that the plaintiff passed his examination and endeavoured to obtain his certificate, is sufficient evidence of the bankruptcy. *Crofton v. Poole*, 1 B. & Adol. 568.

Declarations of an assignee suing as such, made before he was chosen assignee, are not admissible against him. *Fenwick v. Thornton*, M. & M. 51—Abbott.

Where the defendant at the trial gave in evidence a commission of bankruptcy, and a receipt given by the assignees to prove the payment of a sum of money from him to them, and the judge was inclined to think such proof sufficient; and the defendant afterwards attempted to prove the validity of the commission, and failed, and the jury found a verdict for the plaintiff:—It was held, that the defendant was precluded from disturbing the verdict. *Smith v. Evans*, 2 Moore, 474.

On a general plea of bankruptcy under 5 Geo. 2, c. 30, the plaintiff may give the condition of the bond on which the action is brought in evidence, to show that he is not barred by the certificate. *Aleop v. Price*, 1 Dougl. 160.

An allegation, stating that before the execution of a certain release, the party who executed it "became and was a bankrupt," is supported by proof of his having executed it after an act of bankruptcy, which was not followed by a commission for nearly two years, where the execution took place while the party was in prison. *Mavor v. Pyne*, 2 C. & P. 91; 3 Bing. 285; 11 Moore, 2.

*Proceedings Evidence.*—By 6 Geo. 4, c. 16, s. 96, no commission, adjudication, assignment, or certificate, or other matter directed by the Chancellor to be inrolled, shall be evidence without inrolment; but the production of the instrument,

with the certificate of inrolment indorsed, is sufficient evidence.

By s. 97, office copies are made evidence.

### 2. Examinations.

*Of Bankrupt.*—Upon a petition to supersede, the bankrupt's examination before the commissioners is evidence to show that the petitioner is not a creditor, although the petitioner was not present at the examination. *Ex parte Fowles*, Buck, 98.

It cannot be read as evidence against a third party who has no power of cross-examining the bankrupt. *Ex parte Arnsby*, 2 Deac. & Chit. 212.

*Of third Parties.*—Examinations of parties before the commissioners are evidence in actions against them by the assignees, unless such examinations were obtained by imposition, or under duress. *Robson v. Alexander*, 1 M. & P. 448.

Quære whether an admission obtained under such compulsory examination can be used as evidence? *Tucker v. Barrow*, 7 B. & C. 623; 3 C. & P. 85.

Where a party, examined before commissioners, admitted that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt:—Held, that this was not evidence sufficient to support a count on an account stated with the assignees. *Id.*

Where a party had been examined before commissioners, but part only of his deposition had been written down, but which he had signed at the time:—Held, that the examination was evidence against him. *Milward v. Forbes*, 4 Esp. 172—Ellenborough.

So, an examination of a bankrupt before the commissioners, when proved to have been written and signed by the defendant, may be admitted against him, without considering how it was obtained. *Stockfeth v. De Tustet*, 4 Camp. 10; 2 Rose, 282—Ellenborough.

Although a person has been improperly examined before the commissioners, upon a subject unconnected with the interests of the bankrupt's estate, with a view to procure evidence in an action depending against him, the examination may be used as evidence by the plaintiff at the trial of the action, and the judge at *Nisi Prius* cannot inquire into the abuse of the authority of the great seal, by which the examination was obtained. *Id.*

The remedy of a party so improperly examined is by an application to the Lord Chancellor, to have the examination taken off the file and cancelled. *Id.*

The defendant's examination before the commissioners may be given in evidence, to show that, by his own confession, he had concealed property belonging to the bankrupt. *Smith v. Beadnell*, 1 Camp. 30—Ellenborough.

The examination of a creditor of a bankrupt who has taken the goods of the bankrupt in execution after an act of bankruptcy, cannot be used in an action by the assignees to show his

knowledge of the bankrupt's insolvency at the time of the execution. *Deady v. Harrison*, 1 Stark, 60—Ellenborough.

If examinations are taken in the presence of the party, they may be used as evidence. *In re Feaks*, 1 Mont. & Bligh. 218.

The examinations of witnesses after the bankruptcy, are not evidence against the assignees. *Hitchens v. Congreve*, 1 Mont. 225.

*Proof of.*—Parol evidence of any thing that a bankrupt says at the time of his last examination, cannot be received, although it should appear that no part of what he said was taken down in writing. *Rez v. Walters*, 5 C. & P. 138—Park.

Evidence may be given by parol of material facts, which transpired at an examination before the commissioners, but which were not taken down in writing. *Rouland v. Ashby*, 1 C. & P. 649; R. & M. 231—Best.

Examinations of the defendant before commissioners, (proved to be correct,) are evidence although not signed. *Boddenham v. Lewis*, Peake's Add. Cas. 245—Wood.

Where a person is examined at a private examination before commissioners, and that examination is taken down, it is sufficient if so much only is taken down as is conceived to be necessary to be used in evidence, provided such part has been read over to him, and he has signed it: the whole of his examination need not to be taken down, to make that evidence which applies to the matter in dispute. *Milward v. Forbes*, 4 Esp. 172—Ellenborough.

### 3. When no proof of Requisites necessary.

*Assignees' Title admitted.*—If, in an action of trover by assignees, the defendant's attorney admit that the party was duly declared bankrupt, and the defendant do not give notice to dispute, he is precluded from objecting to any of the requisites to support the commission. *Parring v. Tucker*, 3 M. & P. 558.

In an action by assignees, on an account stated with the bankrupt:—Held, that evidence of that fact, without evidence of any promise to repay the assignees, was sufficient to support a count laying the promise to them. *Skinner v. Rebow*, 1 Selw. N. P. 239.

If a debtor to a bankrupt's estate, on being applied to by a person whom he knows to be the collector of debts for the assignee, says, "I will call and pay the money," such promise is an admission of the right of the assignee, and renders it unnecessary, in an action for the money, to give the usual proofs in support of the commission. *Pope v. Monk*, 2 C. & P. 112—Abbott.

It is competent to a defendant to impeach the title of a bankrupt, in an action by his assignees, though he himself claims title under the bankruptcy. *Taylor v. Kinlock*, 1 Stark. 175—Ellenb.

Upon a plea of payment to debt on bond by the plaintiffs as assignees, it is not incumbent on the defendants to prove themselves to be assignees.

*Corbie v. Oliver*, 1 Stark. 76; 2 Rose, 461—Ellenborough.

Where assignees declared as endorsees against the drawer of a bill, and, to prove notice to the latter of the dishonour by the acceptor, produced an agreement between the drawer and K. (an intermediate endorsee,) reciting that the bill in question was, amongst other bills to which the drawer was a party, overdue, and was or ought to be in the hands of K.:—Held, that the plaintiffs were not bound to prove that they were assignees, though they declared in that character. *Gunsan v. Metz*, 2 D. & R. 334: S. C. not S. P. 1 B. & C. 193.

In trover by the assignees of the sheriff against the assignees of a bankrupt, for taking goods which the former claimed under an execution issued before the bankruptcy:—Held, that he must prove the judgment against the bankrupt, as well as the writ of execution, unless it appears upon the record or judge's notes, that the defendants were the assignees of the bankrupt. *Glazier v. Eoe*, 8 Moore, 46; 1 Bing. 209.

The defendant (in an action at the suit of the assignee of a bankrupt) had attended a meeting of the commissioners, and exhibited the account between him and the bankrupt, and afterwards made a part payment to the plaintiff on that account:—Held, in an action for the balance remaining due, that this was prima facie evidence, as against the defendant, that the plaintiff was assignee, and that it was not necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy. *Dickinson v. Coward*, 1 B. & A. 677.

A defendant, in a suit by assignees, was told at an interview with their attorney (which was arranged by his own attorney, but which he thought proper to attend alone,) that his attorney had proposed that he should admit every fact, except the merits, provided the plaintiffs would waive their right of holding him to bail; and he was asked, whether that proposal was made by his authority. He replied, that it was; and that he was ready to carry it into effect, as the only question he wished to try was, whether he was liable on the undertaking he had given:—Held, that this amounted to an admission of the right of the assignees to sue, although no mention was made of it in the conversation. *Davis v. Burton*, 4 C. & P. 166—Tindal.

Semble, that it would have been otherwise, if, without further explanation, he had only said that he wished to try upon the merits. *Id.*

Held, also, that having received advantage from the admission, in the waiver of the right to hold to bail, he could not afterwards withdraw it, and insist upon proof of the bankruptcy. *Id.*

An admission by the defendant that he has received 300l. from a bankrupt, after an act of bankruptcy, will not support a count on an account stated with the assignee. *Stafford v. Clark*, 2 Bing. 377; 2 C. & P. 403.

In proving the title of assignees, if the petitioning creditor was the assignee of another bank-

rupt, it is necessary to prove the title of the petitioning creditor to be such assignee, by all the like proof by which the title of the assignee in question is to be proved. *Doe d. Mawson v. Liston*, 4 Taunt. 741; 2 Rose, 276.

Upon a plea in abatement, that A. and B. the assignees of C. a bankrupt, ought to have joined, it is not sufficient for the defendant to prove that A. and B. acted as assignees; he must prove that they were so, either by the production of the assignment, or by proving the admission of the plaintiff to that effect. *Passmore v. Boussfield*, 1 Stark. 296—Ellenborough.

**What Actions.**—In an action by a bankrupt against his assignees, although they are not named as such in the record, notice must be given under the 49 Geo. 3, c. 121, s. 10, or the commission and proceedings will be sufficient evidence of the trading, act of bankruptcy, and petitioning creditor's debt. *Simmonds v. Knight*, 1 Rose, 358; 3 Camp. 251—Ellenborough.

In an action brought by the bankrupt against his assignees, independently of the notice, he will be presumed to know that the bankruptcy is disputed, and ought to be provided with evidence to support it. *Ex parte Dick*, 1 Rose, 51.

If the title of assignees who are strangers to the record comes in question incidentally, it must be proved in the same mode as before the stat. 49 Geo. 3, c. 129, although no notice of contesting the bankruptcy has been given by the opposite party. *Doe d. Mawson v. Liston*, 4 Taunt. 741; 2 Rose, 276.

In an action by the assignees of A., against whom a commission was sued out upon the petition of the assignees of B., and no notice being given to dispute the validity of the commission:—Held, upon 49 Geo. 3, c. 121, s. 10, that proof of the proceedings under a commission was sufficient evidence of the petitioning creditor's debt, without going into any evidence of the validity of B.'s commission. *Skaife v. Howard*, 4 D. & R. 37.

Where it is immaterial whether the action is brought by the bankrupt or his assignees, the proceedings are evidence of the requisites, although notice is given to dispute. *Smith v. Woodward*, 4 C. & P. 542—Patteson.

In an action of detinue by the assignees, where no demand is made by the bankrupt before the bankruptcy, and notice is given to dispute the requisites, the proceedings are sufficient evidence. *Id.*

If a person who is, in fact, assignee of a bankrupt be sued in trover, and it appear that he claims the goods as property belonging to the bankrupt; in making out this defence he need not give evidence of the trading, &c., unless there has been notice of disputing the commission, although he be not in point of form sued as assignee. *Newport v. Hollings*, 3 C. & P. 223—Vaughan.

Trover is an action for a demand within the meaning of 6 Geo. 4, c. 16, s. 92. *Robson v. Alexander*, 1 M. & P. 448.

#### 4. When depositions evidence.

**Generally.**—By 6 Geo. 4, c. 16, s. 92, if the bankrupt shall not (if he was within the kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was not) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions of the petitioning creditor's debt, trading, and act of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees, for any debt or demand, for which the bankrupt might have maintained any action or suit.

By 2 & 3 Will. 4, c. 114, s. 8, in the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or acts of bankruptcy, the depositions of such witnesses, if inrolled, may be used in all cases where the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand, which the bankrupt might.

The 92d section is prospective, and only applies to commissions to be issued after the passing of that act, as it binds the bankrupt if he does not give notice to dispute the commission within two months after the adjudication. *Key v. Cook*, 2 M. & P. 720.

The depositions are conclusive evidence, so as not to admit evidence of fraud in the concoction of any of the requisites to support the commission. *Young v. Timmins*, 1 Tyr. 15.

Notwithstanding there has been no notice to dispute under the act, the proceedings are not conclusive evidence of the facts therein stated, but the court is still to form a judgment upon them, whether they prove an act of bankruptcy or not. *Brown v. Forrestall*, Holt, 190—Gibbs.

Where no notice is given, the plaintiff may call witnesses to contradict the depositions respecting the trading, petitioning creditor's debt, or act of bankruptcy. *Ellis v. Shirley*, 3 Camp. 424; 2 Rose, 143—Ellenborough.

There is not any necessity for putting in the proceedings as evidence where there is no notice to dispute. *Bevan v. Lewis*, 2 Glyn & J. 245; 1 Sim. 376.

Although the objection appears upon the proceedings, and requires no evidence to support it. *Id.*

In an action by an assignee, for a demand for which the bankrupt, if solvent, might sue, after notice by the defendant to dispute the bankruptcy given within two months after adjudication, the depositions are evidence to prove the bankruptcy, unless the bankrupt himself has given notice to dispute the commission. *Earith v. Schroder*, M. & M. 24—Abbott.

The depositions are conclusive evidence in a case where the bankrupt might have sued, if no bankruptcy had ensued, though the conversion which gave the right of action took place after the act of bankruptcy. *Fox v. Mahoney*, 2 C. & J. 325; 2 Tyr. 285.

To render the proceedings evidence, pursuant to the act, it is enough to show that they are produced from the custody of the solicitor to the commission, or to prove the handwriting of one of the commissioners before whom they were taken. *Collinson v. Hillear*, 3 Camp. 30; 1 Rose, 221—Ellenborough.

*In actions by assignees.*—It is only in actions or suits brought by the bankrupt's own assignees for a debt or demand for which he might have sued, that the depositions are made evidence. *Musket v. Drummond*, 10 B. & C. 153.

Where in an action by the assignees of B., a bankrupt, in order to prove the petitioning creditor's debt, they proved that B. was indebted to one R., that a commission afterwards issued against R., and that his assignees were the petitioning creditors against B., and in order to support the commission against R., produced the proceedings under it:—Held, that they were not admissible in evidence, and that the plaintiffs were bound to prove by other evidence R.'s trading, act of bankruptcy, &c. *Id.*

If a bankrupt, before his bankruptcy, let a person have goods, telling him to keep them till he (the bankrupt) wants them back, and no demand be made of them till after the bankruptcy:—Held, that if, in an action of detinue by the assignees, notice is given of disputing the bankruptcy, the proceedings are evidence of the trading, &c. under sect. 92 of the 6 Geo. 4, c. 16. *Smith v. Woodward*, 4 C. & P. 541—Patteson.

The petitioning creditor's debt, trading, and act of bankruptcy, were sufficiently proved by the production of the commission, and the proceedings under it, in a case where the defendant was not named as assignee on the record, provided no notice under stat. 49 Geo. 3, c. 121, s. 10, had been given by the plaintiff. *Rowe v. Lant*, Gow, 24—Dallas. *S. P. Simmonds v. Knight*, 3 Camp. 251; 1 Rose, 358.

Where, upon a trial, no notice having been given to dispute the commission, the proceedings under it were put in as well as the commission, and a perfect petitioning creditor's debt did not appear upon the proceedings:—Held, nevertheless, that the validity of the commission could not be disputed. *Macbeath v. Coates*, 4 Bing. 34: S. C. nom. *Macbeath v. Cooke*, 12 Moore, 122.

In an action by assignees, where part of the claim might have been recovered by the bankrupt, and part not, and the assignees rely upon the proceedings as evidence of the requisites, they must elect to go for that part which the bankrupt might have recovered. *Gibson v. Oldfield*, 4 C. & P. 314—Tenterden.

In an action by assignees, where there are some counts or causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are admissible in evidence, if the plaintiffs elect to proceed only on those counts which the bankrupt might have sustained. *Jones v. Fort*, M. & M. 196—Tenterden.

A tenant having committed an act of bank-

ruptcy in October, 1810, upon which a commission issued on the 21st of January, 1811, and the sheriff having on the 7th of January levied an execution under which he sold the goods of the tenant on the 21st and 22d of January for 520l., and out of that sum paid the landlord 140l. for one year's rent in arrear:—Held, in an action for money had and received, brought by the assignees of the bankrupt tenant against the sheriff, to recover the whole amount of the sum levied, that the property in the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution creditor, before he had notice of the commission issued, and, not giving such proof, that he was liable for the amount to the assignee. *Lee v. Lopes*, 15 East, 231; 1 Rose, 342.

In an action against assignees and their servants, the proceedings may be read in evidence, where no notice has been given to dispute, although there are other defendants on the record besides the assignees. *Gilman v. Cousins*, 2 Stark. 182—Bayley.

## 5. Notice to dispute.

### (a) Necessity.

By 6 Geo. 4, c. 16, s. 90, in actions by or against assignees, or in actions against commissioners, or persons acting under their warrant, for any thing done as such commissioners or under such warrant, no proof shall be required of the petitioning creditor's debt, trading, or act of bankruptcy, unless the other party in such action shall, if defendant, at or before pleading, or, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters.

By s. 91, the same thing is to apply to suits in equity.

The commission and proceedings under the bankruptcy were conclusive evidence of the trading, the debt, and the act of bankruptcy, unless notice had been given in pursuance of the statute 49 Geo. 3, c. 121, s. 11, of the party's intention to dispute them. *Humphries v. Coggan*, 1 Rose, 226.

In an action by assignees, if the defendant does not give notice to dispute, he cannot dispute the validity of the commission itself. *Bernasconi v. Glengall (Earl)*, 1 M. & R. 326.

In trover by assignees, notice to a petitioning creditor of an act of bankruptcy previous to the debt, is not to be presumed; although the fact that such a prior act was committed appeared on the face of the depositions, which were read in evidence, to prove the act of bankruptcy on which the commission was founded. *Thackrah v. Wood*, 3 Stark. 141—Abbott.

A new trial was granted after a nonsuit, where assignees failed to prove the act of bankruptcy, and defendant's notice to dispute was in too general terms. *Trimley v. Uwins*, 6 B. & C. 537: S. C. nom. *Trimley v. Uwins*, 9 D. & R. 548.

In actions by assignees, if the commission issued between the 2d of May and the 1st of September, 1825, the formal proofs in support of the commission must be made out by parol evidence of the trading, act of bankruptcy, &c. whether notice of disputing them has been given or not. *Giles v. Powell*, 2 C. & P. 259—Best.

A commission of bankruptcy, issued against an infant upon a debt contracted, and an act of bankruptcy committed during his minority, is absolutely void; and if the assignees have reason to know that he intends to set up his infancy, it is not necessary for him to give them the notice required by the statute, that he intends to dispute the proceedings under the commission. *Belton v. Hodges*, 2 M. & Scott, 496; 9 Bing. 365.

#### (b) *Practice.*

*Withdrawing Plea.*—Where a defendant, in an action brought against him by the assignee of a bankrupt, pleads the general issue, without giving notice of his intention to dispute the bankruptcy, he may, under a judge's order, have leave to withdraw such plea, and plead *de novo*, with the notice required by the statute. *Gardner v. Slack*, 6 Moore, 489.

The defendant was allowed to withdraw his plea, and to replead, after giving notice that he intended to dispute the petitioning creditor's debt, &c. *Radmore v. Gould*, Wightw. 80; 1 Rose, 123.

Although the defendant had once pleaded without giving notice "at or before the time of his pleading," yet if he had leave to withdraw the plea and plead *de novo*, such a notice given with the second plea was sufficient, under the 49 Geo. 3, c. 121, s. 10. *Decharme v. Lane*, 2 Camp. 324—Ellenborough.

So, under 6 Geo. 4, c. 16, s. 90, if a plea is delivered without a notice, and upon the clerk discovering that he had omitted to give notice, he gets the plea back, and before the expiration of the time for pleading he delivers a fresh plea with a notice, it seems it is sufficient. *Lawrence v. Crowder*, 1 M. & P. 511; overruling *S. C.* 3 C. & P. 230.

A defendant pleads the general issue, without giving notice to dispute, but, before the time for pleading expires, delivers the general issue again, with notice, such notice is insufficient: the defendant in such a case, ought to move for leave to withdraw his plea. *Poole v. London (Sheriff)*, 1 Stark. 328—Ellenborough.

In actions by assignees, to which the general issue was pleaded before the passing of stat. 49 Geo. 3, c. 121, it was unnecessary to prove the trading, act of bankruptcy, or petitioning creditors debt; but, under these circumstances, a judge would give the defendant leave to withdraw his plea, and plead *de novo* with notice. *Willock v. Westmacott*, 2 Camp. 184—Ellenborough. *S. P. Clarkson v. Dadds*, 2 Camp. 184, n.—Mansfield.

A defendant was allowed to withdraw his rejoinder and give notice to dispute, where the

witnesses to the validity of the commission were dead. *Brickwood v. Miller*, 2 Rose, 340.

*Form and Service.*—A notice to dispute the bankruptcy is too general: the stat. 6 Geo. 4, c. 16, s. 90, requires that the defendant should give notice to dispute "the trading, the petitioning creditor's debt, or the act of bankruptcy." *Trimley v. Unwin*, 6 B. & C. 537; *S. C.* nom. *Trimley v. Unwin*, 9 D. & R. 548.

The notice to dispute required by stat. 49 Geo. 3, c. 121, s. 10, might be served on the assignee, by delivery to his attorney. *Howard v. Rambottom*, 3 Taunt. 526; 2 Rose, 106.

But service, by leaving the notice with a maid-servant, at the dwelling-house of the assignee, was not sufficient service. *Id.*

If the notice be served at the same time when the issue is delivered with notice of trial on the back of it, it is not sufficient under the statute. *Richmond v. Heapy*, 4 Camp. 207; *S. C.* not & P. 1 Stark. 202—Ellenborough.

In an action by or against assignees, a notice to dispute left at the counting-house of the party, with his clerk, was sufficient to exclude the proceedings from being evidence under that statute, as personal service on the assignee was not necessary. *Widger v. Browning*, M. & M. 27; 3 C. & P. 523—Abbott.

It cannot be considered, at *Nisi Prius*, whether the defendant's attorney has agreed to accept a notice to dispute, which had been delivered after the time mentioned in the act of parliament. *Folke v. Scudder*, 3 C. & P. 232—Best.

*Other things.*—In an action by assignees, the notice to dispute is not to be considered as part of the defendant's regular evidence in the cause, but may be proved at the beginning of the trial, and immediately puts the plaintiff to strict proof of the matter disputed. *Decharme v. Lane*, 2 Camp. 324—Ellenborough.

In an action by a bankrupt against his assignees, to try the validity of the commission, where, notice being given only to dispute the act of bankruptcy, the defendants read the two depositions on the file of the proceedings which proved the trading and petitioning creditor's debt, the residue of the proceedings are not to be considered in evidence, and the plaintiff's counsel has no right to inspect them. *Bluck v. Thorn*, 4 Camp. 191; 2 Rose, 285—Ellenborough.

If the trading, petitioning creditor's debt, and act of bankruptcy are proved by the proceedings under the commission, the counsel for the opposite party has no right to look at any of the proceedings, but such as have been used for that purpose. *Stafford v. Clark*, 1 C. & P. 26—Barr.

#### (c) *Effect.*

A party omitting to give notice to dispute the requisites admits them, but not the effect of the commission in point of law. *Phillips v. Hopedale*, 1 B. & Adol. 321, 619.



In an action by assignees, under a commission against an uncertificated bankrupt, the defendant may give in evidence the existence of the previous commission: and that under such commission his effects were assigned, and the bankrupt uncertificated, without notice to dispute any of the requisites; which is an answer to the action. *Phillips v. Hopwood*, 1 B. & Adol. 321, 619.

If the defendant does not give notice to dispute the requisites to support the commission, it is unsettled whether the assignees can invalidate by relation to an act of bankruptcy, without proving a petitioning creditor's debt before the bankruptcy. *Norman v. Booth*, 8 B. & C. 703—Tenterden and Parke; *contra*, Bayley and Littledale.

## 6. Witnesses.

### (a) Petitioning Creditor.

In an action by assignees, the petitioning creditor is not a competent witness to support the commission, although he may be called on the other side to prove it invalid. *Green v. Jones*, 2 Camp. 411—Ellenborough.

A petitioning creditor is a competent witness to defeat the commission, and even to cut down the petitioning creditor's debt. *Loyd v. Stretton*, 2 Camp. 411; 1 Stark. 40; 2 Rose, 461—Ellenb.

Quære, whether, in an action by assignees, the petitioning creditor is compellable to produce a bill indorsed by the bankrupt, on which the petitioning creditor's debt is founded? *Reed v. James*, 2 Rose, 464; 1 Stark. 132—Ellenborough.

A petitioning creditor, called for the mere purpose of producing such a document, cannot, although he has been sworn, be cross-examined by the defendant. *Id.*

### (b) Other Creditors.

In all cases where an action is brought to try the validity of a commission, every creditor of the estate is incompetent as a witness. *Hallen v. Homer*, 1 C. & P. 108—Park.

So where an issue is directed to try its validity *Ex parte Malkin*, 2 Rose, 27.

On an issue to try whether an act of bankruptcy has been committed or not, a creditor is incompetent as a witness, although he has not proved under the commission. *Crooke v. Edwards*, 2 Stark. 302—Ellenborough.

But it seems, that a commissioner is a competent witness to prove the bankruptcy, as he cannot be called on to refund the fees which he has received. *Id.*

A creditor who has not proved is a competent witness to support the commission, although not to increase the estate. *Williams v. Stevens*, 2 Camp. 301—Ellenborough. *But see Adams v. Malkin*, 3 Camp. 543—Gibbs.

A creditor having sold his chance of recovering his debt, is a good witness to support a commission. *Granger v. Furlong*, 2 W. Black. 1273.

A creditor who has assigned his debt is a competent witness to increase the fund out of which

the debt is to be paid. *Heath v. Hall*, 4 Taunt. 326; 2 Rose, 271.

A creditor is not a competent witness to prove the trading. *Ex parte Osborne*, 2 Ves. & B. 177; 1 Rose, 367.

But where the adjudication was founded upon the evidence of a shopman, who, although a creditor, had stated at the time of his examination that he had no claim against the bankrupt, the court refused to supersede the commission. Semble, that if the objection be not taken before the commissioners at the time of the examination, it cannot afterwards be urged as an objection to the commission. *Ex parte Hill*, 1 Mont. & Mac. 272.

The objection to a creditor as a competent witness to sustain a commission, cannot be taken by himself to preclude his examination. *Ex parte Chamberlain*, 19 Ves. jun. 481.

A creditor may be asked questions, the answers to which cannot be open to the objection that they are swayed by interest, notwithstanding they may communicate information by which the commission may be sustained. *Binfield v. Turner*, Gow, 202—Holroyd.

Therefore, a creditor may be asked if he has in his custody the bond upon which the petitioning creditor's debt was founded, and if not, to whom he has delivered it. *Id.*

In an action for giving a false character, whereby the plaintiff has lost the value of his goods, and the person recommended having become bankrupt, a creditor of the bankrupt is a good witness to prove the plaintiff's case. *Burton v. Loyd*, 3 Esp. 207—Kenyon.

### (c) Bankrupt.

A bankrupt can never be a witness to prove his own trading, act of bankruptcy, or the petitioning creditor's debt, or any other fact necessary to support the commission. *Sanderson v. Laforest*, 1 C. & P. 46—Burrough.

A bankrupt cannot be called as a witness, either to support or to defeat the commission, or even to explain a doubtful act, which might or might not have been an act of bankruptcy. *Sayer v. Garnett*, 4 M. & P. 734; 7 Bing. 103; *S. P. Hoffman v. Pitt*, 5 Esp. 22, overruling *Oxlade v. London (Sheriffs)*, 1 Esp. 287.

Even where he has obtained his certificate. *Chapman v. Gardner*, 2 H. Black. 279; *S. P. Cross v. Fox*, and *Flower v. Herbert*, 2 H. Black. 279, n.

And it is immaterial whether a question for such a purpose be asked upon examination or cross-examination; it is equally improper in both cases. *Elson v. Brailey*, 1 Selw. N. P. 271—Lawrence.

A bankrupt who has been examined in chief, to increase the fund in an action by his assignee, cannot be cross-examined to any fact tending to defeat the commission. *Bians v. Tetley*, M'Clel. & Y. 397.

He, therefore, on examination, cannot be asked a question as to the fact of any bankruptcy committed previous to that on which the commission

is founded. *Wyatt v. Wilkinson*, 5 Esp. 187—Chambre.

An uncertificated bankrupt cannot be a witness for his assignees. *Dixon v. Purse, Peake's Add. Cas.* 187—Kenyon.

But an uncertificated bankrupt may be a witness to decrease his estate. *Butler v. Cooke*, Cowp. 70.

In an action by the assignees of a bankrupt who had obtained his certificate, and released the surplus of his estate, such bankrupt is a competent witness to prove the signatures of the commissioners, in order to identify the proceedings taken under his commission. *Morgan v. Pryor*, 3 D. & R. 215; 2 B. & C. 14; S. C. nom. *Morgan v. Price*, 3 Stark. 58.

A bankrupt could not be a witness to defeat his bankruptcy, by proving it to have been concerted. *Mills v. Dawson, Peake's Add. Cas.* 54—Kenyon.

The practice of the court is, where the case requires it, to direct the bankrupt to be examined upon an issue to try the validity of the commission. *Ex parte Staff*, Buck, 431.

It is not a sufficient ground for the postponement of a trial, that the bankrupt is an important witness, and will shortly be competent by the Chancellor's allowance of his certificate, which has been signed by the commissioners. *Tennant v. Strachan, M. & M.* 378; 4 C. & P. 31.

*For what Purpose.*—In a suit against the crown, to which the assignees of a bankrupt, who but for his bankruptcy would have been in the same interest with the plaintiffs, are made defendants, the bankrupt cannot be examined as a witness on behalf of the plaintiffs, although he has released the assignees, because the crown is not bound by the statutes relating to bankrupts. *Craufurd v. Att. Gen.* 7 Price, 2.

The drawer of an accommodation bill, who has become a bankrupt, is a competent witness for the acceptor, after a general release from him, although he has not been released by his assignees. *Cartwright v. Williams*, 2 Stark. 341—Ellenb.

In an action by the indorsee against the maker of a promissory note without original consideration, if the indorsee has become bankrupt, and obtained his certificate subsequent to the date of the note, he is not a competent witness for the defendant. *Maundrell v. Kennett*, 1 Camp. 408, n.—Bayley.

Where A. and B. had dissolved partnership, and two days afterwards A. drew a bill in the name of the partnership, which was accepted and paid by C. without consideration; and C. afterwards sued A. and B. for money lent:—Held, that A. who had become bankrupt, and obtained his certificate, was a competent witness for B. to prove that the acceptance was for his (A.'s) sole accommodation, and not for that of B., inasmuch as B. was merely a surety within the meaning of the statute 49 Geo. 3, c. 121, s. 8, and might consequently have proved under A.'s commission. *Moody v. King*, 4 D. & R. 30; 2 B. & C. 558.

In an action against the indorser of a bill which the defendant indorsed to secure a debt due to the plaintiff from I. S., the latter is not a competent witness for the plaintiff; but a guarantee or surety on a bill, who is discharged by the statute from his liability on the bill, is discharged from the costs also, which follow the debt, and is therefore not an incompetent witness in an action against the principal. *Bottomley v. Wilson*, 3 Stark. 148—Abbott.

The guarantee of a bill, discharged by bankruptcy from his liability on the bill is not an incompetent witness in an action on the bill, by reason of his liability to costs in an action on the bill. *Brind v. Bacon*, 5 Taunt. 183.

The indorser of a note, who has become bankrupt, may be a witness, in an action by the indorsee against the maker, to disprove the plaintiff's title. *Sikes v. Marshal*, 2 Esp. 705—Kenyon.

In an action on a bill accepted for the accommodation of the drawer who has become a bankrupt, and obtained his certificate, the latter is a competent witness for the acceptor. *Ashien v. Longes, M. & M.* 127—Tenterden.

A bankrupt, in an action by the assignees against a judgment creditor, who has taken the goods of the bankrupt in execution, is competent to prove that the creditor knew that the bankrupt was insolvent at the time of the execution. *Reed v. James*, 2 Rose, 465.

In an action for work and labour, an uncertificated bankrupt is a competent witness to prove that the employment of the plaintiff was by him and not by the defendant, by whom the debt has been paid to his assignees. *Wilson v. Gallaty*, 2 C. & P. 467—Abbott.

In an ejectment between two persons (both claiming under a demise from the same person) the landlord, who has become bankrupt, may be a witness to prove that the premises in dispute were not included in the first lease. *Longchamps d. Evitts v. Fawcett, Peake*, 71—Kenyon.

Where in an action against several as partners, for goods sold; some of them pleaded bankruptcy, and others the general issue:—Held, that after the plaintiff had closed his case, and the bankrupt defendants had proved the bankruptcy, one of the bankrupts could not be admitted as a witness, to show a dissolution of the partnership, prior to the delivery of the goods. *Emmett v. Bradley*, 1 Moore, 332; S. C. nom. *Emmett v. Butler*, 7 Taunt. 599; S. P. *Raven v. Dunning*, 3 Esp. 25—Kenyon.

W. drew a bill on the defendant, to whom he had been sending goods for sale, and defendant accepted the bill, neither party knowing the state of the account between them; it turned out that W. was at the time indebted to the defendant: W., lurking from his creditors at large, after an act of bankruptcy indorsed the bill, upon importunity, to the plaintiff, one of his creditors with whom he was on friendly terms, and then became a bankrupt. Plaintiff having sued defendant on the bill:—Held, that W. was an admissible witness; and the jury having found for the

defendant, the court refused to disturb the verdict. *Bagnall v. Andrews*, 7 Bing. 217; 4 M. & P. 839.

In an action by the obligees of a joint and several bond against one of the obligors, who was surety for another of them who had become bankrupt, which action was brought after the plaintiffs had elected to prove their debt under the commission, and thereby had relinquished their action against the bankrupt by s. 14 of the stat. 49 Geo. 3, c. 121; the bankrupt not having obtained his certificate, and being therefore still liable to be sued by the defendant, his surety, in case of a verdict against him by the plaintiffs, is not a competent witness for the defendant, to prove that a payment of a sum equal to the penalty of the bond, made by him (the bankrupt) to the plaintiffs before the action brought, was made in discharge of the bond, and not upon any other account. *Townend v. Downing*, 14 East, 565.

A., the holder of two bills, indorsed them over to the defendants, who, for the accommodation of A., indorsed them over to the plaintiff. A. having become bankrupt; in an action brought against the defendants for the amount of the bills:—Held, that the bankrupt being discharged from any suits by his certificate, was a competent witness for the defendants. *Bassett v. Dodgin*, 9 Bing. 653; 2 M. & Scott, 777.

Quære, if the wife of a bankrupt may be a witness to prove a payment to have been made in contemplation of a bankruptcy? *Jourdaine v. Lefevre*, 1 Esp. 66—Kenyon.

*How rendered competent.*—A bankrupt cannot be a witness for his assignees, until he releases his allowance. *Schneider v. Parr*, Peake's Add. Cas. 66—Kenyon.

Quære, whether he can release it before he obtains his certificate? *Id.*

A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus. *Perryman v. Steggall*, 8 Bing. 369; 1 M. & Scott, 540.

In an action by assignees, the bankrupt is not rendered competent, unless his certificate and release are produced, or the non-production of them is accounted for. *Goodhay v. Hendry*, M. & M. 319—Best.

If a bankrupt has obtained his certificate, and released his assignees, it is sufficient, on an objection as to his competency as a witness in an action by his assignees, for him to state on the voir dire, that he has released them, without producing the releases. *Carlile v. Eady*, 1 C. & P. 234—Park.

A bankrupt who has not paid 15s. in the pound, under a second commission, cannot be a witness for the assignees under that commission, although he has obtained his certificate, and released his allowance and surplus. *Kennett v. Greenwollers*, Peake, 3—Kenyon.

Where an assignee brought an action upon the stat. 9 Anne, c. 14, to recover money lent by the bankrupt to the defendants at play; and the bankrupt, who had obtained his certificate, was called as a witness to prove the loss; and in order to render him competent, the bankrupt released the assignee from all claim upon the surplus fund, if any; and all the creditors who had proved, released the bankrupt from all future claims; and the assignee (who was not a creditor) executed a like release:—Held, that after the expiration of more than a year from the date of the commission, it was to be presumed that all the creditors had proved, and that a release signed by all who had proved was binding as a release by every one of the creditors:—Held, also, that such release did not destroy the assignee's right of action. *Carter v. Abbott*, 2 D. & R. 575; 1 B. & C. 444.

In a qui tam action, on the statute of usury, against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money, notwithstanding he is ready to release to his assignees all benefit which may arise from the discharge of this debt in particular, and all claim to allowance and surplus in general, and notwithstanding the assignee has proved his demand for the money lent under the commission. *Masters q. t. v. Drayton*, 2 T. R. 496.

Where no notice was given of the defendant's intention to dispute the bankruptcy, the bankrupt, having obtained his certificate and released all claims on the surplus of his estate, is thereby rendered a competent witness to prove that the proceedings produced were those taken under the commission against him. *Morgan v. Price*, 3 Stark. 58—Abbott. *S. C.* nom. *Morgan v. Pryor*, 3 D. & R. 215; 2 B. & C. 14.

## XXVII. PLEADINGS IN BANKRUPTCY.

By 6 Geo. 4, c. 16, s. 44, in actions brought against any person for any thing done in pursuance of the act, the defendant may plead the general issue, and give the statute and the special matter in evidence.

By s. 126, if a bankrupt, after the allowance of his certificate, shall have any action brought against him, for any debt, claim, or demand which was proveable under the commission, he may plead generally that the cause of action accrued before he became bankrupt, and give the act and the special matter in evidence; and the certificate and allowance shall be sufficient evidence of the trading, bankruptcy, commission, and other precedent proceedings.

A general plea of bankruptcy, under the statute, ought to pursue the terms of the statute, and conclude to the country. *Sheen v. Garrett*, 6 Bing. 686; 4 M. & P. 535.

The defendant cannot give his bankruptcy in evidence under the general issue. *Gowland v. Warren*, 1 Camp. 363—Ellenborough.

If a plea contain distinct allegations of a trading and petitioning creditor's debt, and then go on to state, that the plaintiff "became bankrupt;" and, in the replication, the plaintiff protest the trading and petitioning creditor's debt, and deny that the plaintiff "became bankrupt:" this merely puts in issue the act of bankruptcy; and the words, "became bankrupt," coupled with the other two allegations, will be held to extend to the act of bankruptcy only. *Cotton v. James*, 3 C. & P. 505; *M. & M.* 273—Tenterden.

A rule nisi for a new trial, on the ground of excessive damages, was afterwards obtained. *Id.*

A plea in bar, stating "that a commission of bankruptcy issued against the plaintiff, under which he was duly found, adjudged, and declared a bankrupt," without alleging that he was in fact a bankrupt, is bad. *Guinnis v. Carroll*, 2 M. & R. 132.

Such a plea should state the trading, the act of bankruptcy, and the petitioning creditor's debt. *Id.*

Quære, whether, in debt on judgment, a replication to a plea of bankruptcy of the plaintiff, after the accruing of the cause of action whereon the judgment was recovered, that plaintiff obtained his certificate before the judgment was recovered, should allege expressly that the certificate was obtained after the commission issued. *Id.*

The plea of bankruptcy given by stat. 5 Geo. 2, c. 30, s. 7, must have stated that the cause of action accrued before the bankruptcy; stating that an indenture, on which an action of covenant was founded, was executed prior to the bankruptcy, was not sufficient. *Charlton v. King*, 4 T. R. 156.

The general plea of bankruptcy, and the certificate given by that statute, might be pleaded, without averring that the bankruptcy happened before the commencement of the suit. But if it appeared at nisi prius that it happened after the action brought, it seems that the defendant could not avail himself of the defence under such a general plea, which was only given by the statute in case any bankrupt who had conformed to the law should afterwards be arrested or impleaded for any debt due before such time as he became bankrupt. *Twiss v. Cameron*, 6 East, 413; 2 Smith, 439.

A general plea of bankruptcy in Ireland, referring to an Irish act of parliament, and concluding to the country (in a mode similar to that given by stat. 5 Geo. 2, c. 30, s. 7, to bankrupts in England,) is clearly bad. *Quin v. Keefe*, 2 H. Black. 553.

To a declaration for money paid, the defendant pleaded his bankruptcy and certificate; and that the plaintiff, before the issuing of the commission, was a surety for a debt of the defendant, and that the money paid by the plaintiff for his use was paid by him as such surety, after the issuing of the commission, and before a final dividend had been made of the defendant's effects under the same; whereby the plaintiff became entitled to prove under the commission: replication, that the plaintiff, before the issuing of the commission, was surety to one J. I. for the defendant, that he, the defend-

ant, should perform certain things contained in articles of agreement, by which an annual rent was to be paid by the defendant; and that, after his bankruptcy, three years' rent became due from the defendant; and that the money paid by the plaintiff for the defendant, was paid by him as such surety, by reason of the non-payment by the defendant of the rent, and for the costs of an action brought against the plaintiff as such surety by J. I.:—Held, that the plaintiff was entitled to recover, as he could not be deemed liable as a surety, within the statute 49 Geo. 3, c. 121, s. 8, as that section related only to debts of the bankrupt due at the time of issuing the commission. *McDougal v. Paton*, 2 Moore, 644; 8 Taunt. 431.

After a general plea of bankruptcy concluding to the country, a replication that defendant was before the commission discharged as a bankrupt, and that his estate had not produced 15s. in the pound, which was pleaded in maintenance of the action generally, and with a verification, was held ill on special demurrer. *Wilson v. Kemp*, 2 M. & S. 549.

Where the plaintiffs declared on four bills of exchange, and the defendant pleaded in bar, that he was indebted to them in divers large sums of money for goods sold; and that for securing to the plaintiffs the said several sums, the defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs for and in payment of one of the said several sums in which he was so indebted; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums in which he so stood indebted as aforesaid; that the defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission; and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration:—Held, on demurrer, that this plea could not be supported; because the proof of a debt under a commission of bankruptcy could not be pleaded in bar to an action at law brought for the same debt. *Harley v. Greenwood*, 5 B. & A. 95.

By 3 & 4 Will. 4, c. 42, s. 9, a plaintiff may reply a discharge by bankruptcy and certificate to a plea in abatement of non-joinder.

In assumpsit against two persons who sever in pleading, a nolle prosequi may be entered as to one, who has pleaded bankruptcy, and it shall not destroy the action as to the other. *Nate v. Ingham* (in error), 1 Wils. 89.

In assumpsit against two, where one pleads non assumpsit, and a plea of bankruptcy, and the plaintiff enters a nolle prosequi as to him, as to the several matters pleaded by him, and the other defendant pleads non assumpsit, the latter is not discharged by the nolle prosequi. *Moravia v. Hunter*, 2 M. & S. 444; 2 Rose, 264.

Where several are sued, and one pleads his

bankruptcy, upon which the plaintiff enters a *nolle prosequi* as to him, he may still give evidence of the admission of such defendant made before he obtained a certificate. *Grant v. Jackson, Peake, 203—Kenyon.*

In assumpsit against two defendants for goods sold, they pleaded the general issue, whereupon issue was joined in Michaelmas term, 1830, and notice of trial given for the sittings after that term. Continuances were entered on the record to the 23d of May, 1831. On the 14th of May in that year, one of the defendants obtained his certificate under a commission of bankruptcy, and on the 5th of June he pleaded his bankruptcy *puis darrein continuance*, to which the plaintiff demurred; but this plea and demurrer were never entered on the *nisi prius* record. The cause was tried on the 29th of June, and a general verdict found against both defendants. The court set aside this verdict for irregularity, on the ground that the jury had given an absolute verdict as to both defendants, whereas they should have been summoned only to try the issue as to one, and to assess contingent damages as against the other. *Thompson v. Percival, 2 C. & Adol. 968.*

## XXVIII. PRACTICE IN BANKRUPTCY.

### 1. Practice in Court of Review.

By 1 & 2 Will. 4, c. 56, s. 11, the judges of the court of Review, with the consent of the Chancellor, have power to make rules and orders regulating the practice of the court of bankruptcy.

By s. 21, the powers given to the commissioners may be exercised by the judges.

The practice in the court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the Lord Chancellor. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxix.*

All petitions now depending before the Lord Chancellor in matters of bankruptcy, may be set down for hearing in the court of Review upon motion for that purpose. *Reg. Gen. January 16, 1832, 1 Deac. & Chit. xxxi.*

The court of Review will not interpose upon the petition of a stranger, except in cases of immediate injury—*Cross, dissent. Ex parte Heath, 1 Mont. & Bligh, 169.*

If, in the court of Review, a petition is ordered to stand over on payment of the costs of the day, the objection to the petition being heard till the costs are paid cannot be made unless the order has been drawn up. *Ex parte Clarke, 1 Mont. 503.*

All petitions presented to the court of Review shall be entered in the registrar's office; and the fiat directing the attendance thereon shall be under the seal of the court of Bankruptcy; and the original petition shall, when served, be returned to the registrar on or before the hearing, and be filed of record; and it shall not be necessary to recite such petitions at length in any order pronounced by the court thereon. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxix.*

All the process of the court of Review shall be under the seal of the court of Bankruptcy. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxix.*

All proceedings before the commissioners in the court of Bankruptcy shall be written on parchment or paper of one uniform size, and shall remain of record in the said court. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxv.*

Where, under an order in bankruptcy, money is directed to be paid, the next order is to pay within four days, or stand committed. *Ex parte Davison, 1 Glyn & J. 227.*

An order was made that the defendant should pay a sum of money by a certain day, or, in default, should stand committed. The plaintiff having been unable to serve that order in time, obtained, as of course, a second order to enlarge the time allowed for the payment, and make service of it on the defendant's clerk in court, good service: the second order was irregular, it ought to have been made on notice. *Leake v. Nalder, 1 Russ. & Mylne, 357.*

The court of Review cannot proceed towards the commitment of a party for non-payment of costs on the usual seven days' order of the Vice-Chancellor. *Ex parte Ferris, 1 Deac. & Chit. 498.*

If a petition is ordered to stand over, without prejudice to the petitioner's proceeding at law, and the petitioner commence an action, the court of Review will not compel him to elect. *Ex parte Heath, 1 Mont. & Bligh, 183.*

Upon an application to the court of Review for an order of reference to the commissioners to certify whether a contract made by a bankrupt was beneficial for the creditors of the bankrupt, the court said that one of the judges would take the reference; and the same in all cases where it had been the practice to refer any matter to a master in Chancery. *Ex parte Jeffery, 1 Deac. & Chit. 206.*

Leave to except to the report of an officer of the court of Review need not be applied for. *Ex parte Crockwell, 1 Deac. & Chit. 546.*

The court of Review has jurisdiction to hear a petition of appeal in bankruptcy from the Vice-Chancellor's decision to the Lord Chancellor, provided the party prefers a fresh petition to that court, for the purpose of having such petition heard. *Ex parte Lowe, 1 Deac. & Chit. 79. But see Ex parte Benson, 1 Deac. & Chit. 324.*

The period of eight days, in which a petition was to be answered, was allowed to be enlarged as a matter of course. *Ex parte Beardsworth, 1 Deac. & Chit. 369.*

But a special application would have been necessary in order to lessen it. *Id.*

Notice must be given to the other side of an application to the court of Review to discharge an order. *Ex parte Lowe, 1 Deac. & Chit. 43.*

One day's notice to vary an order is insufficient. *Ex parte Giles, 1 Deac. & Chit. 552.*

Whatever ground there may be for the discharge of a party, who is arrested on an attach-

ment for not paying costs pursuant to an order, previous notice of the application must be given to the other side. *Ex parte White*, 1 Deac. & Chit. 39.

Where a creditor alleges that there has been a fraudulent preference, the court will, on his petition, send the case for inquiry before the commissioners, the creditor undertaking to pay the costs of such inquiry. *Ex parte Billing*, 1 Deac. & Chit. 112.

Though the appearance of a party is wholly unnecessary; yet, if he is served with notice of an intended application to the court of Review, he is entitled to his costs of appearance. *Ex parte Reid*, 1 Deac. & Chit. 322.

But if he makes affidavits which are unnecessary, he must pay the costs occasioned thereby. *Id.*

All agreements of reference to be made rules of the court of Bankruptcy shall be so made by order of the court of Review; and all matters arising thereon shall be heard and determined by the court of Review. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxix.*

All questions respecting the conduct of the officers and practitioners of the court of Bankruptcy, shall be brought before the court of Review. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxix.*

All recognisances to be taken and acknowledged in the court of Bankruptcy, shall be taken and acknowledged before the court of Review. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxix.*

In all matters referred by the court to any judge or commissioner of the court of Bankruptcy, such judge or commissioner may, in his report, state such special circumstances as he shall think fit, without being specially directed so to do. *Reg. Gen. March 19, 1832, 1 Deac. & Chit. xxii. a.*

## 2. Petition.

### (a) Signing and Attestation.

**Signing.**—The general orders may be dispensed with, under circumstances, in the discretion of the court. *Ex parte Reynolds*, 1 Deac. & Chit. 459.

A petition of a person in Ireland must be signed by the petitioner. *Ex parte Cumming*, 1 Mont. 206.

A petition presented by assignees must, under the general order, 12th Aug. 1809, be signed by all who present it, and not by one only, as in the case of partners. *Ex parte Morgan*, Buck, 109.

If a petitioner reside in Scotland, the signature of the petitioner is sufficient, and the petition need not be signed by an agent in London. *Ex parte Paul*, 1 Mont. 252.

An application to permit a petition to be signed by the petitioner's agent in London was granted, near the end of the sittings after Trinity term. *Ex parte Stone*, Buck, 255.

**Form.**—A petition, merely addressed to the chief judge and the other judges, without adding "of the court of Review," was held to be informal,

and ordered to be amended. *Anon.* 1 Deac. & Chit. 281.

The court of Review gave leave to amend the address of a petition, which by mistake was addressed to the Lord Chancellor, instead of the judges of the court of Review. *Anon.* 2 Deac. & Chit. 22.

The title of a petition was allowed to be altered, on paying the costs of the day. *Ex parte Rea*, 1 Madd. 309.

A petition was allowed to stand over, to amend the title. *Ex parte Mills*, Buck, 230.

A petition was amended upon paying the costs of the day. *Ex parte Peyron*, 2 Rose, 368.

A petition may be framed in the alternative and the respondent cannot call upon the petitioner to elect, to proceed for only one of the objects of the petition, unless under special circumstances. *Ex parte Scholey*, Buck, 476.

An order to amend was made conditionally, that a party should be served, and the petition be heard in fourteen days; default having been made in these conditions, the petition was dismissed with costs. *Ex parte Green*, 2 Deac. & Chit. 65.

Where notice is given to the respondent of a motion for leave to amend the petition, and such permission is granted after the respondent appears to oppose it, the respondent will not be entitled to the costs of the day. *Ex parte Green*, 2 Deac. & Chit. 42.

**Attestation.**—When a solicitor, on his own behalf, presents a petition in bankruptcy, an attestation is dispensed with. *Ex parte Kingdon*, 1 Madd. 446.

Although a petition by a solicitor need not be attested, it must appear on the petition that he is a solicitor. *Ex parte Barrow*, 1 Mont. 93.

A petition, which, upon the face of it, does not appear to be by a solicitor, must be properly attested. *Ex parte Cole*, 2 Glyn & J. 269.

The attestation of the solicitor to a petition is a guarantee that the petition is proper; not a security for costs. *Ex parte Cadhy*, 1 Mont. 332.

The attestation must be to the name of the petitioner, and not to the petition. *Ex parte Cracklowe*, 1 Mont. 353.

Where a petition is attested according to the spirit of the general order, the court of Review will always endeavour to get rid of formal objections, by allowing time to amend. *Ex parte Wiggin*, 1 Deac. & Chit. 497.

A petition presented by a bankrupt in person, and which he appears to support, may be signed by him, and need not be attested; and if it is attested by a person who is not a solicitor, and who does not state himself to be the agent of the petitioner, it is not defective. *In re Bruce*, 4 Rom. 223.

**What Solicitor.**—Unless the person attesting the signatures of the petitioners, under the general order of August 1809, be the solicitor actually presenting the petition, he should state himself in the attestation to be the attorney, as

licitor or agent of the party signing in the matter of the petition. *Ex parte Clapham*, 1 Mont. & Mac. 51; *S. P. Ex parte Wilkinson*, 1 Glyn & J. 363.

An objection that the solicitor attesting the petition, being at the time in prison, was within 12 Geo. 2, c. 13, s. 9, was overruled. *Ex parte Thompson*, 1 Glyn & J. 308.

The petition being presented by a person who is not a solicitor of the court, is not an objection to the hearing. *Ex parte Tanner*, 1 Mont. & Bligh, 391.

A petition attested by the agent of the attorney for the petitioner, is a sufficient compliance with the general order of the 12th of August, 1809. *Ex parte Bellott*, 2 Madd. 258; *S. P. Ex parte Weston*, 2 Rose, 451.

A petition to stay the bankrupt's certificate, attested by the solicitor's agent, which is not in conformity with the general order, was dismissed with costs. *Ex parte Hirst*, 1 Glyn & J. 70.

A solicitor was allowed to sign a petition for a petitioner, under circumstances; the order not to be drawn up, but attached to the petition. *Ex parte Alexander*, 1 Deac. & Chit. 532.

**Form of Attestation.**—The general order of the 12th August, 1809, held to be complied with by the solicitor "authenticating" the signature of the petitioner, without "attesting" it: the object of the order being to secure the responsibility of a solicitor to the propriety of the application. *Ex parte Tilly*, 2 Rose 83.

The order is not complied with by the solicitor authenticating the signature of the petitioner, without attesting it. *Ex parte Bury*, Buck, 393.

The signature of the petitioner to the petition, "authenticated by me, James Lowe, solicitor to the petitioner," is not a compliance with the order. *Ex parte Dumbell*, 2 Glyn & J. 121.

A petition which purported to be signed in the presence of Thomas Lee, master extraordinary in Chancery, was permitted to stand over for the purpose of amendment, and of an affidavit being filed to show that Lee was, at the time of the signature, the petitioner's solicitor or agent, the petitioner paying the costs of the day. *Ex parte Rawlinson*, 1 Glyn & J. 19.

The signature of a petitioner, attested in the following terms: "I attest this to be the signature of the said A. Caldecott. W. H. Ashurst, his solicitor in the matter of this petition," is a sufficient compliance with the general order of the 12th of August, 1809. Semble, that the word "authenticate" would also be sufficient. Where a petition was presented by one of four assignees, describing himself as "acting assignee," and stating the absence of two of his co-assignees, the petition was permitted to proceed. *Ex parte Caldecott*, 1 Mont. & Mac. 433.

Attestation thus: "Witness, J. L., solicitor to the petitioner," J. L. being the country attorney, and the petition presented by agent in town:—Held, informal. *Quære*, tamen. *Ex parte Rose*, 1 Deac. & Chit. 554.

An insufficient attestation is not waived by answer. *Ex parte Hutchinson*, 1 Mont. 130.

A defective attestation is waived by an order on the petition. *Ex parte Tanner*, 1 Mont. & Bligh, 390.

#### (b) Affidavit to support.

**Time and Manner of Swearing.**—Where the affidavit to support a petition had been sworn before a master extraordinary, who was solicitor to the commission, it was ordered to stand over, with liberty to file another affidavit. *Ex parte Brockhurst*, 1 Rose, 145.

An affidavit, sworn before the clerk of the solicitor to the commission, was not allowed to be read. *Ex parte Green*, 1 Glyn & J. 16.

An affidavit, sworn before the petition is answered, cannot be read. *Ex parte Parks*, Buck, 332.

Affidavits in support of petitions to stay certificates, are from necessity an exception to the rule, that an affidavit, sworn previously to the answering of the petition, is inadmissible in evidence. *Ex parte Overton*, 2 Rose, 257.

*Quære*, whether an affidavit, sworn before the petition was filed, will support an indictment for perjury? *Res v. Dudman*, 2 Glyn & J. 389.

Filing affidavits in answer is a waiver of the objection to the affidavits in support of the petition, that they were filed before the petition was presented. *Ex parte Gilpin*, 1 Glyn & J. 183.

If a respondent, knowing that the affidavits in support of the petition are filed after the petitioning day, answer them, he thereby waives the objection to the irregularity. *Ex parte Bury*, Buck, 393.

Where affidavits in support of a petition are irregularly filed, a respondent answering them does not waive the objection to their being read, if he have not notice of the irregularity. *Ex parte Smith*, Buck, 395.

Where respondents are too late in filing their affidavits, the court will let the petition stand over, to give the petitioner an opportunity of replying to them, the respondent paying the costs of the day. *Ex parte Doncaster (Corporation)*, Buck, 463.

Affidavits in support of the petition, filed after the petitioning day, cannot be read. In such a case, the petition was permitted to stand over till the next day of petitions, that the respondent might answer the affidavits, the petitioner paying the costs of the day. *Ex parte Peel*, Buck, 394.

An office copy is the only evidence the court will admit of the filing of the affidavit. *Ex parte North*, Buck, 396.

Where a petitioner's affidavits were only filed the day before the petition was appointed to be heard, the court ordered it to stand over, that the respondent might answer the affidavits. *Ex parte Billings*, 1 Deac. & Chit. 42.

**Form.**—It is no objection to an affidavit that it is not headed in the matter of the bankruptcy

in which it is used, if, from the accompanying circumstances, it is manifest that it is judicially used in the bankruptcy. *Ex parte Simonds*, 2 Glyn & J. 44.

The mode of proceeding upon an irrelevant or scandalous affidavit. *Ex parte Chisman*, 2 Glyn & J. 315.

An affidavit was ordered to be taken off the file as irrelevant and scandalous, with costs, as between attorney and client. *Ex parte Simpson*, 15 Ves. jun. 476.

The court of Review will not, before hearing a petition, decide upon impertinent matter in affidavits; but serus, as to scandalous matter. *Ex parte Williamson*, 1 Deac. & Chit. 529.

A petition to refer an affidavit for impertinence must be presented before the original petition is heard. *Ex parte Pelham*, 1 Mont. 209.

The person scandalized must petition. *Id.*

In a recent case, the court refused to refer an affidavit for impertinence till the hearing of the petition. *Ex parte Arnaby*, 2 Deac. & Chit. 119.

An affidavit cannot be referred for impertinence, after an affidavit in answer to it has been filed. *Chimelli v. Chauvet*, 1 Younge, 385.

A formal objection, successfully urged on one occasion, is not a waiver of the respondent's right to refer for impertinence, when the same petition is again called on for hearing. *Ex parte Cunningham*, 1 Mont. & Mac. 193.

*Other things.*—All affidavits and other documents directed to be filed in the court of Bankruptcy, must be filed with the registrars of the court. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxiii.*

The registrar's officer shall be at the court of Commissioners of Bankrupts in Basinghall Street, in the city of London, and shall be kept open daily, Sundays only excepted, in the morning from ten to four, and in the evening from seven to nine. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxiii.*

Affidavits in reply are only to be permitted in cases where new matter is introduced in the affidavits answering the petition. *Ex parte Shaylor*, Buck, 244.

A party using affidavits already filed, in support of a petition to the Lord Chancellor, which is transferred to the court of Review, must give notice to the other party. *Ex parte Donaldson*, 1 Deac. & Chit. 36.

Where the original petition is filed, and affidavits put in, and then the petition is amended, by adding the name of another party as respondent, those affidavits cannot be read against him. *Ex parte Mascarenas*, 1 Deac. & Chit. 507.

Where a petition has been part heard, and then adjourned, fresh affidavits cannot be filed. *Ex parte Fry*, 1 Deac. & Chit. 489.

An affidavit filed before the petition is filed, bad, unless notice be given of reading it, which notice must be verified. *Ex parte Palmer*, 1 Deac. & Chit. 490.

An affidavit of the service of a petition ought to be in court. *Id.*

#### (c) Service.

A petition to stay a certificate must be personally served two clear days before the petition day. *Ex parte Hopley*, 1 Glyn & J. 63.

Where it was not served till the day of petitions, though not answered till the day before the service, the bankrupt was declared entitled to his certificate. *Ex parte Branchley*, Coop. C. C. 97.

An order was made, on motion, that service of a petition on the attorney of a person abroad, whose debt was sought to be expunged, should be deemed good service. *Ex parte Pelon*, 3 Madd. 116.

Where a person kept out of the way, to avoid the service of an order made upon petition, it was ordered, upon motion, that service at his office should be good service. *Ex parte Anderson*, Buck, 38.

Where the bankrupt is one of two executors, the petition of a party interested under the will must be served on the other executor, as well as on the bankrupt and the assignees. *Ex parte Cutting*, 2 Deac. & Chit. 3.

An order, in the absence of parties, was made on production of an affidavit of service. *In re Roberts*, 1 Deac. & Chit. 555.

This order may be nunc pro tunc, provided service was originally good. *Id.*

#### (d) Hearing.

No application to take a petition out of its turn can be heard, unless notice has been given of the intention to make such application. *Ex parte —*, 1 Glyn and J. 182.

The Vice-Chancellor has not jurisdiction to direct a petition to be heard before the day for hearing fixed by the Lord Chancellor. *Ex parte Charlton*, 2 Glyn & J. 390.

A motion could not be made to adjourn a petition in bankruptcy: a petition in the bankruptcy was necessary for that purpose. *In re Hardy and Dale*, 6 Madd. 252.

Notice of an intention to read certain parts of the proceedings, prevents other parts being read. *Ex parte Langley*, 1 Mont. 355.

If, when a petition is called, the petitioner do not appear, the respondent must produce an office copy of the affidavit of service, before the rising of the court, to entitle him to his costs. *Ex parte Astell*, Buck, 396.

Where a petition is ordered to stand over until after a trial, there need not be a new petition for further directions. *Ex parte Window*, 2 Glyn & J. 280.

A motion to postpone a petition in the paper of the day, may be heard in precedence of the paper, though opposed. *Ex parte Clarke*, 1 Deac. & Chit. 452.

A petition to stand over, for the purpose of replying to affidavits, will not be granted, unless



the application be made at least two days before the petition appears in the papers. *Ex parte Wiltshire*, Buck, 232.

The examination of a bankrupt, taken not in his own bankruptcy, but under another commission, is not, upon the death of the bankrupt, evidence, upon a petition in his bankruptcy to expunge the debt of a creditor; but it may be used by the commissioners as a clue to direct them in the investigation of the subject upon which it has proceeded. *Ex parte Campbell*, 2 Rose, 51.

Where documents are referred to in an affidavit, it does not give the other side an absolute right to their production; but it is a matter for the discretion of the court: a motion for this purpose, before hearing a petition, was refused, with costs. *Ex parte Arnsby*, 2 Deac. & Chit. 192.

Fiats, upon a petition for hearing in the court of Review, are to direct the attendance of parties thereon to be on the eighth day from the day of presenting every such petition; the petition to be served four days before the expiration of the time at which the attendance thereon is ordered, except in the cases of a petition presented to stay a certificate. The above directions to be without prejudice to any application to the court in respect of either the attendance of, or service on, parties, or the hearing of the petition. *Reg. Gen. Jan. 1832*, 1 Deac. & Chit. lvii.

It is to be understood, that the eight days and four days respectively, in the directions above mentioned, be taken as inclusive of the days of presenting and serving such petitions respectively, and exclusive of Sundays, although an intermediate day. *Mem.* 1 Deac. & Chit. lvii.

In strict practice, the application to postpone the hearing of a petition cannot be by motion; but if the opposite party do not object to the application by motion, affidavits filed after the petition day may be read in support of it. *Ex parte Gillon*, Buck, 549.

By 1 & 2 Will. 4, c. 56, s. 38, the judges and commissioners of the court of Bankruptcy, in all matters within their respective jurisdictions, have power to take the whole or any part of the evidence, either viva voce on oath, or upon affidavits.

Where the court is not satisfied as to the facts sworn to in an affidavit, it will order the deponent to be examined viva voce. *Ex parte Howell*, 1 Deac. & Chit. 358.

The court has the power, under the 38th section, after hearing a case partly on affidavit, to examine viva voce the parties who have made affidavits. *Ex parte Palmer*, 1 Deac. & Chit. 341.

Where the court of Review makes a general order for the examination of the parties, on the hearing of the petition, there is no need for a special order as to any particular witness, but the proper course is to take out a subpoena. *Id.*

The court will not order a viva voce examination in the first instance before the hearing. *Ex parte Arnsby*, 2 Deac. & Chit. 120: *S. P. Anon.* 2 Deac. & Chit. 140.

In the ordinary practice of hearing a petition

on affidavit, it is irregular for a counsel to examine a witness viva voce, without any previous order of the court obtained for that purpose. *Ex parte Buldock*, 2 Deac. & Chit. 60.

The bankrupt's affidavit in support of the respondent's case is admissible in evidence, notwithstanding he has previously made one in support of the petition; but when the party is dead, who could best have answered such affidavit, the bankrupt's allegations, uncorroborated, will not go for much. *Ex parte Howell Gwyn*, 2 Deac. & Chit. 12.

The late receipt of affidavits, and consequent non-delivery of briefs to counsel, is no cause for putting off a petition, as the briefs ought to have been delivered without waiting for the affidavits. *Ex parte Bell*, 1 Deac. & Chit. 496.

**Costs.**—In general, costs cannot be allowed on a petition not praying costs. *Ex parte Dainty*, 1 Mont. 7.

The general rule is, that if the petitioner do not pray his costs, he cannot have them. *Ex parte Atkinson*, Buck, 215.

If upon a petition to except to taxation, and which does not pray costs, an order to retax is made, the petition praying confirmation of the certificate of retaxation may pray the costs of the original petition. *Ex parte Spurr*, 1 Mont. 6.

An attorney, under the circumstances, was ordered to pay the costs of an improper petition. *Ex parte Cuthbert*, 2 Rose, 452.

Where a bankrupt presented an unnecessary petition, his solicitor was ordered to pay 40s. costs. *Ex parte Barker*, Buck, 313.

Though an order might be made upon part of a petition; viz. for interest against an assignee who did not pay into the bank appointed by the creditors under the act of parliament, the petition also praying his removal, with much groundless imputation; the whole was dismissed with costs, without prejudice to another petition, confined to the proper object. *Ex parte Vernon*, 13 Ves. jun. 275.

A petition to expunge a charge of collusion made in another petition, and to be heard before that petition, was dismissed with costs; that other petition, coming on to be heard, and the charge of collusion being unfounded, it was dismissed with costs as against the party so charged. *Ex parte Leigh*, Buck, 132.

The costs of, and occasioned by, the application, include the costs of an interlocutory order, made in pursuance of part of the application; costs of the day can only be obtained by a special order at the time. *Ex parte Green*, 1 Glyn. & J. 188.

Where a petition is ordered to stand over, and costs of the day to be paid by the petitioner, it is not usual to draw up the order; therefore the non-payment of these costs is not such an objection as prevents the petitioner from being heard on the future day. *Ex parte Clarke*, 1 Deac. & Chit. 525.

The court will not, under any circumstances,

before hearing, order a bankrupt to give security for costs. *Ex parte Munk*, 2 Deac. & Chit. 120.

A motion for it was refused, with costs, to be set off against those due from the bankrupt. *Id.*

A petition is not necessarily dismissed with costs, because a previous petition for the same object has been also dismissed, if the dismissal of the prior petition was on a mere matter of form. *Ex parte Hooper*, 1 Deac. & Chit. 117.

### (c) Appeal and Rehearing.

By 1 & 2 Will. 4, c. 58, ss. 3 & 31, if a commissioner or subdivision court shall determine any point of law, or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, the matter may be brought under review of the court of Review; and, in like manner, there may be an appeal on the like matter of law or equity, from the court of Review to the Lord Chancellor.

By s. 32, the determination of the court of Review, in favour of appeals touching such decisions, is to be final, unless appealed against within one month.

By s. 39, in certain cases appeals are allowed to the House of Lords.

A petition of appeal from the Vice-Chancellor's order must have had the signature of a barrister. *Ex parte Holt*, Buck. 429.

A petition cannot be reheard, unless the order made on the former hearing is drawn up. *Ex parte Jenkins*, 1 Deac. & Chit. 222.

Where a petition prayed that the court would reverse an order of the Lord Chancellor, and it was objected to for irregularity, on the ground that the court of Review has no power to reverse such order, the objection was overruled; for though the court cannot rescind such order, it can intimate its opinion to the Lord Chancellor, who would act accordingly. *Ex parte Anjer*, 2 Deac. & Chit. 67.

Upon an appeal in bankruptcy, the appellant is entitled to begin. *Ex parte Belcher*, 1 Mont. & Bligh. 281. See also *Ex parte Cunningham*, 1 Mont. & Bligh. 269.

When a petition for rehearing is presented, an order to have the original petition reheard may be made upon an ex parte application. *Ex parte Hensor*, Buck. 427.

Where a former petition in bankruptcy was by the Vice-Chancellor dismissed on merits, with costs to be paid by the bankrupt, who continues in contempt for non-payment of them, he has no locus standi in the court of Review, being considered in contempt of that court also; and the former decision on the same matter was held an estoppel. *Ex parte Munk*, 2 Deac. & Chit. 120.

## XXIX. PROCEEDINGS.

### 1. Inrolment.

By 6 Geo. 4, c. 16, s. 95, an office for registering proceedings in bankruptcy was appointed:

it was transferred to the court of Bankruptcy by 2 & 3 Will. 4, c. 114, s. 1.

By s. 98, all proceedings in bankruptcy are exempted from stamp duty.

By 6 Geo. 4, c. 16, s. 96, no commission, adjudication, assignment, or certificate shall be received as evidence, unless inrolled, which those matters might be without any petition; and the Chancellor might direct upon petition any deposition, proceeding, or other matter to be inrolled: the production of the instrument merely, with the certificate of inrolment, to be sufficient evidence, without any proof of signature.

By 2 & 3 Will. 4, c. 114, s. 2, matters inrolled before Sept. 1825, are deemed to be effectually entered of record.

By s. 4, the judges of the court of bankruptcy may order commissions to be entered of record.

By ss. 5 & 8, fiats are to be entered of record on the application of any interested party; and are not to be evidence unless so entered.

By s. 9, proceedings in bankruptcy, purporting to be sealed with the seal of the court, are to be received as evidence.

The court of C. P. had no authority, under 6 Geo. 4, c. 16, s. 96, to compel parties to inrol the proceedings under a commission of bankruptcy. *Johnson v. Gillett*, 5 Bing. 5; 2 M. & P. 8.

The application to inrol must be made to the court of Chancery, and not to any court of common law. *Id.*

The clerk of the inrolments was not entitled, as against the assignees, to a lien on the proceedings for the expenses of the inrolment upon an order obtained by the bankrupt. *Ex parte Sanderson*, 1 Rose, 275; 19 Ves. jun. 161.

It was not necessary to inrol a provisional assignment, because it appeared in the general assignment. *Ex parte Martin*, 1 Mont. 64.

An application to the court for an order to inrol the proceedings under s. 96, must have been on petition. *Ex parte Johnson*, 1 Mont. & Macf. 1.

Assignees, who refuse, at the request of parties interested, to inrol proceedings, which before the statute they were bound to produce on subpoena duces tecum, refuse at the peril of costs. *Id.*

One of the two assignees petitioned that his co-assignee, or the solicitor of the commission, (one of whom had the custody of the proceedings) might inrol them pursuant to 6 Geo. 4, c. 16, s. 96:—Held, that before he petitioned for this purpose, he ought to have applied to the co-assignee, or solicitor, to produce the proceedings at the office for inrolment. *Ex parte Evans*, 1 Deac. & Chit. 353.

The 5 Geo. 4, c. 98, which repealed the former bankrupt acts, enacted, that, after June, 1804, a bankrupt's certificate should not be received in evidence unless entered of record. The 6 Geo. 4, c. 16, repealed the 5 Geo. 4, c. 98, from May 2, 1825, and the old statutes from September, 1825: it provided also, that its enactments respecting certificates should take effect from May 2, 1825, and that certificates on commissions, issued after the act took effect, should be entered of record.

was issued on January, 1823, and the certificate obtained in November, 1825:—Held, that it need not be entered of record. *Tottle v. Greenwood*, 3 Bing. 493; 11 Moore 432.

There cannot now be any enrolment under 5 Geo. 2, c. 30. *Kay v. Goodwin*, 6 Bing. 576; 4 M. & P. 341.

The proceedings under a commission of bankruptcy sued out in 1822, were not inrolled till after the repeal of the 5 Geo. 2, c. 30, in 1825:—Held, that they were not admissible in evidence, the 6 Geo. 4, c. 16, not applying to the enrolment of proceedings under a commission anterior to the act. *Id.*

Quere, whether the adjudication need be inrolled under 6 Geo. 4, and 1 & 2 Will. 4, in order to be evidence on a trial at Nisi Prius; but, to avoid the difficulty, the court allowed the assignees to have the proceedings, in order to inrol the adjudication. *Ex parte Bowden*, 1 Deac. & Chit. 453.

If the assignee is not bound, in an action where he is plaintiff, to produce the assignment, as he proves his title aliunde, there is no necessity to show the enrolment. *Bates v. Sturges*, 7 Bing. 586; 5 M. & P. 568.

A bill of exchange, on which the commission was sued out, was ordered to be left with the assignees, and inrolled of record with the commission and proceedings. *Ex parte Jackson*, 2 Rose, 188.

## 2. Inspection.

A bankrupt is entitled to the inspection of the proceedings, for the purpose of ascertaining the debts proved, with a view to his certificate. *Ex parte Morgan*, 1 Glyn & J. 404.

An assignee cannot refuse the bankrupt an inspection of his books previous to his last examination, on the ground that such examination is with a fraudulent object. *Ex parte Ross*, 1 Rose, 33; 17 Ves. jun. 374.

The right of a bankrupt to an inspection of his books, &c., or to a list of the debts proved, under the statute 5 Geo. 2, c. 30, s. 5, for the purpose of his examination, depends on his conduct. *Id.*

A bankrupt disputing the bankruptcy is not permitted to see the proceedings. *Ex parte Vaughan*, 14 Ves. jun. 513.

A general inspection of a bankrupt's books, for the purpose of getting rid of the certificate, by proving gambling transactions, was refused. *Ex parte Mawson*, 6 Ves. jun. 614.

A bankrupt, pending a commission, has a right to an inspection in respect to the surplus; and the Lord Chancellor will take care, that at the close of it, he shall have justice; but in this case the bankrupt was not permitted to surcharge and falsify in the master's office the accounts settled by the commissioners long ago, though a palpable error, specifically pointed out by a short petition would be rectified. *Twogood v. Swanston*, 6 Ves. jun. 485.

A commission against the petitioner had been

enablers for liberty to inspect the commission, &c. The judge thought he had no authority to make the order. The petitioner then presented his petition for the same purpose, and obtained an order; but, under the circumstances, with no costs on either side. *Ex parte Warren*, 1 Rose, 276; 19 Ves. jun. 162.

A person who is interested in the proceedings under a commission, is entitled to have them produced in a collateral cause. *Cohen v. Templar*, 2 Stark. 260—*Horroyd*.

## 3. Custody.

*What are.*—Books of the bankrupt noticed or referred to by him on his last examination, form part of the proceedings under the commission, to be delivered with costs to the assignees by any person, who, by refusal to part with them, renders an application necessary to obtain them. *Ex parte Hurdy*, 1 Rose, 395.

Depositions upon which the commissioners have founded a report, are proceedings in the bankruptcy, and, as such, to be left in the custody of the assignees. *Ex parte Newton*, 2 Rose, 19.

An application by the petitioning creditor and provisional assignee, under a subsisting commission, to compel the solicitors, under a superseded commission against the same parties, to deliver up the proceedings under the superseded commission was refused. *Ex parte Shaw*, 1 Glyn & J. 124.

*Custody.*—In bankruptcy, the assignees and not the commissioners are entitled to the custody of the proceedings. *Ex parte Scarth*, 15 Ves. jun. 293.

Neither the assignees nor the solicitor under the commission are permitted to say that the proceedings are in any person's hands but their own. *Ex parte Bullen*, 1 Rose, 134.

Proceedings under a commission of bankruptcy, in the secretary's office, were not permitted to be used as evidence in actions, by strangers unconnected with the commission. *Jervis v. White*, 8 Ves. jun. 314.

After a commission has been superseded, the great seal has power over the proceedings for the purpose of safe custody, and sometimes orders them to be deposited in the bankrupts' office. *Ex parte Shaw*, Jacob, 270.

Where a commission was superseded, and an action brought, the Lord Chancellor ordered the commission and proceedings to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial, with liberty to inspect and copy. *Ex parte Warren*, 19 Ves. jun. 162; 1 Rose, 276.

The proceedings under a commission superseded, were ordered to be produced at the hearing of a cause in the court of Chancery in Ireland, with a view to evidence from the bankrupt's examination; but not of course. *Ex parte Bernal*, 11 Ves. jun. 557.

The assignees appointed under old commissions shall be at liberty to retain, until further order, the custody of the commission and proceedings heretofore taken thereon, according to the present practice in bankruptcy. *Reg. Gen. H. T. 2 Will. 4, 1 Deac. & Chit. xxiv.*

If a solicitor refuse to deliver the commission and proceedings to the assignee, the order is of course, with costs. *Ex parte Crouse, 1 Mont. & Bligh, 90.*

The proceedings were ordered to be deposited in the office, sometimes with a view to a criminal prosecution, as for a conspiracy; even if the bond was assigned, because the remedy, being limited to the penalty, was less beneficial than an action on the case. *Ex parte Warren, 19 Ves. jun. 163; 1 Rose, 276.*

If a true bill for perjury is found against the solicitor to a commission, who made an affidavit in opposition to a petition to supersede, and it is necessary to produce the commission and proceedings, and the original affidavit at the trial; the court will order the solicitor to deposit them in the secretary's office, to be produced. *Ex parte Tipton, 1 Mont. 214.*

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**BANNS OF MARRIAGE—See HUSBAND AND WIFE.**

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**BARGAIN AND SALE—See DEED.**

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**BARON AND FEME—See HUSBAND AND WIFE.**

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**BARRATRY—See INSURANCE.**

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**BARRISTER.**

[For his rights, on account of his Client, at the time of Trial—See PRACTICE.]

*Calling to the bar.*—A mandamus does not lie to the benchers of an inn of court to compel them to admit an individual to be a member of the society, for the purpose of qualifying himself to become a barrister. *Rex v. Lincoln's Inn (Bencher), 7 D. & R. 351; 4 B. & C. 855.*

The only mode of relief is by appeal to the twelve judges. *Rex v. Gray's Inn, 1 Dougl. 353.*

No mandamus lies to the Archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at Cambridge, as an advocate of the court of Arches. *Rex v. Canterbury (Archbishop), 8 East, 212.*

By 55 Geo. 3, c. 184. *sched. 1*, the stamp upon the admission to the degree of barrister is 50l.

A bill in equity will not lie against the benchers of an inn of court, relative to a grant of chambers. *Cunningham v. Wegg, 2 Bro. C. C. 241.*

An action at law may be maintained upon the

bond usually given to the society on being called to the bar, to recover arrears of "absent commons," "vacation commons," "preacher's duties," and "pensions" which have occurred while the party has remained a member of the society, although he has not lived in the inn, or practised at the bar. *Rosslyn (Earl of) v. Jodrell, 4 Camp. 303; 1 Stark. 147—Ellenborough.*

*Actions by and against.*—No action lies against a barrister for misconduct in the management of a cause. *Fell v. Brown, Peake, 96—Kenyon.*

Nor to recover back a fee given to him to argue a cause which he did not attend. *Turner v. Philipps, Peake, 122—Kenyon.*

An action for defamation will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue. *Hodgson v. Scarlett, 1 B. & A. 232.*

But although counsel in the discharge of their duty are privileged to utter matter injurious to individuals, the subsequent publication of such matter is unlawful. *Flint v. Pike, 6 D. & R. 528; 4 B. & C. 473.*

A certificated conveyancer may maintain an action for his fees. *Poucher v. Norman, 5 D. & R. 648; 3 B. & C. 744; S. P. Davies v. Sibly, 6 D. & R. 4; overruling S. P. contra Jenkins v. Slade, 1 C. & P. 270. And see Crammond v. Crouch, 3 C. & P. 77.*

Persons required to take out certificates under the 55 Geo. 3, c. 184 (*schedule A. part I. title certificate*), are only persons being members of one of the four Inns of Court, &c. *Edgar v. Hunter, Holt. 528—Gibbs.*

Serjeants and barristers, when they sue, are entitled to lay and retain the venue in Middlesex. *Sparke v. Stokes, 1 Tidd's Prac. 76, 656.*

Even though the cause of action arose in another county. *Spelman v. —, 1 Wils. 139; S. C. nom. Spelman's case, 1 W. Black. 19.*

But when a barrister is defendant, he has no privilege whatever respecting the venue, and therefore cannot change it to Middlesex when laid in another county. *Id.*

He is privileged from arrest whilst in attendance on the courts, and therefore will be discharged if arrested on the circuit. *In re Hippeley, 1 H. Black. 636.*

He is privileged from arrest whilst he is on his return from court. *Luntly v. Nathaniel, 2 Dowl. P. C. 51; 1 C. & M. 579.*

*Practice.*—After the 14th Dec. 1814, the attorney and solicitor general took precedence before all the king's serjeants; whereas, before then, they were accustomed to have place and audience in the courts next after the two most ancient of the king's serjeants, but before the others. 6 Taunt. 424; 2 Ves. & B. 422.

The attorney-general is the only legal representative of the crown in the courts. *Rex v. Austen, 8 Price, 142. And see Rex v. Wilkes, 4 Burr, 2570.*

The attorney-general is an officer of the crown.

and in that sense only the officer of the public.  
*Att. Gen. v. Brown*, 1 Swans. 288.

The Chancellor had not jurisdiction in bankruptcy to interfere with the practice of a barrister as to a retainer. *Ex parte Elsee*, 1 Mont. 69.

On an application by a person against whom a commission of bankruptcy had issued, that counsel might be permitted to attend the commissioners on his behalf, before adjudication; the Lord Chancellor declined to make any order, but intimated his opinion that under the circumstances it would be proper for the commissioners to comply with the request. *Ex parte Taylor*, 1 Mont. & Mac. 427.

Seemingly, that the House of Lords will, under peculiar circumstances, hear two counsel for a respondent, although to hear but one on each side may be part of the order made on advancing the appeal, on the petition of the appellant. *Dillon v. Parker*, 1 Clark & Fin. 303.

By 6 Geo. 4, c. 50, s. 2, practising barristers are exempted from serving on juries.

The salary of the assistant parliamentary counsel to the treasury is not assignable, and the court will not appoint a receiver for it. *Cooper v. Reilly*, 2 Sim. 560, 1 Russ. & Mylne, 560.

Cases and statements for the opinion of counsel, admitted by the answer of the defendant to be in his custody, possession, or power, were ordered to be produced for the usual purposes; but it would seem that, for the future, cases laid before counsel in the progress of the cause, or prepared in contemplation of, or with reference to the cause, will not be ordered to be produced for the purposes of the cause. *Newton v. Berresford*, 1 Younge, 377.

**Authority to bind Client.**—A counsel, to whom a retainer in a cause has been given, no brief having been delivered, cannot withdraw the record. *Doe d. Crake v. Brown*, 5 C. & P. 315—Gurney.

A statement made by a counsel upon his address to the jury; but in the hearing of his client, is binding on the client if he make no objection. *Colledge v. Horn*, 3 Bing. 119; 10 Moore, 431.

A party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprized of all those facts of which the knowledge was essential to the proper exercise of their discretion; but he may be relieved from an order made by such consent, if they give that consent in ignorance of a material circumstance. *Furnival v. Bogle*, 4 Russ. 142.

To support an action against a party, founded on an undertaking entered into by him (after having appeared and pleaded to an indictment for an assault), to do an act in consideration of the prosecutor consenting to a nominal fine only being imposed on him, the indorsement to that effect of the terms of the agreement between the parties on the briefs signed by the counsel on both sides was held at Nisi Prius not sufficient to be left to the jury, without proving the assent of the defendant; and a nonsuit was directed on that ground, which the court refused to set aside.

*Elworthy v. Bird*, 13 Price, 222; 9 Moore, 430; 2 Bing. 258; 1 Tam. 38.

Held in equity, on a bill for a specific performance, that it was not incumbent on the plaintiffs to prove that the defendant did assent to the agreement entered into by his counsel, but on the defendant to disprove it. *Id.*

Held, also, that the weight of the evidence being, that the defendant did not dissent, the court will conclude that the counsel had authority. *Id.*

Held, also, that the plaintiffs were entitled to a decree for a specific performance, with costs. *Id.*

## BASTARD.

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I. WHO ARE, AND HOW PROVED TO BE SO.

In case of a child born in wedlock, the access or non-access of the husband may now be proved like any other fact; the old rule by which access was always presumed when the husband was within the four seas, having given way. *Shelley v. —*, 13 Ves. jun. 58.

Every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled by proof of such facts as satisfy the jury, beyond all doubt, that no sexual intercourse took place between the parties at a time when the husband could by possibility be the father of the child. *Morris v. Davies*, 3 C. & P. 215—Vaughan. S. C. 3 C. & P. 427—Gascoke.

And the jury, before they can find against the legitimacy, must be convinced that no such sexual intercourse took place, by irresistible evidence, and not by a mere balance of probabilities. *Id.*

If such intercourse did take place, the adultery of the wife is immaterial. *Id.*

And if there was an opportunity for sexual intercourse between the husband and wife, the law

presumes that such intercourse did take place, unless the contrary be satisfactorily proved. *Id.*

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the presumption must stand rebutted by clear and satisfactory evidence. *Head v. Head*, 1 Turn. & Russ. 138; 1 Sim. & Stu. 150.

A child born of a married woman whose husband is within the four seas, is always to be presumed to be legitimate, unless there is evidence affording irresistible presumption that sexual intercourse did not take place between them at any time, when, in the course of nature, the husband might have been the father of the child. *Id.*

If the husband be found to have gone beyond seas above two years before the birth of a child borne by his wife, she remaining at home, the conclusion is irresistible, that such child is a bastard. *Rez v. Maidstone*, 12 East, 550.

Non-access of the husband need not be proved during the whole period of the wife's pregnancy; it is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth. *Rez v. Luffe*, 8 East, 193.

If the husband have access, and others at the same period have a criminal intimacy with his wife, and she have a child, such a child is legitimate; but if the husband and wife be living separately, and the wife is notoriously living in adultery, a child born under such circumstances would be illegitimate, although the husband had an opportunity of access. *Cope v. Cope*, 5 C. & P. 604; 1 M. & Rob. 269—Alderson.

On an issue to try the legitimacy of a party born of a married woman, since dead, declarations by her that he was not the son of her husband, but of another man, are not admissible; nor are such declarations of the husband admissible. *Id.*

But a baptismal register, in which the party is described as the illegitimate son of his mother, is admissible evidence on the trial of such an issue. *Id.*

The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access. *Goodright d. Thompson v. Saul*, 4 T. R. 356. And see *Rez v. Lubbenham*, 4 T. R. 251.

A woman cannot give evidence of the non-access of her husband, to bastardize her issue, though he be dead at the time of her examination as a witness; and therefore an order of sessions, stated by that court to be founded in part upon credence given to her testimony of that fact, was quashed. *Rez v. Kea*, 11 East, 132; S. P. *Goodright d. Stevens v. Moss*, Cowp. 531.

But the mother is a competent witness to prove the illegitimacy of her children. *Rez v. Bramley*, 6 T. R. 330; S. P. *Standen v. Standen*, 6 T. R. 331. And see *Rez v. Ravenstone*, 5 T. R. 373.

And evidence of the reputed father may be admitted to prove the bastardy of the children after the mother's death. *Rez v. St. Peter's*, Burr. S. C. 25.

A child born in Scotland before marriage of parents domiciled there, and who afterwards marry there, cannot inherit lands in England. *Doe d. Birtwhistle v. Vardill*, 8 D. & R. 186; 2 B. & C. 438.

## II. FILIATION.

### 1. Jurisdiction of Justices and Sessions.

The right to examine women who have been delivered of bastards is given by 6 Geo. 2, c. 31; and women who are pregnant, but not delivered, by 49 Geo. 3, c. 68.

Under these statutes concerning bastards, no order of filiation for payment of the expenses can be made, unless the child be born alive. *Rez v. De Brouquens*, 14 East, 277.

An action for false imprisonment lies against overseers for imprisoning a man under a justice's warrant, until he paid a sum of money for the maintenance of a child, which should be born of a woman then pregnant by the plaintiff, but who had not as yet been delivered. *Wenman v. Fisher*, 2 Selw. N. P. 896.

If a person be bound by a recognisance by one magistrate under 6 Geo. 2, c. 31, to appear at the next sessions, and perform such order as shall there be made on him, under the 18th Eliz. c. 3, respecting bastards, the sessions can only make an order of bastardy on him, but cannot order him also to give security for the performance of that order. *Rez v. Price*, 6 T. R. 147.

Nor can the magistrates order the father to find security. *Rez v. Fox*, 1 Bott's P. L. 477; 6 T. R. 148; S. P. — *v. Messenger*, 1 Bott's P. L. 474.

But they may order the payment of a sum in gross. *Rez v. Gravesend*, 1 Bott's P. L. 500.

An original order of bastardy may be made at the quarter sessions. *Rez v. Greaves*, 2 Dougl. 632.

Two justices out of sessions cannot make an order to acquit or discharge a person who is charged with being the reputed father of a bastard child. *Rez v. Jenkins*, 1 Bott's P. L. 474.

Nor can they commit a person for refusing to discover the father of a bastard child. *Rez v. Southby*, 1 Bott's P. L. 477.

The sessions cannot fine a constable for suffering a putative father to escape. *Rez v. Ridge*, 1 Bott's P. L. 507.

If an unmarried woman be committed for disobedience to an order of bastardy, a subsequent marriage is no cause for discharging her. *Rez v. Taylor*, 3 Burr. 1679.

The defendant must appear in court when an order of bastardy is quashed. *Rez v. Gibson*, 1 W. Black. 198.

If an order of sessions recite that it was made on full hearing, the merits must have come before them, and their discharge is conclusive. *Rez v. Teriam*, 1 Bott's P. L. 509.

If a court of general quarter sessions next after an order of bastardy quash the order, the

court of King's Bench will not intend that a court of general sessions intervened; and unless that appear, the order of sessions will be confirmed. *Rex v. Chichester, (Guardians, &c.)* 3 T. R. 496.

A rule for a certiorari to remove an order of bastardy was discharged because not applied for within six months. *Rex v. Howlett*, 1 Wils. 35.

A soldier in actual service is not protected under the Mutiny Act from being committed to prison under 6 Geo. 2, c. 31, for want of sureties, &c. upon an oath charging him to be the father of a child likely to be born a bastard. *Rex v. Bowen, Nolan*, 186; 5 T. R. 156; *S. P. Rex v. Archer*, 2 T. R. 156.

## 2. Examination of Mother.

The two justices must be present at the same time and place, when a woman is examined and committed for not affiliating a bastard child. *Billings v. Prinn*, 2 W. Black. 1017. And see *Rex v. Forrest*, 3 T. R. 38; *Rex v. Great Marlow*, 2 East, 244; *Rex v. Hamstall Ridware*, 3 T. R. 380.

One magistrate has no power to commit a single woman for refusing to be examined respecting the father of her bastard child. *Ex parte Martin*, 9 D. & R. 65; 6 B. & C. 80.

Trespass will not lie against one magistrate for committing the mother of a bastard child for refusing to affiliate it, without the previous notice of action required by the stat. 42 G. 2, c. 24, although the jurisdiction in such matters is given by 18 Eliz. c. 2, s. 2, to two magistrates only. *Bird v. Gunston*, Hull. Costs, 240; 2 Chit. 459. And see *Weller v. Toke*, 9 East, 364; and *Briggs v. Evelyn*, 2 H. Black. 115.

An order of filiation may be made under the stat. 6 Geo. 2, c. 31, upon an examination of the woman pregnant when taken, if the woman die before the application is made. *Rex v. Ruvenstone*, 5 T. R. 373.

Every reasonable intendment will be made in favour of an order of justices. Therefore, where an order of bastardy, reciting that it had appeared to the justices on the oath of R. T. that the said Mary Cole (referring to the title in which she was named as Mary Cole, deceased) was delivered of a bastard child, &c.; and further, that upon the examination of the said M. C. taken on oath, &c.; dated, &c. in the presence of the said R. T., the said M. C., upon her oath, charged the defendant with being the father, &c., adjudged that therefore upon examination of the cause and circumstances of the premises, as well on the oath of the said M. C. before birth so taken, and also upon the oath of the said R. T., that the defendant was the father, and that he should pay so much, &c.; the court would intend, (especially after appeal confirming the order,) that M. C. was dead at the time of the order made, and that her examination on oath before taken in writing under the stat. 6 Geo. 2, c. 31, was verified on the oath of R. T. before the magistrates making the order; which examination was sufficient after the death of the mother to warrant a subsequent order of filiation. *Rex v. Clayton*, 3 East, 58.

It is not necessary to the validity of an order of filiation, that the putative father should be present at the examination of the woman before the two justices. *Rex v. Upton Gray*, Cald. 308.

## 3. Who may apply for.

An order of bastardy must be made on complaint of the parish where the child is born, and it must be stated in the order to have been made on such complaint. *Rex v. St. Mary Nottingham*, 13 East, 57; 1 Bott's P. L. 482.

Therefore, where, by the order, it did not appear to have been made on complaint of the parish where the child was born, but on the contrary stated that she was a casual poor there, it was held bad: for, non constat but that she may have been born in a parish in another county, out of the jurisdiction of the justices making the order. *Id.*

But as to orders in bastardy, and upon whose complaint they must be made, see *Rex v. Fox*, 6 T. R. 148.

Justices have no authority to make an order of bastardy where the child is born in an extra-parochial place. *Rex v. Baker*, 1 Bott's P. L. 476; and see *Rex v. Hexham*, 1 Bott's P. L. 498; *S. P. Rex v. Willey*, 1 Bott's P. L. 499; *Rex v. Stanley*, Cald. 172.

One who is de facto guardian of the poor of a parish, united with other parishes under the stat. 22 Geo. 3, c. 83, for the better relief and employment of the poor, and who is received and acknowledged by the parish as guardian, though not legally appointed such under the statute, is yet competent to apply in that character to a justice of the peace, to take the examination of a single woman with child, in order to filiate the bastard; which by the stat. 6 Geo. 2, c. 31, s. 1, is directed to be made upon application by the overseers of the poor, in whose place such guardian is appointed; and he is also competent to apply to the justice for a summons against a reputed father for not obeying an order of bastardy; which by stat. 49 Geo. 3, c. 68, s. 3, is directed to be made upon complaint by any one of the overseers of the poor. And though the latter stat. direct the magistrate upon such complaint, and proof upon oath of the order for payment of maintenance, and non-payment thereof, to issue his warrant to apprehend the reputed father; yet it is proper for the justice to issue a summons in the first instance to the party charged, to attend and show cause, &c. *Rex v. Martry*, 13 East, 56.

## 4. Form of Order.

An order of bastardy, stated to be as well upon the oath of the wife, as otherwise, is good; for it will be presumed that the non-access of the husband was proved by competent witnesses on oath other than the wife; or if proved by her also, that the judgment of the justices was founded on the other proof. *Rex v. Luffe*, 8 East, 193.

Such an order filiating the child of a married woman is good; though it only state that such child was likely to become chargeable; which are

the words of the stat. 8 Geo. 2, c. 31, s. 1, as applied to the bastards of single women; for upon that statute, as well as the stat. 18 Eliz. c. 3, which has the words, born out of lawful matrimony, the only question is, whether the child be by law a bastard. *Id.*

An order of filiation, stating that the child is likely to become chargeable, is sufficient, without showing that it was actually chargeable. *Rez v. Hartington*, 4 M. & S. 559.

The justices must expressly adjudge that the child was born in the parish. *Rez v. Hexham*, 1 Bott's P. L. 498; *S. P. Rez v. Willey*, 1 Bott's P. L. 499; *Rez v. Stanley*, Cald. 172.

But if it appear in any part of the order—as in the title—that the child was born in the parish, it is sufficient. *Rez v. Fox*, 1 Bott's P. L. 501; 6 T. R. 148.

To wit, Liberty of the Tower Hamlets, London, in an order of bastardy, is sufficient, without saying in what county. *Rez v. Messenger*, 1 Bott's P. L. 499.

An order of bastardy stating "whereas it hath appeared to us, &c." without an express adjudication that the person charged is the putative father, is void. *Rez v. Pitts*, 2 Dougl. 662.

#### 5. Appeal to the Sessions.

The sessions have no jurisdiction to receive an appeal in a matter of bastardy, until the requisites of 49 Geo. 3, c. 68, ss. 5 & 7, have been complied with, as to the notice of appeal and entering into a recognisance: notice of appeal for an adjourned sessions for a different division of a county, does not satisfy the requisites of that statute. *Rez v. Lincolnshire*, (*Justice*), 5 D. & R. 347; 3 B. & C. 548.

By the stat. 49 Geo. 3, c. 68, s. 5, the notice of appeal in a matter of bastardy must specify the cause and matter of such appeal: where, therefore, a notice given by the reputed father of a bastard child, of his intention to appeal against an order of filiation, merely stated that he intended to prosecute an appeal against an order of filiation, whereby he was adjudged to be the father of a female bastard child, born on the body of E. H. and chargeable to the parish of S., pursuing the words of the order, without specifying the particular grounds of appeal:—Held, that the notice of appeal was insufficient. *Rez v. Gloucestershire (Justices)*, 2 D. & R. 426; *S. C. nom. Rez v. Oxfordshire (Justices)*, 1 B. & C. 279.

And, under the 5th section of that statute, the notice of appeal in a matter of bastardy must specify the cause and matter thereof. *Id.*

A verbal notice of appeal is sufficient. *Rez v. Salop (Justices)*, 4 B. & A. 626.

Upon an appeal to the sessions against an order of filiation, the respondents are to begin by supporting their order as in all other cases. *Rez v. Knill*, 12 East, 50. And see *Rez v. Newbury*, 4 T. R. 475; Nolan, 25.

### III. INDEMNITY TO THE PARISH.

#### 1. Bond.

By 54 Geo. 3, c. 170, ss. 8 & 9, overseers are to sue on the bond of indemnity; and the inhabitants are made competent witnesses.

By that statute, an action on a bastardy bond must be brought in the names of the overseers for the time being, and not of those to whom the bond was given. *Addy v. Woolley*, 3 Moore, 21; 8 Taunt. 691.

Where the putative father gave a voluntary bond, and not under the compulsory clause of 6 Geo. 2, c. 31, to the parish officers, conditioned for the payment of a sum certain every three months until the child should be deemed capable of providing for herself:—Held, that such bond was good, and the condition sufficiently certain. *Middleham v. Bellerby*, 1 M. & S. 310.

A bond, conditioned for payment to the overseers of a parish of a certain weekly sum so long as a bastard child shall continue chargeable, is not illegal or contrary to public policy. *Strangeways v. Robinson*, 4 Taunt. 498.

To debt on such a bond, it is no plea, that after the child attained the age of seven years, the putative father offered thenceforth to keep and maintain the child, and requested the overseers to deliver it to him, without showing that the child was within the power and custody of the overseers. *Id.*

And in a very recent case, where the putative father voluntarily entered into a bond, conditioned to pay the plaintiffs, parish officers, and their successors, 2s. 6d. per week, for all costs and charges concerning the child, so long as it should live, and be provided for at the expense of the parish: to an action on the bond, to recover divers weekly payments, the defendant pleaded that he was able and willing to provide for the child, without the assistance of the parish, and that he had requested the plaintiffs to deliver it over to his care; but that the child had been provided for at the expense of the parish, by the plaintiffs, of their own wrong, and that if they were damnedified, they were damnedified of their own wrong:—Held, that the bond was a valid security, and an indemnity to the parish to a certain extent. *Pope v. Sale*, 5 M. & P. 334; 7 Bing. 477.

Held also, that the plea disclosed no matter of legal defence to the action, as the only plea in discharge of the bond would be performance, as the child had been provided for at the expense of the parish. *Id.*

Where the father of a bastard child, upon whom an order of affiliation had been made, paid several sums on that account to the parish, and during all that time for which he paid, the child was in the Foundling Hospital, and the parish put to no expense:—Held, that he might recover the money back. *Hodgson v. Williams*, 6 Esp. 29—Mansfield.

The court of C. P. will stay the proceedings in an action on a bastardy bond, on payment of the penalty and costs. *Shutt v. Proctor*, 2 Marsh. 226.



Before the 6 Geo. 4, c. 16, s. 56, the obligor was not discharged by his bankruptcy and certificate. *St. Martin v. Warren*, 1 B. & A. 491; 2 Stark. 188.

Surety obligors in a bastardy bond, discharged under the Insolvent Debtors' Act subsequently to a judgment on the bond, are liable on scire facias on the judgment, for expenses incurred in respect of the bastard subsequently to their discharge. *Davies v. Arnott*, 3 Bing. 154; *S. C. nom. Davies v. Arnott*, 10 Moore, 539.

If the father offer to take and maintain the child, and the parish choose to support it, they cannot proceed on the bond. *Newland v. Osman*, 1 Bott's P. L. 460.

A plea, that the mother of a bastard child took it away, to debt on a bond to indemnify the plaintiff from all charges, was held bad. *Hulland v. Walker*, 2 Wils. 126.

The parish officers have a right to fix the amount of the security. *Dickenson v. Brown*, Peake, 234—Kenyon.

## 2. Deposit or other Security.

The stat. 6 Geo. 2, c. 31, only authorizes parish officers to take security from the putative father of a bastard child, to indemnify the parish: therefore parish officers can only require from him security to indemnify the parish from any charge for its maintenance: consequently a deposit of money for that purpose is contrary to the policy of the law, and such deposit may be recovered back. *Clark v. Johnson*, 11 Moore, 319; 3 Bing. 424.

The mother of an illegitimate child may recover, in an action for money had and received, money deposited with a parish officer to meet any charges to which the parent might be liable in respect of the child. *Id.*

If the putative father pay, before the birth, a fixed sum to the parish officers, to discharge him from all future responsibility for the maintenance of the child; after the birth and death of the child, he may recover back such part of the money as remains unexpended, as had and received to his use. *Watkins v. Hewlett*, 1 B. & R. 1: *S. C. nom. S. P.* 3 Moore, 211.

A note given to the officers of a parish, to indemnify them against the expenses of a bastard child, is to be taken as an indemnity only so far as the parish have been put to expense, though not so expressed in the note. The maker may set up the defence, that they were not damnified. *Wilde v. Griffin*, 5 Esp. 143—Ellenborough.

And if a sum be paid sufficient to cover the whole of the expenses which the parish has been put to, no action can be maintained on the note. *Id.*

Where the parish officers had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum as the amount of the charge actually sustained by the parish, which tender was found for the defendant:—Held, that the plaintiffs could not recover further upon the note. *Cole v. Gosser*, 6 East, 119; 2 Smith, 246.

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Where 40*l.* had been paid to the parish, and 4*l.* only expended:—Held, that the remainder might be recovered back. *Anon.* 1 Camp. 398—Lawrence.

Rule for a new trial refused under the names of *Stainforth v. Staggs*, 1 Camp. 564. And see *Ferrall v. Horne*, 1 Camp. 564.

An action lies to recover back money paid to parish officers by a person taken up under a warrant, as the putative father of a bastard child, by way of bargain with the parish to be released from all liability respecting the child, against those who receive the money; although before the commencement of the action, they may have gone out of office, and accounted with their successors for so much of the money as was not expended on the child and its mother during her lying-in:—However, in such action, the plaintiff is only entitled to recover the surplus after the charges have been deducted. *Townson v. Wilson*, 1 Camp. 396—Ellenborough.

If an overseer receive from the putative father, a sum of money as a composition with the parish for the maintenance of a child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish. *Rex v. Martin*, 2 Camp. 268—Ellenborough.

Even though the putative father pay the money under a mistake of law, and not under duress, it may be recovered back. *Id.*

## IV. LIABILITY OF PARISH.

Where a bastard child is born, for whose sustenance the parents neglect to provide necessities, the parish officers are obliged to do it, without an order of justices for that purpose. *Hays v. Bryant*, 1 H. Black. 253.

A certificate, acknowledging an unmarried woman to be pregnant, and undertaking to provide for the child or children she went with, will oblige the parish granting it to provide for an after-born bastard. *Rex v. Ipeley*, Burr. S. C. 650.

Where a bastard having a different settlement from the mother, lives with her for nurture, the parish where the bastard's settlement is must maintain it. *Simpson v. Johnson*, 1 Dougl. 7: *S. P. Rex v. Hemlington*, Cald. 6.

## V. CUSTODY OF CHILD.

The mother of an infant illegitimate child is entitled to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it. *Ex parte Kneer*, 1 N. R. 148.

And if the putative father obtain possession of the child from the mother by fraud, the court of K. B. will order it to be restored to the mother. *Rex v. Soper*, 5 T. R. 278: *S. P. Rex v. Moseley*, 5 East, 224, n.

The court will grant a habeas corpus to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the

custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force; and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the King in Chancery. *Rez v. Hopkins*, 7 East, 579; 3 Smith, 577.

For quere, whether the putative father of a bastard child has any right to the custody of the child in any case. *Strangeways v. Robinson*, 4 Taunt. 498.

Although in one case it was held, that the putative father had a natural right to the care and education of the child, and therefore that it could not be taken from his custody. *Rez v. Cornfoot*, 1 Bott's P. L. 465.

And the putative father may take the child from the parish, and maintain it himself. *Newland v. Orman*, 1 Bott's P. L. 466.

Justices cannot order a bastard child to be delivered to the care of its mother. *Rez v. Felton*, 1 Bott's P. L. 478.

## VI. LIABILITY OF PUTATIVE FATHER.

### 1. On Order of Affiliation.

*Expenses.*—The reputed father cannot be ordered to pay a gross sum at a future day, for the purpose of binding the child out apprentice. *Rez v. Willey*, 1 Bott's P. L. 499. And see *Rez v. Gravesend*, 1 Bott's P. L. 500.

An order of bastardy is only binding on the reputed father, to indemnify the parish in which the bastard is born, till the bastard has acquired another settlement for herself elsewhere. *Rez v. St. Mary Nottingham*, 13 East, 57.

A party is not compellable to find sureties for the performance of an order in bastardy made upon him. *Rez v. Price*, 6 T. R. 147.

An order of bastardy, awarding a gross sum to be paid for the midwife and other charges, and for the past maintenance, &c. is good. *Rez v. Fox*, 6 T. R. 148; 1 Bott's P. L. 501.

And if it direct the sum to be paid towards the lying-in and maintenance, it seems to be enough, without stating that the sum was expended by the overseers. And if it be stated to be on complaint of the overseers of the township, it need not state that it is a township maintaining its own poor. *Rez v. Hartington*, 4 M. & S. 559.

So, an adjudication that the child was baptized in the parish, and that 3*l.* should be paid, part whereof had already been expended for maintenance of the child, and other incidental charges, was held good. *Rez v. Morana*, 1 Bott's, P. L. 500.

*Costs.*—In an order of filiation and maintenance, the justices have no power, by the stat. 18 Eliz. c. 3, to direct the defendant to pay the costs of the parish in obtaining the order; but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it. *Rez v. Sweet*, 9 East, 25.

So, a commitment "until he should pay the sum due for the maintenance of the child and legal accustomed fees, or until he should be otherwise delivered by due course of law," is bad. *Robson v. Spearman*, 3 B. & A. 493; *S. P. Marsh's case*, 2 W. Black. 806.

An order of bastardy made twelve years after the death of the child, whereby the putative father (who had in the mean time absconded) was adjudged to pay two several sums, one for the bygone maintenance, and the other for the costs, is void in toto; and though the filiating justices committed the father upon an illegal warrant, from which he was discharged at the next sessions, still they might afterwards issue a fresh warrant, founded on the original order: but if the case fell within the 49 Geo. 3, c. 68. s. 3, as an order unappealed from, the commitment for non-payment of maintenance, must be for three months, unless the money was sooner paid. *In re Addis*, 2 D. & R. 167; 1 B. & C. 87.

### 2. Independent of Order.

A father of a bastard child, if he has adopted it as his own, though no order has been made on him, is liable for nursing and necessaries. *Haketh v. Gowing*, 5 Esp. 131—Ellenborough.

Bankruptcy is no discharge of a promise to allow a weekly sum for the support of an illegitimate child. *Millen v. Whittenbury*, 1 Camp. 496—Ellenborough. And see *St. Martin v. Warren*, 1 B. & A. 491; 2 Stark. 188.

If the father of an illegitimate child has consented to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give the most distinct notice of his intention to discontinue the payment of such annual sum. *Cameron v. Baker*, 1 C. & P. 268—Best.

If a person know that his illegitimate daughter, of the age of sixteen, is boarded and clothed by a party, and neither expresses dissent, nor takes his daughter away, he is liable to pay for such board and lodging, without any express promise to do so, unless he can show that his daughter was so boarded and clothed against his consent, or that he has refused to maintain her any longer at his expense. *Nichols v. Allen*, 3 C. & P. 36—Tenterden.

Where the putative father had made various payments for maintenance, and then refused to continue its support until the mother obtained an order of filiation:—Held, that no action would lie at the suit of the mother for arrears of maintenance. *Furrliss v. Crouther*, 7 D. & R. 612.

The father of two illegitimate children executed a bond, conditioned for the payment of an annuity of 30*l.* for the support of them and their mother during their joint natural lives; or in case of the death of the children, during the natural life of the mother; one of the children having died:—Held, that the executor of the obligor was liable on the bond, for the arrears of the annuity accruing after the death of that child. *James v. Tallent*, 1 D. & R. 548; 5 B. & A. 889.

A natural child cannot take by a prospective bequest made before his birth. *Arnold v. Preson*, 18 Ves. jun. 289.

It is a rule that a bastard cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before its birth. *Earle v. Wilson*, 17 Ves. jun. 531.

Under a devise by a married man, having no legitimate children, "to the children which I may have by A. and living at my decease," natural children who had acquired the reputation of being his children by her before the date of the will, were held to be entitled. *Williamson v. Adam*, 1 Ves. & B. 422.

Quere, whether future illegitimate children can take under any description in a will. *Id.*

Under a bequest "to such child or children, if more than one, as A. may happen to be enciente of by me," a natural child of which she was then pregnant cannot take, though a bequest to the natural child of which a woman was enciente without reference to any person as the father, would probably be good, having no uncertainty. *Earle v. Wilson*, 17 Ves. jun. 528.

BATHING—See SEA.

BATTERY—See TRESPASS.

BAWDY HOUSE.

[See statutes 25 Geo. 2, c. 36, s. 6, 7, 8, & 9; 28 Geo. 3, c. 19; 58 Geo. 3, c. 70.]

In an action founded upon the statute 25 Geo. 2, c. 36, by one of the two inhabitants who had given information &c. to the parish constable, of A. B. keeping a bawdy-house, in consequence of which A. B. was prosecuted to conviction, it is necessary, in order to entitle the plaintiff upon such conviction to recover the reward of 10*l.* from the overseers, that the prosecution should have been conducted by the parish constable; and therefore, where the two inhabitants had taken upon themselves to conduct it, it was holden that they were not entitled to the reward; and that a demand upon the overseer, stating the prosecution so to have been carried on, was insufficient to entitle them to an action for the double penalty given by the act, in case of a neglect or refusal by the overseer to pay such sum of 10*l.* on demand. *Clarke v. Rice*, 1 B. & A. 694.

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BENEFIT SOCIETIES—See FRIENDLY SOCIETY.

BERWICK-UPON-TWEED.

The town and liberties of Berwick-upon-Tweed are not for any purpose within, or part of, the county of Northumberland. *Berwick-upon-Tweed (Mayor, &c.) v. Shanks*, 11 Moore, 372.

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## XVIII. FORGERY OF—See CRIMINAL LAW.

## I. PARTIES.

## 1. Corporations.

Quære, whether a local act, enabling a corporation to issue promissory notes under their seal, enables them to make a promise, and subjects them to an action of assumpsit as incident to the making of such note? *Slark v. Highgate Archway Company*, 5 Taunt. 792.

If a corporation is authorized to raise money on promissory notes for a particular purpose, semble that evidence may be received to impeach the notes, by showing they were issued for another purpose. *Id.*

Assumpsit may be maintained on a bill against a trading corporation, whose power of drawing and accepting bills is recognised by statute. *Murray v. E. I. Company*, 5 B. & A. 204.

By the provisions of several statutes passed for the protection of the Bank of England, it is enacted, that "it shall not be lawful for any body corporate to borrow, owe, or take up any money upon their bills or notes payable on demand, or at any less time than six months from the borrowing thereof:"—Held, that a corporation not established for trading purposes, cannot become acceptors of a bill of exchange payable at a less period than six months from the date. *Brough-ton v. Manchester Waterworks*, 3 B. & A. 1.

It is doubtful whether any, except a trading corporation, can bind themselves as parties to a bill. *Id.*

Quære, whether a Scotch Corporation, called the British Linen Company, has any authority to issue bills? *Rea v. McKay, R. & R. C. C. 71.*

The directors of a mining association cannot bind the members by accepting a bill, unless they are authorized so to do by the deed or instrument of co-partnership, by the necessity of such a power to the carrying on of the business, by the usage of similar establishments, or the express assent of the party sought to be charged. Still less can the directors bind the members by a bill drawn upon the directors by their own servant, such a bill being in effect a promissory note. *Dickinson v. Valpy*, 5 M. & R. 126; 10 B. & C. 128.

### 2. Infants.

In an action against the acceptor by the indorsee, it is no defence that the drawers who had drawn the bill payable to themselves, and of course indorsed it, were infants when it was drawn. *Taylor v. Croker*, 4 Esp. 187—Ellenb.

The infancy of the payee is no answer in an action by the indorsee of a bill of exchange against the drawer. *Grey v. Cooper*, 3 Dougl. 65; 1 Selw. N. P. 306.

An infant cannot accept a bill even for necessities. *Williamson v. Watts*, 1 Camp. 552—Mansfield. But see *Trueman v. Hurst*, 1 T. R. 40.]

A person is liable as acceptor of a bill which was drawn while he was an infant, but was accepted by him after he came of age. *Stevens v. Jackson*, 2 Rose, 285; 1 Marsh. 469; 6 Taunt. 196; 4 Camp. 164.

In an action against acceptors, where the payee and first indorser was an infant, the jury having found a verdict for the plaintiffs, on evidence that the defendants knew, when they accepted it, that the payee was an infant, and that he had, in fact, indorsed the bill before they accepted it—the court refused to disturb the verdict; but they refrained from giving any opinion on the effect of it, if brought before them on a case more free from imputation. *Jones v. Darch*, 4 Price, 300.

### 3. Agents.

If an agent for A. draw a bill upon B. in favour of C, though he direct B. to place the amount to A.'s debit, he will be personally liable to C. if the bill is not paid, though C. knew he was only agent for A., unless he uses proper words to prevent such liability. *Leadbitter v. Farrow*, 5 M. & S. 345; Bayl. Bills, 55.

An agent to a country bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon London, drew in his own name for the amount upon the firm in London, the two firms being the same:—Held, that the agent was liable as drawer, although the plaintiff knew that he was merely an agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money. *Id.*

An authority given to A., to draw bills in the name of B., may be exercised by the clerks of A. *Ex parte Sutton*, 2 Cox, 84.

An agent for an association who draws bills in his own name for the purposes of the company, does not bind the partners as drawers, though authorized to draw bills. *Ducarrey v. Gill*, M. & M. 450; 4 C. & P. 121—Tenterden.

Where a bill is drawn on an agent, and made payable out of a particular fund, and the agent says he will pay it when he gets money from the principal; this is binding on him; and if he gets money at any subsequent time, he is bound to pay the bill. *Stevens v. Hill*, 5 Esp. 247—Ellen.

The declaration in an action on a bill stated it to have been drawn by one H. P., accepted by

the defendant, and indorsed by the said H. P. to the plaintiffs. The drawing appeared to be in this form:—Per pro. H. P., J. P. A clerk of the plaintiffs proved that the drawing and indorsement were of the handwriting of Mr. John P., whom he understood to be the son of Mrs. P., whom he had never seen, but with whose house, the house of his employers had dealings, and that he had seen bills drawn and accepted in the same form as the bill in question, some of which had been paid. The plaintiffs, on this evidence, had a verdict, and a rule nisi for a new trial having been obtained, an affidavit in consequence of an observation made by the Lord Chief Justice, was produced, stating the name of the party to be H. P., and that the bill was drawn by her authority; the court on the whole evidence, refused to make the rule for a new trial absolute. *Jones v. Turnour*, 4 C. & P. 204.

Where one gives a power of attorney to another, to demand and receive all monies due to him, on any account whatsoever, and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, "and to do all other business;" the latter words must be understood, with reference to the former, as meaning all business appertaining thereto, and although the attorney may receive monies due in autre droit to the principal, yet he cannot indorse a bill for him, which comes to his hands under the power. *Hay v. Goldsmith*, 2 Smith, 79.

The indorsee of a bill accepted by procuration is bound to use due caution, and should not only see the general power of the agent to accept, but also inquire into the propriety of his accepting that particular bill; and if he does not and it was improperly accepted, he cannot recover against the acceptor. *Attwood v. Munnings*, 7 B. & C. 278; 1 M. & R. 66.

An averment in a declaration that A. B. & Co. accepted a bill of exchange according to the usage and custom of merchants, is supported by evidence that the bill was accepted by C. D. their authorized agent, thus, "for A. B. & Co., C. D." *Heys v. Heseltine*, 2 Camp. 604—Ellenb.

The defendant is not at liberty to object that the indorsement is not in the handwriting of the payee himself, after a promise, with a knowledge of this circumstance, to pay the bill. *Helmsley v. Loader*, 2 Camp. 450—Ellenborough.

If a bill is indorsed by procuration, it should not be stated in the declaration that the party indorsed it, his own proper hand being thereunto subscribed: for if it appears to have been done by procuration from such party, it is a fatal variance. *Levi v. Wilson*, 5 Esp. 180—Ellenborough.

If A. permits B. to draw bills in his name, he is liable as drawer to ignorant indorsees, although he had neither any interest nor knew of the particular bills drawn: but he is not liable to a payee having knowledge of the transaction. *Smith v. Strange*, Peake's Add. Cas. 116—Kenyon; *S. P. Curtis v. Barra*, Peake's Add. Cas. 119.

From the fact that the defendants' confiden-

tial clerk had been accustomed to draw checks for them; that, in one instance at least, they had authorized him to indorse; and in two other instances had received money obtained by his indorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to indorse. *Prescott v. Flynn*, 9 Bing. 19; 2 M. & Scott, 18.

#### 4. Husband and Wife.

Where a note is payable to a feme sole, or order, and she marries, it becomes her husband's property, and she cannot indorse it over whilst she is covert. *Conner v. Martin*, 3 Wils. 5.

The indorsement by a married woman, with her husband's assent, of a bill drawn by her, is binding upon him, and will pass the interest in the bill to the indorsee, so as to enable him to sue the acceptor. *Prestwick v. Marshall*, 5 M. & P. 513; 7 Bing. 765; 4 C. & P. 594.

If a note is made payable to a married woman, and she indorses it for value in her own name, and the maker afterwards promises to pay it; in an action against him by the indorsee, it will be presumed that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff. *Cotes v. Davis*, 1 Camp. 485—Ellenborough.

Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff, in payment of a debt which she owed him (in the course of carrying on a trade in her own name, by the consent of her husband,) yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff; neither could the plaintiff recover upon the money counts under such circumstances. *Barlow v. Bishop*, 1 East, 432; 3 Esp. 266.

Husband and wife may sue on a note made to the wife during coverture. *Philliskirk v. Pluckwell*, 2 M. & S. 393.

Where a bill was payable to a feme sole, who intermarried before the same was due, it was held that the husband might sue in his own name, without joining the wife, although the latter had not indorsed the bill. *McNeillage v. Holloway*, 1 B. & A. 218; *S. P. Burrough v. Moss*, 10 B. & C. 558.

Defendant, who carried on business on his own account, and in partnership, gave a general power of attorney to his wife and partners to act for him and in his name, and to his use, and to indorse bills, and generally to act for him while abroad. He gave another power to his wife alone, to act for him and on his behalf, and to pay and accept such bills as should be drawn by his agents and correspondents as occasion should require. One of the partners drew a bill on defendant for money to supply the partnership concerns, defendant having received while abroad money on the partnership account, and the wife accepted the bill for her husband:—Held, 1st, that the partner could not be called defendant's agent; and there-

fore, that the wife had not power to accept the bill. 2dly, That she had not power to accept a bill for partnership transactions, but only bills on his account. *Attwood v. Mannings*, 1 M. & R. 66; 7 B. & C. 278.

A married woman, separated from her husband, and having a separate maintenance, renders the same liable by accepting a bill. *Stuart v. Kirkwell (Viscount)*, 3 Madd. 387.

#### 5. Joint or several.

A note, beginning, "I promise to pay," &c. and signed by two parties, is joint and several. *Clerk v. Blackstock*, Holt, 474—Bayley: & P. *March v. Ward, Peake*, 130.

A member of a country bank signing for himself and partners notes beginning with the words, "I promise to pay," was held to make himself severally liable. *Hall v. Smith*, 2 D. & R. 584; 1 B. & C. 407.

But if A., B., and C., are in partnership, and A. draws a note, by which he promises individually to pay the money, and which he signs with his own name only, but prefixing to his signature "for A., B., & C.," this binds the whole partnership. *Galway (Lord) v. Matthew*, 10 East, 264; 1 Camp. 403. And see *Mason v. Ramsey*, 1 Camp. 284.

A note in these words, "I, J. C., promise to pay J. F., or his order, 50*l.*, with interest, at six months' notice," dated, &c., (signed) "J. C., or else H. B." is no note as against H. B. *Fern v. Bond*, 4 B. & A. 679; Bayl. Bills, 13.

A bill, drawn in this form—"pay to our order," &c. signed in the name of two persons, and Co., and accepted by defendant, may be declared upon by the indorsees as a bill drawn by an aggregate firm; and if it be proved that the firm consists of only one person, yet it is not a variance. *Bess v. Clive*, 4 M. & S. 13; 4 Camp. 78. And see *S. C.* 3 M. & S. 283.

A note which appears on the face of it to be the separate note of A. only, cannot be declared on as the joint note of A. and B., though given to secure a debt for which A. and B. were jointly liable. *Siffin v. Walker*, 2 Camp. 308—Ellenborough: *S. P. Emley v. Lye*, 15 East, 7.

A declaration that the defendant and another made their note, by which they jointly or severally promised to pay, is good. *Rees v. Allen*, Cowp. 532.

In an action against one of the several makers of a joint note, or one of several drawers of a joint bill, if it be stated as a several one made by one alone, the objection can only be taken by a plea in abatement. *Evans v. Lewis*, Bayl. Bills, 307; 1 B. & A. 226; 1 Phil. Evid. 199.

If a bill be drawn by two, payable to "us or our order," and subscribed by both, though not in partnership, they make themselves partners by the form of the bill, to the effect of making an indorsement by one of them valid. *Carriock v. Vickery*, 2 Dougl. 653, n.

But a universal usage of merchants and

bankers may render such an indorsement void. *Id.*

In an action by indorsee against acceptor of a bill, payable to two persons not partners, and, when accepted, indorsed by one of those persons in the name of both—it was held that the defendant could not dispute the regularity of this indorsement. *Jones v. Radford*, 1 Camp. 83, n.—Ellenborough.

The non-joinder of one of two joint drawers of a bill, is no variance in an action by an indorsee against the other. *Wilson v. Reddall*, Gow, 161—Dallas.

When the plaintiff, on a joint and several note, declares against the defendants jointly, and they sever in their pleas, and one of them by his plea admits his handwriting to the note, and the other pleads non-assumpsit; at the trial, the plaintiff must prove the handwriting of all. *Gray v. Palmers*, 1 Esp. 135—Kenyon.

Where, in an action against the drawer, who had pleaded non-assumpsit, it appeared that the bill was drawn by him and another jointly:—Held, to be no variance. *Germain v. Frederick*, 1 Phil. Evid. 199; Bayl. Bills, 307; 2 B. & A. 226.

Where a declaration stated a bill to be drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by the three jointly with a fourth:—Held, that this was no variance. *Mounstephen v. Brooke*, 1 B. & A. 224.

Where the parties intended that a promissory note should be joint and several; but, through ignorance, it was expressed to be joint only, a court of equity would not relieve. *Rawstone v. Parr*, 3 Russ. 424.

But where a joint note, signed "J. and J. E., J. P., surety," was given to a creditor of the firm of J. and J. E., and J. P. died; and J. and J. E. being both alive, one of whom afterwards became bankrupt, and the other insolvent:—Held, that the note must be considered as joint against J. P., the surety. *Id.*

A court of equity will reform an instrument which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it, himself drew the instrument. *Ball v. Story*, 1 Sim. & Stu. 210.

When a person signs a note on a representation that others are to join, and one afterwards refuses to sign, the payee cannot recover against the person who signed it, unless the jury are satisfied that such person, knowing the facts, and being aware of his rights, had consented to waive his objection. *Leaf v. Gibbs*, 4 C. & P. 466—Tindal.

Where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills by means of a clerk, in this form, "for agents of the R. V. B., J. G.," it was held to be no answer to a joint action against them by the indorsee of such a bill, to show that it was accepted for the private advantage of one without

the knowledge of the other, although it appeared that the indorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact. *Sanderson v. Brookbank*, 4 C. & P. 286—Tindal.

## II. FORM AND OPERATION.

### 1. Payable at all events.

*Contingency.*—By 3 & 4 Anne, c. 9 s. 1 (made perpetual by 7 Anne, c. 25, s. 3.) promissory notes are put on the same footing in all respects as bills of exchange.

A bill or note payable on a contingency, is absolutely void. *Palmer v. Pratt*, 9 Moore, 358; 2 Bing. 185.

An order for the payment of a sum of money on a contingency, is not a note within the statute of Anne. *Carlos v. Fancourt*, (in error) 5 T. R. 482.

### Nor a bill. *Id.*

Even though accepted by the drawee. *Ralli v. Sarell*, D. & R. N. P. C. 33—Abbott. And see *Sproule v. Legge*, 2 D. & R. 15; 1 B. & C. 16; 3 Stark. 156.

But a note given to pay 8l. on receipt of prize money, is a good negotiable note within the statute. *Evans v. Underwood*, 1 Wils. 262.

A note given to an infant payable when he shall come of age, is good if it specify the particular day. *Goss v. Nelson*, 1 Burr. 226; 1 Ld. Ken. 498.

An order or promise to pay money, "provided the terms mentioned in certain letters written by the drawer were complied with," is not a bill or note. *Kingston v. Long*, Bayl. Bills, 13; 4 Dougl. 9.

An instrument by which a man promised to pay a sum of money if his brother did not pay it within a specified time, was held not to be a note on account of the contingency. *Appleby v. Bidulph*, Bayl. Bills, 13.

So, a note in the name of two, but signed by one only, promising to pay "on the death of G. H., provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay," is not a negotiable note. *Roberts v. Peake*, 1 Burr. 323.

A note to pay when the circumstances of the drawer will admit, without detriment to himself or family, creates no debt. *Ex parte Toolcell*, 4 Ves. jun. 372.

An instrument by which money was made payable on a contingency, cannot be given in evidence as a promissory note, on the counts for money lent, or on the account stated, though sued on between the original parties, and expressing value to have been received. *Morgan v. Jones*, 1 Tyr. 21; 1 C. & J. 162. And see *Blankenhagen v. Blundell*, 2 B. & A. 417.

*Particular Fund.*—A bill or note, drawn on a particular fund, and not payable generally, is not valid. *Darwese v. Delorsine (Earl)*, 2 W. Black. 789; 3 Wils. 307.

An instrument in this form, "out of my half pay, which will become due the 1st of January, pay to Stevens 15*l*," and addressed to a navy agent, is not a bill: *Stevens v. Hill*, 5 Esp. 247—Ellenborough.

So, a note, promising to pay "on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods, &c., value received," cannot be declared upon as a promissory note within the statute, though it be averred that before the action commenced the White Hart and the goods were sold. *Hill v. Halford* (in error), 2 B. & P. 413.

L. being indebted to plaintiff, and about to sell his property by auction, gave an order in writing signed by him and addressed to defendant (the auctioneer), "to pay to plaintiff, out of the produce of the sale of his goods and furniture, 200*l*., and interest from the 23d of June last, due to plaintiff on warrant of attorney; and also 110*l*. due to plaintiff for goods sold, for which several sums the receipt of plaintiff was to be defendant's discharge:"—Held, that this order required an inland bill stamp. *Emly v. Collins*, 6 M. & S. 144.

But where A., being indebted to B., and B. to C., B. by letter requested A. to pay C. the balance due to him (B.) and stated that C.'s receipt should be a sufficient discharge:—Held, that this was not a bill of exchange, or requiring a stamp as such within the 55 Geo. 3, c. 184. *Crowfoot v. Gurney*, 2 M. & Scott, 473.

An instrument, by which A. promises to pay to the bearer 50*l*., "being the portion of a value, as under, deposited in security for the payment thereof," may be declared upon as a promissory note. *Haussoullier v. Hartsinck*, 7 T. R. 733. And see *Collis v. Emmett*, 1 H. Black. 313.

An order or promise to pay money "in good East India bonds," or "in cash or Bank of England notes," is in neither case a bill or note. *Anon.* Bull. N. P. 272; Bayl. Bills, 7: S. P. *Ex parte Imeson*, Bayl. Bills, 7; 2 Rose, 225; *Res v. Wilcox*, Bayl. Bills, 8; *Ex parte Davison*, Buck, 31.

**Definite Sum.**—An instrument, by which a party promised to pay 65*l*., "and also all other sums which may be due," is too indefinite to be a note within the statute. *Smith v. Nightingale*, 2 Stark. 375—Ellenborough.

A note payable to the representatives of J. S., three months after his decease, "first deducting thereout any interest or money which J. S. might owe the defendant on any account," is a note for the payment of a definite sum at all events, within the statute. *Barlow v. Broadhurst*, 4 Moore, 471.

And such note may be given in evidence in an action brought by the representatives of J. S. against the defendant, on an account stated between him and J. S., although it was improperly stamped as a note. *Id.*

Where a testatrix gave to the plaintiff a note to pay him or order "on demand, the sum of 100*l*. for value received and his kindness to me," with a verbal engagement on the part of the

plaintiff, that the note should not be demanded until after her death:—Held, that it did not operate by way of testamentary disposition; nor was it void on the ground that it was a fraud on the legacy duty, that duty never having attached upon it, and there being nothing to show that the amount passed by way of a donatio causa mortis. *Woodbridge v. Spooner*, 1 Chit. 661.

A. having given his daughter, on her marriage, the stock of a public house, amounting in value to 1200*l*., she and her husband signed the following instrument:—"On demand, we promise to pay to A. or his order for value received in stock, &c., this being intended to stand against me, M. (the daughter,) as a set-off for that sum left me in my father's will above my sister Ann's share:"—Held, that this was not a promissory note. *Clarke v. Percival*, 2 B. & Adol. 661.

**Certainty of Payee.**—A bill or note payable to the order of a person is payable to himself, *Sheldon v. Occarson*, Bayl. Bills, 329: S. P. *Smith v. McClure*, 5 East, 476; 2 Smith, 43.

And a note payable to A. without the words "or bearer," "or order," is a valid note within the statute. *Smith v. Kendall*, 6 T. R. 123; 1 Esp. 231.

A note, whereby the maker promised to pay to A. or to B. and C. a sum therein specified, value received, is not a promissory note within the meaning of the statute of Anne. An action cannot be maintained at common law upon such an instrument, even by the payee against the maker, although it is stated on the face of the note to be given for value received. *Blanchenkagen v. Blundell*, 2 B. & A. 417. And see *Morgan v. Jones*, 1 Tyr. 21; 1 C. & J. 162.

But a note of this tenor, "on demand we promise to pay Messrs S. W. and S. D. stewards-esses for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, 64*l*., with 5 per cent. interest for the same, value received, this 7th day of February, 1815, for F. C.," is within the stat. 2 Geo. 2, c. 25. *Res v. Bex*, 6 Taunt. 325.

Proof of a note payable to A. B. generally, is prima facie evidence of a promise to A. B. the father, and not A. B. the son, the names being the same; and A. B. the son, although styled in the declaration A. B. the younger, bringing the action, and being in the possession of the note, is entitled to recover upon it. *Sweeting v. Fowler*, 1 Stark. 106—Bayley.

## 2. Acknowledgments merely.

An instrument in the following terms, "Received of Mr. D. B. 100*l*. which I promise to pay on demand, with lawful interest. J. D." is a note. *Green v. Davis*, 6 D. & R. 306; 4 B. & C. 235; 1 C. & P. 451. And see *Butts v. Summ*, 2 B. & B. 78; 4 Moore, 484.

An instrument, acknowledging the receipt of drafts for the payment of money, and promising to repay the money, is a special agreement, and



not a promissory note. *Williamson v. Bennett*, 2 Camp. 417—Ellenborough.

So, an acknowledgment of having received the acceptance of a bill of exchange, is a receipt for money, and not a promissory note. *Scholey v. Walsby*, Peake, 24—Kenyon.

An "I O U" is neither a promissory note nor a receipt, and may be received in evidence to prove an acknowledgment of a debt, without any stamp. *Childers v. Boulnois*, D. & R. N. P. C. 8—Abbott: *S. P. Fisher v. Leslie*, 1 Esp. 426. But see *Guy v. Harris*, Bayl. Bills, 8.

A paper in these words, "Mr. L., please to let the bearer have 7*l*, and place it to my account, and you will oblige your humble servant, R. S." is not a bill of exchange. *Little v. Slackford*, M. & M. 171—Tenterden.

A written paper containing a bare acknowledgment of a debt, is good evidence under the money counts without a stamp. *Israel v. Israel*, 1 Camp. 499—Ellenborough: *S. P. Fisher v. Leslie*, 1 Esp. 426.

A document in the following form, "I have this day received a bill of exchange, which I hold as your attorney, to recover the value from the parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity reasonable and proper:"—Held to be a mere acknowledgment of the duty which the party took upon himself to perform, and therefore admissible in evidence without a stamp. *Longdon v. Wilson*, 7 B. & C. 640; 2 M. & R. 10.

A paper stating that the party signing it has received certain bills in his hands, which he has "to get discounted, or return on demand," does not require an agreement stamp. *Mullett v. Hutchison*, 1 M. & R. 522; 7 B. & C. 639; 3 C. & P. 92.

An acknowledgment in this form, "Sept. 15, 1824, Mr. T. has left in my hands 20*l*. J. A." does not require a stamp. *Tompkins v. Ashby*, 6 B. & C. 541; 9 D. & R. 543; 5 C. not S. P. M. & M. 32.

A document in this form, "Received of A. B. 150*l*., which I promise to pay on demand with interest," is a promissory note and requires to be stamped as such. *Ashby v. Ashby*, 3 M. & P. 186.

An instrument whereby the plaintiff acknowledges a loan of money, and promises repayment, and engages to pay an unliquidated demand out of the interest, and to pay the principal and the remainder of the interest to the lender, his executors, administrators, and assigns, is not a promissory note, and it is properly stamped with an agreement stamp. *Epton v. Dugdale*, 1 Nev. & M. 412.

### 3. Ambiguous as Bills or Notes.

If it be ambiguous whether an instrument be a bill or a note, the person who receives it may treat it as against the maker as either. *Edis v. Bury*, 6 B. & C. 433; 9 D. & R. 492; 2 C. & P. 559.

An instrument which is in the form of a note,  
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but which is in addition addressed to a third party, who accepts it, is a promissory note. *Id*.

And may be declared on as such. *Black v. Bell*, 1 M. & Rob. 149—Lyndhurst.

An instrument in the common form of a bill, except that the word "at," is substituted for "to," before the name of the drawee, is a bill, and not a note. *Shuttleworth v. Stephens*, 1 Camp. 407—Ellenborough.

But semble, that it may be treated as either by the holder. *Id*.

Particularly where "at" is written so as to be scarcely legible, for the purpose of deceit. *Allan v. Mawson*, 4 Camp. 115 & Gibbs.

It is not absolutely essential that the drawee's name should be mentioned on the bill by the drawer, if there be a place of payment fixed, and the drawee accept the bill in such form, by writing thereon his name, which will be an adoption of the bill on his part. *Gray v. Milner*, 3 Moore, 90; 8 Taunt. 739; 2 Stark. 336.

### 4. Qualifying Stipulations.

A stipulation indorsed on a note by the payee, is not to be taken as part of that instrument, without evidence that it was written at the time the note was made. *Stone v. Metcalfe*, 4 Camp. 217; 1 Stark. 53—Ellenborough.

A note promising to pay J. F. or order a sum certain, the amount of the purchase money of a quantity of fir belonging to H., with an indorsement thereon at the time of making the note, that it was given on condition that it should be void if any dispute should arise between H. and W. respecting the fir, was held not to be a promissory note within stat. 3 & 4 Ann. c. 9. *Hartley v. Wilkinson*, 4 M. & S. 25; 1 Camp. 137.

The words, "accepted on myself, payable every where," written in the margin of a note payable at a specified time after sight by the maker at the time of making it, constitute no part of the original instrument, and need not be noticed in the declaration. *Splügerber v. Kohn*, 1 Stark. 125—Ellenborough.

An instrument in the common form of a joint and several note, signed by three persons, is indorsed with a memorandum made, at the time of signature, which states that it is taken as a security for all the balances, to the amount of the sum within specified, which one of the three might happen to owe to the payee, that it shall be in force for six months, and that no money shall be liable to be called for sooner in any case. In an action against one of the sureties, the payee cannot declare upon this instrument as a promissory note payable either on demand, or at six months after date. Between these parties the instrument is an agreement, and must be stamped and declared upon as such. *Leeds v. Lancashire*, 2 Camp. 205—Ellenborough.

### 5. Fictitious Payees.

A bill payable to a fictitious person or order is completely void. *Bennett v. Farnell*, 1 Camp. 130—Ellenborough.

The indorsee of a bill payable to a fictitious payee cannot recover against the acceptor. *Id.*

Such a bill is not a bill payable to bearer. *Were v. Taylor*, 1 Camp. 131 cited.

Where a bill was drawn by defendant and others, on the defendant alone, in favour of a fictitious person, (which was known to all the parties concerned in drawing the bill,) and the defendant received the value of it from the second indorser:—it was held, that a bona fide holder for a valuable consideration might recover the amount of it, in an action against the acceptor, for money paid, or money had and received. *Tutlock v. Harris*, 3 T. R. 174.

Quære, if a bill so drawn is not, in its legal operation, payable to bearer? *Vere v. Lewis*, 3 T. R. 138.

If a bill be drawn in favour of a fictitious payee, and that circumstance be known as well to the acceptor as the drawer, and the name of such payee be indorsed on the bill as indorsing it to the drawer, who indorses it to an innocent indorsee, for a valuable consideration, the latter may recover on it against the acceptor, as on a bill payable to bearer. *Gibson v. Minet* (in error,) 1 H. Black. 569; 3 T. R. 481. And see *Collis v. Emmett*, 1 H. Black. 313.

Perhaps also, in such case, the innocent indorsee might recover against the acceptor as on a bill payable to the order of the drawer, or on a count stating the special circumstances. *Id.*

A person discounting a bill payable to a fictitious payee, for the benefit of the drawers, and with knowledge of the transaction, cannot recover against the acceptor. *Hunter v. Jeffery*, Peake's Add. Cas. 146—Kenyon.

A. draws a bill upon B. payable to a fictitious payee or order, and indorsed in the name of such payee, which B. accepts. In an action by an innocent indorsee, for a valuable consideration, against B. on the bill, in order to draw an inference, either that B. at the time of his acceptance knew the name of the payee to be fictitious, or that B. had given an authority to A. to draw the bill in question, by having given a general authority to A. to draw bills on B. payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by A. on B. payable to fictitious payees and accepted by B., though none of these transactions or circumstances have any efficient relation to the bill in question, and though none of them prove that B. accepted any of those other bills with a knowledge that the payees mentioned in them were fictitious. *Gibson v. Hunter* (in error,) 6 Bro. P. C. 255; 2 H. Black. 228.

In an action by indorsee against acceptor of a bill payable to "A. or order," the defendant may give in evidence, that the person who indorsed to the plaintiff was not the real payee, though he be of the same name, and though there were no addition to the name of the payee on the bill. *Mead v. Young*, 4 T. R. 28.

Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer,

the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and, therefore, an indorsee may bring evidence to show that the signatures of the supposed drawer to the bill and to the first indorsement are in the same hand-writing. *Cooper v. Meyer*, 10 B. & C. 469.

### 6. Other Points of Form.

It is not essential that a bill or note should import to be for value received. *White v. Lednick*, Bayl. Bills, 34; 4 Dougl. 247.

A bill in this form: "pay to T. G. B. or order, 315*l.* value received," and subscribed by the drawer, may be alleged to be a bill for value received by the drawer. *Grant v. Da Costa*, 3 M. & S. 351.

A bill drawn by J. S. to his own order, value received, means value received by the drawee; and if it be alleged in the declaration to be for value received by the said J. S. it is a variance. *Higmore v. Primrose*, 5 M. & S. 65; 2 Chitt. 333.

A declaration by the payee against the maker of a note payable to the order of the payee for "value received," generally, is not disproved by evidence of a note payable to the plaintiff's order for "value received in Mrs. L.'s estate." *Bond v. Stockdale*, 7 D. & R. 140.

An order or promise to pay so many "pound," instead of "pounds," is a bill or note. *Rex v. Post*, Bayl. Bills, 8.

A bill for twenty-five, seventeen shillings and three pence, is a bill for twenty-five pounds, seventeen shillings and three pence, and may be declared on as such. *Phipps v. Tanner*, 5 C. & P. 488—Tindal.

The word "sterling," in a bill, must be taken to mean sterling in that part of the kingdom where payable. *Taylor v. Booth*, 1 C. & P. 226—Best.

In the case of a note in these words, "borrowed of J. S. 10*l.* which I promise not to pay," it was held that the word "not," might be rejected, as a man could not be allowed to say, I am a cheat, and have defrauded. *Russell v. Lanstaffe*, and *Peach v. Kay*, Bayl. Bills, 6.

A note payable on demand, with interest until paid, is not to be considered as payable immediately. *Gascoyne v. Smith*, M'Clel. & Y. 338.

A note payable with interest twelve months after notice, which is expressed to be for value received, may be proved under a commission of bankruptcy against the maker, before any notice has been given. *Clayton v. Gosling*, 5 B. & C. 360.

A bill payable at sight is not to be considered as a bill payable on demand. *Anson v. Thomas*, Bayl. Bills, 79; S. C. nom. *Janson v. Thomas*, 3 Dougl. 421.

An indorsee may recover against the acceptor of a bill dated on a Sunday, when there is no evidence that the bill was accepted on that day. *Begbie v. Levy*, 1 Tyr. 130; 1 C. & P. 190.

## III. AMOUNT UNDER £5.

By 15 Geo. 3, c. 51, and 48 Geo. 3, c. 88, s. 2, all bills and notes for sums under 20s. are void.

By 17 Geo. 3, c. 30, s. 1, all negotiable promissory notes, bills, drafts, and undertakings in writing for 20s. and less than 5l., must specify the names and places of abode of the persons to whom they are payable; bear date before the time of drawing or issuing; be made payable within twenty-one days after date; and cannot be transferred or negotiated after the time limited for payment. Every indorsement thereof must be made before the expiration of the time limited for payment; must bear date at the time of making; and must specify the name and place of abode of the person to whom it is made: the signature both of the note and of every indorsement must be attested by one witness at least. A form is given to which they must conform; and all others are void.

By 7 Geo. 4, c. 6, s. 1, these regulations do not extend to bankers' notes under 5l. payable on demand.

Quære, whether a promissory note, by which the defendants jointly and severally promised to pay the plaintiff 4l. 16s. six months after date, is a negotiable or transferable note within the statute 17 Geo. 3, c. 30; or void, on the ground that it was not attested by a subscribing witness? *Quarterman v. Green*, 1 C. & P. 92—Hullock.

## IV. STAMPS.

By 37 Geo. 3, c. 136, s. 5, bills or notes made after July, 1797, if on stamps of an equal or superior value, though on different denominations than the legal stamp, may be properly stamped on payment of the duty and a penalty.

By 55 Geo. 3, c. 184 s. 11, a penalty of 50l. is given for making, signing, or issuing, or accepting, or paying any bills, drafts, orders, or notes, without being duly stamped.

By s. 12, a penalty of 100l. is given for post dating.

By 1 Sched. inland bills, drafts, or orders to the bearer, or to order, either on demand or otherwise, are to have the following stamps.

| If 40s. exceeding | 5l. 5s. | 20 | 30 | 50 | 100 | 200 | 300 | 500 | 1000 | 2000 | 3000 | Not exceeding 3 months after date, or 60 days after sight. | Exceeding 3 months after date, or 60 days after sight. |
|-------------------|---------|----|----|----|-----|-----|-----|-----|------|------|------|--|--|
|                   |         |    |    |    |     |     |     |     |      |      |      |  |  |
|                   |         |    |    |    |     |     |     |     |      |      |      | £ s. d.  | £ s. d.  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 5l. 5s. 0  | 1 0 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 20l. 0   | 1 6 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 30 0   | 2 0 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 50 0   | 2 6 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 100 0  | 3 6 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 200 0  | 4 6 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 300 0  | 5 0 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 500 0  | 6 0 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 1000 0   | 8 6 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      | 2000 0   | 12 6 0   |
|                   |         |    |    |    |     |     |     |     |      |      |      | 3000 0   | 15 0 0   |
|                   |         |    |    |    |     |     |     |     |      |      |      | —  | 1 5 0  |
|                   |         |    |    |    |     |     |     |     |      |      |      |  | 1 10 0   |

## The Duties on Foreign Bills of Exchange in sets For every Bill of each set, not exceeding

|                                  | £    | s. | d. |
|----------------------------------|------|----|----|
| Above £100 and not exceeding 200 | 200  | 3  | 0  |
| 200 ——— 500                      | 500  | 4  | 0  |
| 500 ——— 1000                     | 1000 | 5  | 0  |
| 1000 ——— 2000                    | 2000 | 7  | 6  |
| 2000 ——— 3000                    | 3000 | 10 | 6  |
| 3000 ———                         |      | 15 | 6  |

## Promissory notes for the payment to the bearer on demand, of any sum not exceeding—

|                                     | £   | s. | d.   |
|-------------------------------------|-----|----|------|
| Exceeding 1 1 and not exceeding 2 2 | 2   | 2  | 0 10 |
| 2 2 ——— 5 5                         | 5   | 5  | 1 3  |
| 5 5 ——— 10 0                        | 10  | 0  | 1 9  |
| 10 0 ——— 20 0                       | 20  | 0  | 2 0  |
| 20 0 ——— 30 0                       | 30  | 0  | 3 0  |
| 30 0 ——— 50 0                       | 50  | 0  | 5 0  |
| 50 0 ——— 100 0                      | 100 | 0  | 8 6  |

## Which notes may be reissued.

Promissory notes for the payment in any other manner than to the bearer on demand, but not exceeding two months after date or sixty days after sight, the same duty as bills.

A bill purporting to be payable two months after date, is properly stamped with the duty imposed on bills payable at two months after date, though it be issued before the day on which it bears date. *Williamson v. Garratt*, 2 Nev. & M. 49.

A note payable to bearer, generally, is in law payable on demand. *Whitlock v. Underwood*, 3 D. & R. 356; 2 B. & C. 157.

A note, whereby the maker promised to pay "W. or bearer, the sum of 40l., value received, with interest," being, in law, a note payable on demand; a five shilling stamp is required to be affixed thereto by the 55 Geo. 3, c. 184, sched. 1, class 1. *Id.*

A promissory note for 11l. payable to A. B. on demand, was held to be a promissory note payable to bearer on demand, and required a stamp of two shillings. *Keates v. Whieldon*, 8 B. & C. 7.

A note payable to A. B. was held not to be a note payable to bearer. *Cheetham v. Butler*, K. B. Nov. 22, 1833, MS.

A note payable to A. B. or order, on demand, is within the second class of notes mentioned in the schedule, being a note payable in another manner than to bearer on demand, and not exceeding two months after date. *Moyser v. Whidaker*, 9 B. & C. 409: S. P. *Ex parte Robinson*, 1 Deac. & Chit. 275.

A note for 100l., payable to A. B. or order on demand, is subject only to a stamp of 3s. 6d. *Armitage v. Berry*, 5 Bing. 501; 3 M. & P. 211.

It is distinguishable from a note payable to bearer on demand, which may be reissued after payment. *Id.*

A note for 11l. 10s. made payable "on demand to the bearer, with interest, for value received," requires a 2s. stamp by 55 Geo. 3, c. 184, sched. 1. *East v. —*, 2 M. & R. 8.

A bill payable at sight, was not a bill payable on demand, within the exception in 23 Geo. 3, c.

49. *Janson v. Thomas*, 3 Dougl. 491 : S. C. nom. *Anson v. Thomas*, Bayl. Bills, 79.

The value of a stamp on a bill under 55 Geo. 3, c. 184, sched. 1, tit. Bills of Exchange, depends on the date on the face of the bill. *Peacock v. Murrell*, 2 Stark. 558—Abbott.

A bill drawn on the 21st of December, for 30*l.*, payable at two month after date, on a 2*s.* stamp, and altered on the same day, before acceptance, to the 31st of December, does not require a 2*s.* 6*d.* stamp, within the statute 55 Geo. 3, c. 184, the word date, as used in that statute, meaning the period of payment expressed on the face of the bill. *Upston v. Marshall*, 3 D. & R. 198; 2 B. & C. 10.

A note for the payment of 30*l.* at three months after date, with interest from the date, only requires a stamp applicable to a note not exceeding 30*l.* *Pruessing v. Ing*, 4 B. & A. 204.

A note payable two months after sight requires a stamp appropriated to a note payable more than sixty days after sight, or two months after date, as the two months begin to run not from the day of the date, but on the presentment for sight. *Sturdy v. Henderson*, 4 B. & A. 592.

A draft on a banker, post-dated and delivered before the day of the date, though not intended to be used till that day, required to be stamped by the stat. 31 Geo. 3, c. 25. *Allen v. Keesee*, 1 East, 435, 3 Esp. 281: *S. P. Whitwell v. Bennett*, 3 B. & P. 559.

An unstamped draft drawn on A. B., brick-layer, was not within the exception of 23 Geo. 3, c. 49, s. 4, in favour of drafts drawn on persons sitting as bankers within ten miles of the place where the draft was drawn: if at the bottom of such a draft there be an acknowledgment of the drawee, that a third person paid for him, that acknowledgment cannot be received in evidence. *Castleman v. Ray*, 2 B. & P. 383. And see *Rez v. Pooley*, 3 B. & P. 311.

The proper stamp for a note of 45*l.* was 1*s.* 6*d.* composed of three different sums applicable to different funds, under three acts of parliament. But such a note on a 2*s.* stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was holden valid. *Taylor v. Hague*, 2 East, 414.

A note written upon a stamp of greater value than the proper stamp required, cannot be received in evidence, though the stamp was applicable to the same kind of instrument. *Farr v. Price*, 1 East, 55.

So a note drawn before the 37 Geo. 3, c. 136, upon a receipt stamp of equal value with that required for a promissory note, was not available in law. *Chamberlain v. Porter*, 1 N. R. 30.

A note written on a receipt stamp of the same amount as the necessary note stamp under the same stamp act, was admitted in evidence. *Aitchison v. Sharland*, 1 Esp. 292—Kenyon.

In an action on a note by an indorsee, the stamp appeared to be a 7*s.* deep stamp:—Held, at Nisi Prius, that the note could not be read, and the plaintiff was nonsuited. *Manning v. Livie*, Bayl. Bills, 454.

Though a note has not the proper stamp, so that it cannot be given in evidence, the plaintiff may go into evidence of the debt for which it was given. *Wilson v. Kennedy*, 1 Esp. 245—Kenyon. *S. P. Brown v. Watts*, 1 Tann. 353.

A receipt for interest on the back of a note without a stamp, and which cannot therefore be given in evidence, is evidence to go to the jury, from which they may presume that, from the payment of so much for interest, there was a principal sum in proportion due. *Mamley v. Peel*, 5 Esp. 191—Ellenborough.

It is no defence to an action at the suit of an indorsee of a note or bill, that it was not stamped at the time of making it, if it has a proper stamp when produced at the trial. *Wright v. Riley*, Peake, 173—Kenyon.

Although a promissory note without a stamp cannot be received in evidence as a security, or to prove the loan of money, it may be looked at by the jury with a view to ascertain a collateral fact. *Gregory v. Fraser*, 3 Camp. 454—Ellenborough.

An instrument, by which a party promises to pay the sum of 65*l.*, and also all such other sums as by reference to his books he owed to another, with interest, requires an agreement stamp. *Smith v. Nightingale*, 2 Stark. 375—Ellenborough.

A bill of exchange, expressing the terms of an agreement between a landlord and an in-coming tenant, is not admissible in evidence without an agreement stamp. *Nicholson v. Smith*, 3 Stark. 128—Abbott.

By the statute 55 Geo. 3, c. 184, sched. 1, orders for the payment of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed, are to be placed on the same footing as bills of exchange: therefore, a letter written from A. to B., requesting him to pay C. & Co., or their order, 600*l.* out of the first proceeds of a stock of gunpowder, then in the hands of B., and to charge the same to the account of A., although followed by a subsequent correspondence between the parties, was held to require a stamp, as an order for the payment of money within the provisions of that statute; and consequently, that an agreement stamp affixed on payment of a penalty was improper. *Batts v. Swan*, 4 Moore, 484; 2 B. & B. 78.

The consignee of goods sent to the consignee the following order: "Please to pay to N. on account of G. & Co. the proceeds of a shipment of 12 bales of goods, value about 2000*l.* consigned by me to you." The consignee, in a letter by way of answer, agreed so to do:—Held, that neither of these two instruments required such a stamp as the statute 48 Geo. 3, c. 149, and 55 Geo. 3, c. 184, impose on bills, drafts, or orders for the payment of money. *Jones v. Simpson*, 3 D. & R. 545; 2 B. & C. 318.

Where C. was directed by a letter from B. to pay out of the proceeds of his goods, then unsold, in his, C.'s hands a certain sum of money to D., which C. consented to do by letter to D., (which letter was stamped with an agreement stamp,) and these letters being given in evidence to prove

that the money was paid by order of B.:—It was holden, that they did not amount to an agreement between B. and C., and, consequently, that the stamp was improper, and that the order itself for payment should be stamped, as being an order for the payment of money out of a fund, which might or might not be available, within the meaning of the stat. 55 Geo. 3. c. 184, sched. 1. *Firbank v. Bell*, 1 B. & A. 36.

Where B. drew a check at the place of his residence, a small house four miles from Llanelly, on unstamped paper, dated at Llanelly, upon a banker there, and delivered it to his farming bailiff to give to C., in whose favour it was drawn; and the bailiff discounted it with A., a banker at Carmarthen, twelve miles from Llanelly, and five days afterwards the drawee stopped payment, A. not having presented the check:—Held, that the check was not admissible in evidence, because void for want of a stamp. *Waters v. Brogden*, 1 Y. & J. 457.

#### V. MADE ABROAD.

It was once doubted whether notes made abroad were within the statute of Anne; but it was afterwards considered that they were. *Carr v. Shaw*, Bayl. Bills, 22. And see *Pollard v. Herries*, 3 B. & P. 335.

A note made in Scotland is within the statute of Anne, and may be sued upon in England by the indorsee against the maker. *Milne v. Graham*, 2 D. & R. 293; 1 B. & C. 192; *S. P. Bentley v. Northouse*, M. & M. 66.

And in another case where a note sued upon was made in Prussia, no objection was taken on that point. *Spiligerber v. Kohn*, 1 Stark. 125—Ellenborough.

Where the body of a bill is written, and the acceptance of it made in England; yet if it be afterwards transmitted to the drawer abroad for his signature, and it is there drawn, the bill is a foreign bill; and, consequently, does not require an English stamp. *Boehm v. Campbell*, Gow, 56—Dallas.

A., in Jamaica, draws a bill on B., in London, on a Jamaica stamp, leaving the payee's name in blank; C. gets possession of the bill, and inserts his own name as payee, without any other authority than a letter from B., promising to accept it; but having the address torn off, and containing nothing to show to whom it was addressed:—Held, that though the bill might not require an English stamp, the letter, had it been sufficient, being a separate contract, would require a stamp. *Crutchley v. Mann*, 1 Marsh. 29; 5 Taunt. 529.

In an action by the payee against the drawer of a bill, the declaration stated that the latter drew it "at St. Helena, to wit, at Westminster," and did not aver a protest either for non-acceptance or non-payment: on the production of the bill, it was dated at St. Helena, and not stamped: on an objection that it was inadmissible as an inland bill for want of such a stamp, and that the plaintiff had given no evidence of a protest for non-acceptance or non-payment:—Held, that as there was

evidence of a subsequent promise by the defendant to pay the amount of the bill, coupled with a letter written by his attorney, offering terms for payment, it was a waiver of those objections, although such attorney swore that such offer was made without prejudice. *Patterson v. Becher*, 6 Moore, 319.

A bill drawn in Ireland upon a person in England is not an inland bill, and may therefore be accepted without writing on such bill, notwithstanding the stat. 1 & 2 Geo. 4. c. 78, s. 2. *Ma-honey v. Ashlin*, 2 B. & Adol. 478.

Where partners resident in Ireland signed and indorsed a copperplate impression of a bill, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B., in England, for his use, who filled up the blanks and negotiated it:—Held, that this was to be considered a bill of exchange by relation, from the time of the signing and indorsing in Ireland, and consequently, that an English stamp was not necessary. *Saath v. Mingay*, 1 M. & S. 87.

A bill drawn in Ireland for 256l. 18s. sterling, payable in England, must be taken to mean English money. *Taylor v. Booth*, 1 C. & P. 286—Best.

A foreign bill is accepted for the payment of 100l. sterling: the omission of the word "sterling" is not a material variance. *Glossop v. Jacob*, 1 Stark. 69; 4 Camp. 227—Ellenborough.

The declaration stated that a bill was drawn and accepted at Dublin, to wit, at Westminster, for a certain sum therein mentioned, without alleging it to be at Dublin, in Ireland:—Held, that the bill upon this declaration must be taken to have been drawn in England for English money, and therefore proof of a bill drawn at Dublin, in Ireland, for the same sum in Irish money, which differed in value from English money, did not support the declaration, and that this was a fatal variance:—Held, also, the bill having been drawn for a certain sum sterling, that the omission of the word "sterling" in the declaration was immaterial. *Keesney v. King*, 2 B. & A. 301; 1 Chit. 28.

Where a declaration upon a note made in Ireland, alleged that it was made payable at No. 81, Dame-street, Dublin, for sterling money, without averring that Dublin was in Ireland, and that the money for which the note was given was Irish currency:—Held, to be insufficient, as the note must be taken to have been drawn in England, and for English money, and was not supported by proof that it was made payable at Dublin, in Ireland, and for Irish money. *Sproule v. Legge*, 2 D. & R. 15; 1 B. & C. 16; 3 Stark. 156.

To prove that a bill, purporting to be drawn abroad, was in point of fact drawn in England, and is therefore void for want of a stamp, it is not sufficient barely to show that the drawer was in England at the time the bill bears date. *Abram v. Du Bois*, 4 Camp. 269—Ellenborough.

If an action be brought on a bill not having any English stamp, and purporting to be drawn at Paris, the defendant will be entitled to a verdict, if it appear from the evidence that the

plaintiff must have been in England on the day on which it purports to have been drawn; but it will be sufficient to enable the plaintiff to recover, if the bill was drawn at a place in France nearer to England than Paris, though it be dated as from Paris. *Bire v. Moreau*, 2 C. & P. 376—Abbott.

If a promissory note made in Scotland be sued upon in this country, and there is any difference in the law of the two countries as to the liability of the defendant, it lies upon the latter to prove such difference. *Brown v. Gracey*, D. & R. N. P. C. 41, n.—Abbott.

A holder may recover in an English court on a bill drawn in France on a French stamp, though, in consequence of its not being in the form required by the French code, he had filled in an action which he brought on it in France. *Wynne v. Jackson*, 2 Russ. 351.

Quære, whether the property in a promissory note made in England, and payable to order or bearer, is transferable by indorsement or delivery in a foreign country? *De La Chaumette v. Bank of England*, 9 B. & C. 203.

A promissory note payable to the bearer, made in England, is by the statute of Anne transferable by delivery in a foreign country? *De La Chaumette v. Bank of England*, 2 B. & Adol. 385.

## VI. ALTERATION.

### 1. When considered as issued.

An alteration of a bill or note, so as to make a new stamp necessary, is not material, until it is in the hands of some one who is entitled to claim payment, even though it is accepted and indorsed. *Downes v. Richardson*, 5 B. & A. 674; 1 D. & R. 332: Bayl. Bills, 94.

An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law. *Id.*

An accommodation bill, payable to the drawer's own order, cannot be altered after acceptance and an attempt to negotiate it, though before it is actually negotiated. *Calvert v. Roberts*, 3 Camp. 343—Ellenborough.

One having made and signed a promissory note, handed it to a third person, the payee being present; but before it was given to the payee, it was altered by the consent of all parties:—Held, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp. *Sherrington v. Jermyn*, 3 C. & P. 374—Tenterden.

If accommodation acceptances be exchanged, after an alteration in the date, made with the consent of all parties, but without a fresh stamp, it is sufficient to render the bills invalid. *Cadwalwell v. Martin*, 9 East, 190; 1 Camp. 79, 180.

A. and B. having exchanged their acceptances of bills drawn by each on the other at so many days' date:—Held, that the delivery of the respective bills for acceptance, and the redelivery of the same by the acceptors to the respective

drawers, was a negotiation of the bills; and that such bills could not after they had been so exchanged for valuable consideration (as the exchange of acceptance is) for twenty days, be post-dated without a new stamp, as upon new bills; although during all that time, each had remained in the hands of the original drawer. *Id.*

Before it is negotiated, an instrument altered from a note to a bill, is valid without a fresh stamp. *Webber v. Maddocks*, 3 Camp. 1—Ellenborough.

Where a promissory note had been altered without having a new stamp, it was held evidence of the terms on which the money had been originally lent. *Sutton v. Toomer*, 7 B. & C. 416; 1 M. & R. 125.

### 2. What a material Alteration.

*Generally.*—To make a bill or note void, the alteration must be in a material part, as in the sum or date. *Trapp v. Spearman*, 3 Esp. 57—Kenyon.

And if it be altered in any material part, after it has been once issued, though with the consent of all parties, it requires a new stamp. *Wilson v. Justice*, Bayl. Bills, 89; Peake's Add. Cas. 96.

But the insertion of words in a bill which do not affect the responsibility of the parties will not vitiate it. *Marson v. Petit*, 1 Camp. 82, n.—Ellenborough.

Where the bill was originally addressed "Messrs. J. C. & Co." but the words " & Co." were obliterated, and the word "and" inserted, so that the address was "Messrs. J. and C.," and it did not appear when the alteration was made:—Held, immaterial, though made after acceptance, as it made no difference in the liability of the parties. *Farquhar v. Southey*, M. & M. 14; 2 C. & P. 497—Littledale.

So an alteration by the payee by making the bill payable at a particular place, after it had been accepted, and whilst it remained in his hands, was held immaterial. *Jacobs v. Hart*, 6 M. & S. 143; 2 Stark. 45.

A bill of exchange was drawn by mistake, as dated on the corresponding day of the preceding month, instead of the day when drawn, and carried by the payee to the defendant for acceptance, who accepted it, noticing the mistake; afterwards the payee, upon communication with the drawer, altered the date to the day when drawn, and acquainted defendant with what he had done, who approved of the same; before the bill was negotiated, defendant, at the request of the payee that he would make it payable in London, added to his acceptance the words "payable at Mr. A. Isaacs, St. Mary-Axe, London:"—Held, that a new stamp was not required on account of either of these alterations. *Id.*

A bill drawn by A., payable to his own order, and accepted by B. generally, was altered with the consent of B. while it continued in the hands of A., by the addition of a particular place of payment to the acceptance. This alteration does not vitiate the bill so as to prevent the acceptor

from being liable on it. *Stephens v. Lloyd, M. & M.* 292—Tenterden.

A bill having been accepted generally, the drawer added the words, "payable at Mr. B.'s, Chiswell-street," without the consent or knowledge of the acceptor:—Held, a material alteration, and that it discharged the acceptor. *Cowie v. Halsall*, 4 B. & A. 197; 3 Stark. 36.

So also since the statute 1 & 2 Geo. 4, c. 78. *Mackintosh v. Haydon*, R. & M. 362—Abbott.

If an accommodation bill be drawn payable to "bearer," and after acceptance the words "or order" be added, the bill is not thereby vitiated, and it may be sued upon without any fresh stamp. *Attwood v. Griffin*, 2 C. & P. 368; R. & M. 425—Best.

Where the drawer of a bill, accepted payable at B. & Co.'s, after keeping it three or four years, indorsed it to plaintiff, erasing the name of B. & Co., and substituting E. & Co., without the knowledge of the acceptor, B. & Co. having failed since the acceptance:—Held, that plaintiff could not recover against the acceptor. *Tidmarsh v. Grover*, 1 M. & S. 735.

An acceptor may cancel his acceptance before he returns the bill. *Cox v. Troy*, 1 D. & R. 38; 5 B. & A. 474. But see *Thornton v. Dick*, 4 Esp. 270.

Where the words "or order" had been added by the drawer subsequently to his indorsement: it neither vitiates the bill, nor makes a new stamp necessary. *Kershaw v. Cox*, 2 Esp. 246—Le Blanc.

A note to pay 250*l.* and 3 per cent. interest, was, after several years, altered by consent of the parties to 2*l.* per cent.: Held, that it was thereby made void, but was evidence of the terms of the original loan. *Sutton v. Thomer*, 7 B. & C. 416; 1 M. & R. 125.

If a note be signed by A., and subsequently by B. as a security for A., unless such signature of B. is in virtue of a previous agreement, it will be void without an additional stamp. *Clerk v. Blackstock*, Holt, 474—Bayley.

A note for 100*l.* payable to the plaintiff, or order, and originally expressed to be for value received generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words "for the good-will of the lease and trade of Mr. F. K. deceased," requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill v. Williams*, 10 East, 431.

When a joint note, signed by the directors of a joint stock company, was afterwards altered by the secretary into a joint and several note, without the knowledge or authority of the directors, of whom the defendant was one, and in answer to a letter from the holders, informing the defendant of the dishonour of the joint and separate note of himself and the other directors who were parties to it, he said that their letter should have his earliest attention:—Held, that this did not amount to an assent to the alteration of the note by the defendant, and that he was not bound

thereby. *Perring v. Bone*, 12 Moore, 135; 4 Bing. 28.

**Date and Time of Payment.**—An alteration in the date of a bill, with the assent of the acceptor before its negotiation by the drawer, is not such a reissuing of the bill as to render a new stamp necessary. *Leykarriff v. Ashford*, 12 Moore, 281.

Where the date has been altered after the bill is due, but before it is negotiated, it is invalid without a fresh stamp. *Bowman v. Nicholl*, 5 T. R. 537; 1 Esp. 81.

A bill is drawn on a proper stamp, dated 2d September, payable 21 days after date; it is afterwards altered, and made payable fifty-one days after date, and on the 30th September is again altered to twenty-one days after date, and the date is brought forward to the 14th September:—Held, that this is a distinct transaction from the first, and requires a new stamp, although the alterations are made with the consent of the acceptor before the bill is negotiated. *Id.*

An accommodation bill, altered in its date before negotiation, with the consent of the parties, does not require a new stamp; and therefore, if it be in the hands of a bona fide holder for a valuable consideration, the acceptor, who had assented to such alteration before the bill became due, cannot avail himself of such an objection. *Downes v. Richardson*, 1 D. & R. 332; 5 B. & A. 674; Bayl. Bills, 94.

The alteration of a bill by the drawee, after it has been drawn and indorsed, and before it is accepted, postponing the time of payment, vitiates the bill. *Outhwaite v. Luntley*, 4 Camp. 179—Ellenborough.

Where a bill indorsed by the drawer was left with the drawee, who, without the consent of the drawer, altered the date from 5th March to 15th March before he accepted it: the alteration rendered the bill void. *Id.*

Nor would the consent justify the alteration, with a view to the stamp laws, after the bill had been negotiated. *Id.*

But the bill altered in date, after acceptance, but before it was put into the indorsee's hands, was held good. *Johnson v. Garnett*, 2 Chit. 122.

So, an alteration of the date after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration. *Master v. Miller*, 4 T. & R. 320. Affirmed in the Exchequer Chamber, 2 H. Black. 141; 1 Anst. 225; 5 T. R. 367.

But though a bill be altered by the drawer after acceptance, with the consent of the payee, but without the actual assent of the acceptor, and which alteration makes the bill payable twenty days later, yet the acceptor is liable if it appear to be an accommodation bill, and the acceptor have agreed to accept any bill drawn by the drawer, which is strong presumptive evidence that the latter was sufficiently the agent of the acceptor to make the alteration. *Johnson v. Gibb*, 2 Chit. 123; Bayl. Bills, 42.

A bill which, after delivery by the drawer to the payee, is post-dated by the son of the payee at the acceptor's request, without any communication with the drawer, is void. *Walter v. Hastings*, 2 Chit. 121; 1 Stark. 215; 4 Camp. 223.

And semble, that if the drawer had assented, a new stamp would have been necessary. *Id.*

If, upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered, he vacates the bill as against the drawer and indorsers; but if the holder acquiesces in such alteration and acceptance, it is a good bill as between the holder and acceptor. *Patton v. Winter*, 1 Taunt. 420.

And the holder cannot afterwards maintain an action on the case against the acceptor for thereby destroying the bill. *Id.*

In assumpsit by the indorsee of a bill against the acceptor, where after acceptance the word "date" had been inserted in the place of "sight," in which form it had originally been drawn:—Held, that the acceptor being thereby discharged, the plaintiff could not recover at all; for, as the defendant was liable only by virtue of the instrument, that being vitiated, his liability was at an end. *Long v. Moore*, 3 Esp. 155, n.—Kenyon.

A bill drawn on the 1st of August at two months, by A. on B., payable to the order of the drawer, and accepted and redelivered by B. as a security for a debt, and kept by A. for twenty days, cannot be altered in its legal effect by bringing forward the date to the 21st, without a new stamp; though by the consent of the acceptor, and before indorsement and delivery to a third person; the alteration not being made to correct a mistake in the original form of the bill, which was drawn conformably to the original intention of the parties, and available in that form. *Bathe v. Taylor*, 15 East, 412. And see *Cole v. Parkin*, 12 East, 471.

Where a bill was dated, by mistake, in January, 1822, instead of January, 1823, and the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, corrected the mistake, by altering the figure 2 into a 3, without their knowledge or consent:—Held that such alteration did not vacate the bill. *Brutt v. Picard*, R. & M. 37—Abbott.

On a bill in which four months is substituted for three, by the assent of the drawer, a new stamp is not requisite. *Kennerly v. Nash*, 1 Stark. 452—Ellenborough.

### 3. Proof of Circumstances.

Where a party sues on an instrument which, on the face of it, appears to have been altered, it is for him to show that the alteration has not been improperly made. *Henman v. Dickinson*, 5 Bing. 183; 2 M. & P. 289.

In an action on a bill or note, if it appear on inspection to have been altered, it lies on the plaintiff to show that the alteration took place under such circumstances as will entitle him to recover. *Bishop v. Chambre*, 3 C. & P. 55; M. & M. 116—Tenterden.

And if the plaintiff gives no account of the note, it is for the jury to say if an alteration was made after the completion of the instrument. *Id.*

In an action by the indorsee against the acceptor of a note, the date of which appears to have been altered by the acceptor, it lies on the plaintiff to show that the alteration was made before the first indorsement; if not proved to have been made before acceptance, the bill of course would be void for want of a new stamp. *Jackson v. Marlborough*, (Duke), 2 Stark. 313—Abbott.

In an action on a bill, where the defence is, that the bill has been altered, the defendant cannot go into evidence to show that other bills have been likewise altered. *Thompson v. Mozely*, 5 C. & P. 501—Lyndhurst.

On the day before an acceptance becomes due, the name of the acceptor was erased, and a renewed bill was indorsed on the back, but no new stamp was affixed:—Held, that the jury could not look at the indorsement for the purpose of ascertaining whether the acceptance was struck out with the drawer's assent. *Sweeting v. Hulse*, 4 M. & R. 287; 9 B. & C. 365.

## VII. TRANSFER.

### 1. To what extent negotiable.

An indorsement written on a note with a blacklead-pencil instead of ink, is a writing in law, and gives the indorsee a right to recover upon the note in a court of law. *Geary v. Thyeir*, 7 D. & R. 653; 5 B. & C. 234.

The indorser is bound by his indorsement, though the bill is bad. *Ex parte Clarke*, 3 Bro. C. C. 238.

A bill is negotiable ad infinitum until it has been paid by, or discharged on behalf of the acceptor. *Callow v. Lawrence*, 3 M. & S. 95—Ellenborough.

If a bill is paid and afterwards indorsed before it becomes due, it is a valid instrument in the hands of a bona fide indorsee. *Burbridge v. Manners*, 3 Camp. 194—Ellenborough.

A bill which has been paid by the drawer in default of payment by the acceptor, may afterwards be reissued by the drawer, and the acceptor will be still liable to pay it. *Hubbard v. Jackson*, 1 M. & P. 11; 4 Bing. 390; 3 C. & P. 134.

In such case, if an action be brought against the acceptor by the indorsee of the drawer, the acceptor cannot inquire into the state of the accounts between the indorsee and drawer, nor will the state of such accounts furnish him with any defence. *Id.*

A bill or note cannot be indorsed or negotiated after it has been once paid; if such indorsement or negotiation would make any of the parties liable who would otherwise be discharged. *Beck v. Robley*, Bayl. Bills, 125; 1 H. Black. 69, n.

The drawer of a bill payable to his own order, after settling with the acceptor, and giving him a



receipt in full of all demands, cannot, afterwards, by indorsing the bill, give a title against the acceptor. *Thorogood v. Clarke*, 2 Stark. 251—Ellenborough.

B. paid to C. a note drawn by A., payable to B. or order, and afterwards took it up, and paid to C. the value, and paid it to C. the second time, and then failed: Held, that C. might bring an action against A. the drawer. *Serra v. Berkley*, 1 Wils. 46.

A having declared on a note against B., made by C. to A., and by him indorsed to B., and by him again indorsed to A., and having obtained a verdict, the judgment was arrested. *Bishop v. Haywood*, 4 T. R. 470.

A bill was drawn by A., and accepted by B., for the purpose of being discounted, and having the proceeds applied in the payment of other bills accepted by B., but the other bills, before they became due, were paid by B., who directed A. to hold the first-mentioned bill for his, B.'s use, and not to part with it without his authority: A. however, for his own purposes, indorsed it to C., for a valuable consideration, having first informed the latter that it belonged to B., and that he, A., had no authority to part with it:—Held, that the property in the bill was in B., the acceptor, and that he might, under these circumstances, maintain trover for the bill against C. *Evans v. Kymer*, 1 B. & Adol. 528.

A bill or note payable to bearer is negotiable like other bills. *Grant v. Vaughan*, 1 W. Black. 485; 3 Burr. 1516.

A foreign note is transferable in England by an indorsement by virtue of 3 & 4 Anne, c. 9. *Bentley v. Northhouse*, M. & M. 66—Tenterden. *S. P. Miln v. Graham*, 1 B. & C. 192; 2 D. & R. 293.

An injunction will lie to restrain the negotiating of bills or notes void at their creation. *Lloyd v. Gurdon*, 2 Swana. 180.

If the payee of a note prove that part has been paid before indorsement, but that the plaintiff, on indorsing, had no notice of such payment, he is entitled to recover the full amount. *Cooper v. Davies*, 1 Esp. 463—Kenyon.

When a check is given on a verbal condition which the holder expresses his intention to elude, the drawer may resist the payment. *Wienholt v. Spitta*, 3 Camp. 376—Ellenborough.

## 2. When issued in blank.

A bill or note with a blank for the payee's name is not a legal instrument until filled up. *Rez v. Randall*, Bayl. Bills, 31.

A bill drawn, and issued in blank for the name of the payee, may be filled up by a bona fide holder, with his own name, and it will bind the drawer. *Crutchley v. Clarence*, 2 M. & S. 90. And see *Attwood v. Rattenbury*, 6 Moore, 579.

If he can show that he came regularly to the possession of it. *Crutchley v. Mann*, 2 Marsh. 29; 5 Taunt. 529.

A., in Jamaica, draws a bill on B., in London, on a Jamaica stamp, leaving the payee's name in

blank. C. gets possession of the bill, and inserts his own name as payee, without any other authority than a letter from B. promising to accept it, but having the address torn off, and containing nothing to show to whom it was addressed:—Held, that this was not evidence to show that C. was the payee of the bill. *Id.*

If a bona fide holder of a bill, accepted, payable to — or order, insert his own name as payee, and indorse the same, the bill may be declared on in that form. *Attwood v. Griffiths*, R. & M. 425; 2 C. & P. 368—Best.

An indorsement written on a blank note or check, will afterwards bind the indorser for any sum and time of payment, which the person to whom he intrusts the note chooses to insert in it. *Russel v. Langstaffe*, 2 Dougl. 514.

So, where an indorsement is in blank, the holder may over-write what he pleases. *Edie v. E. L. Comp.* 2 Burr. 1216; 1 W. Black. 297.

Where A. draws a bill on B., payable to his own order, to enable him by accepting it and passing it away, to raise money, and sends it to him with his name indorsed in blank: *querre*, whether B. can restrain its general negotiability by inserting the words, "pay to C. or order," over the name of A. written on the back. *Blad v. Ryan*, Peake's Add. Cas. 39—Kenyon.

Where the payee of a bill indorses it in blank, and delivers it to B., and B. writes above A.'s indorsement, "pay the contents to C.," B. is not liable to C. as an indorser of the bill. *Vincent v. Horlock*, 1 Camp. 442—Ellenborough.

But after an indorsement by the payee in blank, no subsequent indorsee can restrain its negotiability by a special indorsement. *Smith v. Clarke*, Peake, 225; 1 Esp. 180—Kenyon. And see *Peacock v. Rhodes*, 2 Dougl. 611.

## 3. After Maturity.

By the general rule, any person receiving a negotiable instrument after it is due is deemed to have taken it upon the credit of the person from whom he received it, and subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it. *Taylor v. Mayther*, Bayl. Bills, 118; 3 T. R. 83, n.: *S. P. Banks v. Colwell*, Bayl. Bills, 454.

The indorsee of an overdue note is liable in an action against the maker to all equities arising out of the note transaction itself, but not to a set-off in respect of a debt due from the indorser to the maker of the note arising out of collateral matters. *Burrough v. Moss*, 10 B. & C. 559.

Where a note has been indorsed to the plaintiff after it became due, who sues the maker upon it, the latter is entitled to go into evidence to show that the note was paid as between him and the original payee from whom the plaintiff received it. *Brown v. Davies*, 3 T. R. 80. But see *Hubbard v. Jackson*, 4 Bing. 390; 1 M. & P. 11; 3 C. & P. 134.

So, if the holder of a note, made without consideration, himself gave a full consideration for

it, yet if he took it after it was due from an indorser who had given none, he cannot sue upon it. *Tinson v. Francis*, 1 Camp. 19—Ellenb.

Where the drawers of a banker's check issued it nine months after it bore date, upon a consideration which afterwards failed:—Held, that, as between them and the persons to whom they delivered it, they could not be permitted to object to this circumstance in an action brought by a subsequent holder for a valuable consideration and without notice. *Beehm v. Stirling*, 7 T. R. 423; 2 Esp. 575. And see *Grant v. Vaughan*, 3 Burr. 1516; 1 W. Black. 485.

Where one bill is substituted for another, it is subject to the same equities as the one in lieu of which it was given. *Lee v. Zagury*, 1 Moore, 556; 8 Taunt. 114.

The holder in America of two bills of the same tenor, having transmitted them to his agents here to present them for acceptance, and receive the money when due, and pay over a part of it to the plaintiff, while the bills so remained in his agent's hands, agreed with the defendant, the indorser, (who had lent his indorsement on each to the drawer, from whom the holder received them) that upon payment of one of the bills he should be exonerated from both. In the mean time, the bills having been presented for acceptance by the agents, were dishonoured; and after the dishonour, the agents, not knowing of such agreement between their principal and the indorser, assigned one of the dishonoured bills to the plaintiff, who was informed of the dishonour, and who received it liable to all its infirmities, but without notice of such agreement:—Held, that the bill so received by the plaintiff was bound by the agreement; and that the defendant, having afterwards taken up and discharged the other bill, which had remained in the hands of the same agents, was discharged from both. *Crossley v. Ham*, 13 East, 498.

Where two indorsements of the same party appeared on a bill, with an intermediate one of another person:—Held, that the first must be presumed to have been made before the bill became due. *Fryer v. Brown*, R. & M. 145—Abbott.

A banker's check, overdue, stands on the same footing as a bill or note put into circulation after its date has expired, and the holder must show title in his immediate payer before he can retain the proceeds. *Down v. Helling*, 6 D. & R. 455; 4 B. & C. 330; 2 C. & P. 11.

Where the defendant received, in payment of goods, a check which had been due five days, it was held, that he could have no better title than the party from whom he received it; and the plaintiff having shown the property in the check to have once been in himself, that it lay upon the defendant in such case to show that the party from whom he took it had a good title to it. *Id.*

Courts of equity have a concurrent jurisdiction with the courts of law in relieving against notes taken when overdue. *Hodgson v. Murray*, 2 Sim. 515.

Where it appeared by parol evidence that the

holder had paid the balance remaining due on a bill to a previous holder after maturity, not on the account of the acceptor or drawer, but in order to acquire an interest in the bill as purchaser:—Held, that it might be indorsed, so as to give the indorsee all the rights which the previous holder had before the indorsement, and such indorsee might therefore recover from the drawer the balance unpaid by him. *Graves v. Key*, 3 B. & Adol. 313.

In an action by the indorsee of a bill, if the declaration states the indorsement to have been made before the bill became due, and it appears in evidence to have been made after the bill was due, this is not a material variance. *Young v. Wright*, 1 Camp. 139—Ellenborough.

#### 4. After Death or Bankruptcy.

A note being handed over for valuable consideration, the indorsement is a form which the party is entitled to call for. *Watkins v. Maule*, 2 J. & W. 243.

A note, drawn for the accommodation of A., was transferred by him to B. & C., without indorsement, for valuable consideration, and afterwards he became bankrupt, and died intestate: Held, that B. & C. might recover against the drawer, the note having been indorsed, several years after it was due, by B. to B. and C., B. having for that purpose procured letters of administration to the effects of A. *Id.*

There is no difference between an indorsement of a note by the party and one of his personal representatives. *Id.*

The indorsee of a bill, made payable sixty-five days after date, which was issued by the drawer, and indorsed by the payee, who died before the day when it bore date, may make title through such indorsement to recover on the bill against the drawer. *Pasmore v. North*, 13 East, 517.

A note payable to A. or his order may be indorsed and assigned over by his administratrix; and the indorsee being plaintiff, need not make a proffer in curiam of the letters of administration. *Rawlinson v. Stone* (in error), 3 Wils. 1.

If a bill be remitted to two agents, payable to them personally, who on the death of the principal become his executors, the mere indorsement of one, after they are executors, in order to enable the other to receive the money, is not sufficient to charge him who does not receive it. *Hovey v. Blakeman*, 4 Ves. jun. 608.

Where an agent, having money in his hands belonging to his principal, bought a bill of exchange with it, which he indorsed specially to the latter, who was dead at the time of the indorsement, but of which circumstance the agent was ignorant:—Held, that the property in the bill passed to the administrator of the principal; and consequently, that he might sue on it in his character as such. *Murray v. E. I. Company*, 5 B. & A. 204.

In an action by an indorsee against acceptor, it is a good defence under the general issue, that the bill was indorsed after an act of bankruptcy committed by the indorser. *Pinkerton v. Adams*, 2 Esp. 611—Kenyon.

In an action by indorsee against acceptor, the latter cannot defend himself on the ground of the drawer's bankruptcy at the time of such indorsement. *Arden v. Watkins*, 3 East, 322. [The cases as to indorsement after bankruptcy are fully collected in tit. BANKRUPT.]

The debtor of an uncertificated bankrupt made a note payable to the bankrupt "or his order," in discharge of a debt contracted before the bankruptcy, who indorsed it for a bona fide debt to A., who indorsed it to B. for a valuable consideration; in an action by B.—Held, that such maker, by the terms of his note, was estopped from saying that the bankrupt had no authority to indorse. *Drayton v. Dale*, 3 D. & R. 534; 2 B. & C. 293.

Where one of two partners in trade had, after an act of bankruptcy, accepted a bill of exchange in the name of the firm, without the privity of his co-partner:—Held, that in the hands of an innocent indorsee it was an available security. *Lacy v. Woolcott*, 2 D. & R. 458.

### 5. Of Stolen or Lost Bills.

If a bill or note with a blank indorsement be stolen and negotiated, an innocent indorsee may recover upon it against the drawer. *Peacock v. Rhodes*, 2 Dougl. 633.

Where a bill has been lost, or fraudulently or feloniously obtained from the defendant, the holder who sues must prove that he came to the bill upon good consideration. *Patterson v. Hardacre*, 4 Taunt. 114.

But the defendant will not be permitted to object to the want of such proof, unless he has given the plaintiff reasonable previous notice, that the plaintiff may come to trial prepared to prove his consideration. *Id.*

Where a bill when lost had only a special indorsement upon it, it was held that the indorsee might recover at law without producing the bill. *Long v. Bailie*, 2 Camp. 214, n.—Ellenborough.

If a bill has been lost, and the loser has advertised it in the newspaper, and it is discounted for the person who found it, and so came fraudulently by it, this entitles the person discounting it to recover the amount, if done bona fide, and without notice of the way in which the holder became possessed of it. *Lawson v. Weston*, 4 Esp. 56—Kenyon. This case is doubted in *Gill v. Cubitt*, next case.

A bill broker cannot recover against the acceptor of a bill indorsed generally, if he discounted it under circumstances which ought to have excited suspicion in his mind at the time: he ought in such a case, to act with care, and a reasonable degree of caution. *Gill v. Cubitt*, 5 D. & R. 324; 3 B. & C. 466; 1 C. & P. 163, 487.

In an action, by the owner of a lost bill against a banker, who had cashed it to a stranger, held, that the jury were properly directed to consider whether the plaintiff had used due diligence in apprizing the public of his loss, and whether the defendant had acted with good faith and sufficient caution in the receipt of the bill. *Beckwith v. Corall*, 3 Bing. 444; 2 C. & P. 261.

A tradesman, having in the course of business received a banker's check, which had been stolen from the payee, and given the difference to a stranger, who presented it in payment of an article purchased, brought assumpsit against the drawer for the amount:—Held, in the absence of fraud and negligence on his part, that the action was maintainable. *Lee v. Newson*, 2 D. & R. N. P. C. 50—Abbott. And see *Down v. Halling*, 6 D. & R. 455; 4 B. & C. 330; 2 C. & P. 11.

A bank note for 1000*l.* dated 12th October, 1820, was lost in London, in April, 1821, and in June 1822, was presented for change to a money broker in Liverpool, by a person with whom the latter was well acquainted, but who was then in pecuniary difficulties, and he changed it by giving bills, which had some time to run, and cash, deducting a commission, without asking any questions how the holder became possessed of it:—Held, in an action of trover by the true owner against the money broker, that it was for the jury to say whether the defendant had received the note fairly and bona fide in the ordinary course of business, and had given full value for it; and the jury having found for the plaintiff, the court refused to disturb the verdict. *Egan v. Threlfall*, 5 D. & R. 326.

A trader in London took a bill in part payment for goods, of a person representing himself to be a tradesman from the country, and to have been recommended by a customer; and sent the goods, in consequence of an order from the buyer to a public house, which was not a booking-office, without making any inquiries except as to the respectability of the acceptor. The bill turned out to have been stolen, and in an action by the trader against the acceptor, the defendant had a verdict, on the ground that the plaintiff had taken the bill out of the ordinary course of trade, and under circumstances which ought to have excited suspicion. *Slater v. West*, 3 C. & P. 326—Tenterden.

### 6. Conditional or qualified.

Quære, whether a negotiable bill can by any words of restriction be rendered not negotiable? *Edie v. E. I. Comp.* 1 W. Black. 295; 2 Burr. 1216.

A bill payable to A. or order, and indorsed personally to B., may be afterwards indorsed by B. to another. *Id.*

A bill payable to order, and becomes negotiable, may be indorsed over, without the word order to the indorsement. *Id.*

A bill being drawn by A. on B. payable to C. or order, and indorsed by C. in these words:—"the within must be credited to D., value in account," D. being indebted to B., and the bill being sent to B. and accepted by him; and he having given D. notice that he had received it, and placed it to C.'s account, this is such a special indorsement as restrains the negotiability of the bill. And if afterwards a forged indorsement, purporting to be by D., to pay to E. or order, is written upon it, and the bill is discounted, the person discounting it shall stand to the loss. *Archer v. England (Bank)*, 2 Dougl. 697. And see *Robertson v. Kensington*, 4 Taunt. 20.

And if an agent of A. (B. having become insolvent) pay the money for A., and take up the bill, A. may recover back the money paid by his agent to the person who discounted it, in an action for money had and received. *Id.*

But where a bill was indorsed by the drawer in this form, "pay the contents to A. B., being part of the consideration in a certain deed of assignment, executed by the said A. B. to the indorsees and others," it is not a limited indorsement. *Potts v. Reed*, 6 Esp. 57—Ellenborough. *And see Haussoullier v. Hartinck*, 7 T. R. 733.

"Pay to A. or his order for my use," is a restrictive indorsement; and the indorsee of A. must hold the proceeds to the use of the restricting indorser. *Sigourney v. Lloyd*, 8 B. & C. 622; 3 M. & R. 58; S. C. nom. *Lloyd v. Sigourney*, 3 M. & P. 229; 3 Y. & J. 220; 5 Bing. 525.

A special indorsement does not transfer property in bills of exchange till delivery. *Rex v. Lambton*, 5 Price, 428.

The drawer and payee of a bill, after it became due, indorsed it to B., on condition that he would take up bills discounted by the payee: B. did not take them up, but transferred the bill to C.—Held, that he might recover against the acceptor. *Wright v. Hay*, 2 Stark. 398—Abbott.

If a defendant, having promised to pay over to the plaintiff the amount of a bill delivered to him to get discounted, pay it away in discharge of a debt of his own; he is liable to the plaintiff as having discounted the bill. *Oughton v. West*, 2 Stark. 321—Ellenborough.

Bills are drawn on the 12th May, by a house in London, on a house in Lisbon, payable thirty days after sight, and indorsed to A. in London. A. indorses them, without any qualification, to B. at Paris; B. without presenting them for acceptance, puts them in circulation, and on the 22d August, they are presented at Lisbon for acceptance, and dishonoured. In an action by B. against A.—Held, that A. was bound by his unqualified indorsement, and could not offer evidence to show that he was acting merely as B.'s agent. *Goupy v. Harden*, 2 Marsh. 454; 7 Taunt. 159; Holt, 342.

There is a distinction between the discount and deposit of bills, depending not on the mere fact of indorsement, but the intention to make an absolute transfer, giving full power to go against all parties on the bills, or merely to enable the person with whom they are deposited to receive the amount from the other parties. *Ex parte Tweagood*, 19 Ves. jun. 229.

Indorsement is prima facie evidence of the former, unless the object of mere deposit is clearly shown. *Id.*

A bill remitted, indorsed merely to enable the person receiving it to raise money to meet future advances, is, while retained, a mere deposit applicable to the demands of the remitter, subject to the right under the indorsement of constituting a third person a creditor, by negotiating it. *Id.*

Where the plaintiffs had drawn a bill on J. S., which he accepted, and they indorsed it to the defendant, who reindorsed it to the plaintiffs, in

purview of an agreement (without consideration) that he should do so, as a security for the payment of it by the acceptor, and for the purpose of rendering the bill more negotiable: on demurrer to a declaration against the defendant upon the bill, in the usual form, containing an averment, that, at the time of the drawing of the bill, and of the indorsement by the defendant to the plaintiffs, it had been agreed between them that the name of the defendant should be indorsed on the bill as a security to the plaintiffs for the due payment thereof by the acceptor, and that the bill was so indorsed by the defendant under such agreement, and for such purpose only; and that the plaintiffs took and received the bill in satisfaction of such debt of the acceptor, upon the faith that the defendant would indorse the same as such security, and that the indorsement by the plaintiffs was made without any consideration, and for the purpose only, of procuring the indorsement of the defendant, and making the bill negotiable, and an averment that the bill was presented to the acceptor, and that he refused to pay it; that notice of such refusal was given to the defendant, and he thereby became liable to pay, and being so liable, promised accordingly:—Held, that the declaration was bad, as, if the action was founded on the bill, the plaintiffs could only recover according to the custom of merchants, and that by such custom, they, as indorsers and drawers, would be liable to pay its amount to the defendant; and that if the action could be considered as founded on the special contract, it could not be maintained, as there was no consideration for the defendant's indorsement. *Britain v. Webb*, 3 D. & R. 650; 2 B. & C. 483.

### 7. Proof of Indorsement.

An indorsement upon a bill or note is prima facie evidence of money lent by the indorsee to the indorser. *Kessebower v. Times*, Bayl. Bills, 288.

Semble, that a subsequent indorsement of a bill by a holder, does not imply a warranty by him that a former indorsement is genuine. *E. I. Comp. v. Tritton*, 5 D. & R. 214; 3 B. & C. 280.

If the payee of a bill deliver it, with his name indorsed on it, to another, no proof is required of the handwriting of the indorsement. *Glover v. Thompson*, R. & M. 403—Abbott.

In an action against the indorser of a bill, it is not necessary to prove any indorsements on the bill prior to the defendant's. *Crutchlow v. Parry*, 2 Camp. 182—Ellenborough.

In an action by the indorsee of a bill, where several indorsements have taken place, which are laid in the declaration, though necessary to be proved in general; yet if the defendant apply for time to the holder, and offer terms, it is an admission of the holder's title, and a waiver of proof of all the indorsements except the first. *Besanquet v. Anderson*, 6 Esp. 43—Ellenborough.

In an action against the maker of a note payable to A. B. or bearer, if the declaration state that A. B. indorsed it to the plaintiff, this in-

dersement must be proved. *Waynam v. Bend*, 1 Camp. 175—Ellenborough.

The acceptance of a bill admits merely the drawing, but not the indorsement of the drawer. Therefore, if a bill be drawn and indorsed by procuration, in an action by the indorsees against the acceptor, the indorsement by procuration must be proved. *Robinson v. Yarrow*, 1 Moore, 150; 7 Taunt. 455. And see *Macferson v. Thoytes*, Peake, 20.

In an action by bankers to recover the amount of a bill accepted by the defendant, payable at their house, and paid by them after it was indorsed, they are bound to prove the indorsement by the payee, as well as the acceptance by the defendant. *Forster v. Clements*, 2 Camp. 17—Ellenb. And see *Mead v. Young*, 4 T. R. 28.

Where a foreign bill was drawn by A. upon, and accepted by B., payable to the order of C., and a person representing himself to be C. indorsed the bill to D. for value, and the alleged indorsement turned out to be forged:—Held, that in an action by indorsees against acceptor, it was unnecessary to give positive proof of the identity of the indorser, as the person to whom the bill was really payable; prima facie evidence being sufficient for that purpose. *Bulkeley v. Butler* (in error,) 3 D. & R. 625; 2 B. & C. 434.

A declaration by indorsee against acceptor, averred that the bill had been indorsed to certain persons trading under the firm of H. & F.; and that they had indorsed the bill by procuration of one J. D. to C., from whom the plaintiff derived title: it appeared in evidence that the firm of H. & F. had ceased to exist for ten years prior to the indorsement, but that a new firm of H. & Co. had been established; and that D., one of the members thereof, was in the habit of indorsing bills by procuration in the name of H. & F., but that all other transactions in trade were carried on in the name of H. & Co. only;—Held, that as between an innocent indorsee and the acceptor there was sufficient evidence to satisfy the allegation in the declaration. *Williamson v. Johnson*, 2 D. & R. 281; 1 B. & C. 146.

In an action against acceptor, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. *Smith v. Chester*, 1 T. R. 654; *S. P. Cooper v. Lingo*, 1 Selw. N. P. 380.

An indorsement on a bill of exchange, not stated in the declaration, may be struck out after the bill has been read in evidence, and after one objection has been made on account of the variance. *Mayer v. Jadis*, 1 M. & Rob. 247—Denman.

Although a bill has been shown to the drawer, with the name of the payee indorsed upon it, and he merely objects to paying it because he had drawn it without consideration; in an action against him by the indorsee, this does not dispense with regular proof of the indorsement: *Duncan v. Scott*, 1 Camp. 101—Ellenborough.

In an action on a note by the indorsee against the maker, notice of the indorsement need not

be averred. *Reynolds v. Davies* (in error), 1 B. & P. 625.

So, in a declaration by indorsee against acceptor, it is unnecessary to aver notice of the indorsement. *Heald v. Johnson*, 2 Smith, 44.

### 8. Without Indorsement.

A promissory note given as a security for a debt passes to the crown by act and operation of law, upon an inquisition before a coroner, and verdict of *facto de se* upon the body of the payee and holder. *Lambe v. Taylor*, 6 D. & R. 186; 4 B. & C. 138.

So it passes by grant from the crown, under the sign manual, to the grantee, without indorsement. *Id.*

A mere discount of a bill, without the indorsement of the party who receives the money, does not give the holder of the bill any claim against such party. *Ex parte Roberts*, 2 Cox, 171.

A. employs B. to get bills, which he had not indorsed, discounted for him; B., in order to effect the discounting, indorses them:—Held, that A.'s estate must relieve B.'s from the liability incurred by the indorsement. *Ex parte Robinson*, Buck, 113.

A note payable on demand with interest, drawn by A. in favour of B. as a security for a debt, was by him indorsed to C. for the same purpose; after the indorsement, it passed backwards and forwards between B. and C. several times, and previous to its being ultimately deposited with C. he received an intimation from B. not to negotiate it, as he should want it when he settled accounts with A.:—Held, that C. could not, after a settlement of accounts between A. and B., without a delivery of the note, recover on it against A. *Roberts v. Eden*, 1 B. & P. 398.

If the holder of a bill receive from the drawer a second bill to get discounted, in order to provide for the first, there is a sufficient transfer to him of the second, to enable him to retain the proceeds. *Walsh v. Tyler*, 2 Stark. 288—Ellenb.

Where a party discounts bills with a banker, and receives in part of the discount other bills, not indorsed by the banker, which bills turn out to be bad, the banker is not liable. *Fyddell v. Clarke* 1 Esp. 447—Kenyon.

J. S. drew a bill on the defendant (which the latter accepted for the accommodation of the former,) and indorsed it to the plaintiff as his agent, in which character the plaintiff paid it away on account of the drawer, for wine contracted to be purchased for him. Subsequently the wine contract being rescinded, the holder of the bill refused to give it up until he had been paid a sum of 150*l.*, which he alleged to be due to him from the drawer. The plaintiff engaged to pay it, received the bill, and sued the defendant as the acceptor:—Held, that he was not entitled to recover, although it was insisted that he had a lien on it to the amount he had promised to pay to the holder on its being delivered up to him. *Hallett v. Davis*, 1 M. & P. 79.

Where A. deposits with B. a banker, a pro-

ure. *Dufaur v. Ozenden*, 1 M. & Rob. 230n.

can be liable as acceptor but the person the bill is addressed, unless he be for honour. *Polhill v. Walter*, 3 B. 114.

erson other than the drawee write an ac- upon the bill in the usual form, he is as an acceptor, but must be sued on eral undertaking. *Jackson v. Hudson*, 447—Ellenborough.

fore, where a bill was drawn in the fol- orm: "London, two months after date, ny order 157l. for value received. F.

To Mr. I. Irving," and accepted by ind afterwards specially by Hudson:— at Hudson was not liable as acceptor,

drawn, payable to plaintiff's order in , and accepted payable there, is a general nce within the statute. *Faile v. Bird*, C. 534; 9 D. & R. 639; 2 C. & P. 303.

re three persons undertake to accept bills rticular concern, and the drawer draws account of one of them only, which he in the name of the three, a bona fide who received it from the drawer cannot against the other two. *Williams v. Tho-* Esp. 18—Ellenborough. But see *Ridley* or, 13 East, 182.

#### (b) Acceptance in Blank.

acceptance in blank is sufficient to charge eptor, where the bill is afterwards drawn ution of his authority. The 1 & 2 Geo. , s. 2, does affect such acceptances. *Les-* *Hastings*, 1 M. & Rob. 119—Lyndhurst.

action by indorsee against acceptor, it ejection that the acceptance actually took efore the drawer's name was signed, al- the declaration be in the usual form, t the bill being drawn, the defendant af- is accepted, and that the transaction was ng to the custom of merchants; and it is ssary to offer any evidence to show s the custom of merchants so to transact s. *Molloy v. Delovee*, 7 Bing. 428; 5 M. & 4 C. & P. 492.

iving signed his name to a blank paper mped, and delivered it to B. for the pur- drawing a bill in such a manner as B. think fit. B. drew a bill payable to a sic- payee or order, and indorsed it over for a e consideration to C., who was ignorant ransaction between A. and the indorser:— hat C. might maintain an action against e drawer of a bill payable to bearer, on a o that effect. *Collis v. Emmett*, 1 H. Black.

in a court stating the special circum- . *Id.*

#### (c) Keeping Bill.

ose cases to which the stat. 1 & 2 Geo. 4, es not apply, the drawee keeping a bill

which is presented to him for acceptance may amount to such. *Harvey v. Martin*, Bayl. Bills, 149; 1 Camp. 525, n.

Where a bill is sent for acceptance to the drawee, and he retains it in his possession contrary to the usual mode of dealing between him- self and the drawee, it amounts to an acceptance. *Id.*

Quere, whether in any case the mere deten- tion of a bill for an unreasonable time, by the drawee, with whom it is left for acceptance, in point of law amounts to an acceptance. *Mason v. Barff*, 2 B. & A. 26.

In that case, the vendor of goods had been in the habit of drawing bills in payment upon the vendee, and discounting the same with bankers, by whom the bills were transmitted by post for acceptance; the vendee cautioned the bankers to inquire, when they discounted any such bills, whether the goods for which such bills were re- spectively drawn had been delivered, and the carrier's receipt sent, and assured them that, in that case, they would be accepted; the bankers afterwards discounted a bill, and transmitted the same for acceptance to the vendee, who detained it in his possession for ten days, and then in- formed the bankers that he could not accept the bill, as the invoice of the goods had not been delivered; and after a further interval of sixteen days, the bankers having made no objection to his detaining the bill, returned the same; the vendor having then stopped payment, without delivering the goods, or sending the carrier's re- ceipt:—Held, that the drawee of the bill was not liable as acceptor. *Id.*

Where an acceptance of a bill was refused by the defendant, but it remained afterwards for a considerable space of time in his hands, and was ultimately destroyed by him:—Held, by three justices, diss. Lord Ellenborough, C. J., that the defendant was not thereby liable as acceptor of the bill. *Jeune v. Ward*, 1 B. & A. 653; 2 Stark. 326.

#### (d) By Letter.

A letter, undertaking to accept bills, was held to be an acceptance. *Ex parte Dyer*, 6 Ves. jun. 9.

And a letter from the drawee of a bill in Eng- land, to the drawer in America, stating that "their prospect of security being so much im- proved, they should accept or certainly pay the bill," was held to be an acceptance in law, al- though the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in England; and again after the writing such letter, refused payment of it when presented for payment; and although such letter, written before, was not received by the drawer in America till after the bill became due. *Wayne v. Raikes*, 5 East, 514; 2 Smith, 98.

But where the drawer of a bill wrote to the drawee, stating that he had valued on him for the amount, and added "which please to honour," to which the drawee answered, "the bill shall have attention":—Held, that these words were ambi- guous, and did not amount to an acceptance of

the bill, inasmuch as although an acceptance may be made by letter to a drawer, still that can only be so where the terms of the letter do not admit of doubt. *Rees v. Warwick*, 2 B. & A. 113; 2 Stark. 411.

A., in consideration of having commissioned B. to receive certain African bills payable to him, drew a bill upon B. for the amount payable to his own order; B. acknowledged by letter the receipt of the list of the African bills, and assured A. that the bill would meet with due honour from him:—Held, that this was an acceptance by B. *Clarke v. Cock*, 4 East, 57.

#### (c) Undertaking to accept.

An answer received at the house of the drawee, "that the bill would be taken up when due," does not amount to an acceptance, unless it can be shown that the answer was given by the drawee or by his authority. *Sayer v. Kitchen*, 1 Esp. 209—Kenyon.

A mere promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand, he should then have the money and would pay it, does not amount to an acceptance of the bill when drawn; and an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon a count upon the bill as accepted, nor on the general counts for money had and received, &c. *Johnson v. Collings*, 1 East, 98.

Where the holders of a foreign bill presented it to the drawees for acceptance, which being refused, they protested it for non-acceptance, and afterwards, on the day when it became due, presented it to the drawees for payment, making a charge for the expenses for protesting it; to which the drawees said, "this bill will be paid, but we cannot allow you for a duplicate protest," when the holders refused to receive payment without the charges:—Held, that the drawees might revoke their offer to pay, for it did not amount to an acceptance of the bill by them. *Anderson v. Heath*, 4 M. & S. 303.

A promise to give notice to a party when he might draw a bill, amounts to an undertaking to accept the bill when drawn in pursuance thereof. *Smith v. Brown*, 2 Marsh. 41; 6 Taunt. 440.

Except the communication is to another than the party who is to receive the bill, and who is thereby induced to take it. *Miln v. Prest*, Holt, 181; 4 Camp. 393—Gibbs.

Bills having been drawn on the defendants by their agents, and with their authority, in respect of a mine which they afterwards transferred to A., they requested A. to place funds in their hands to meet the bills when due, saying, "it would be unpleasant to have bills drawn on them paid by another party." A. placed funds accordingly; but when the bills were left with defendants for acceptance, no acceptance was written on them. A's. agent having complained to one of the defendants on the subject, he said, "What! not accepted? we have had the money, and they ought to be paid; but I do not interfere in this business."

ness, you should see my partner!"—Held, that all this amounted to a patrol acceptance of the bills, on which the defendants were liable to an indorsee, between whom and A. there was no privity; and that the indorsee was not precluded from suing by having made a protest in ignorance of this acceptance. *Farlie v. Herring*, 3 Bing. 625; 11 Moore, 520.

By a letter of credit, merchants in London agreed to accept at ninety days sight the drafts of a merchant at Demerara, on receiving invoices, bills of lading, &c. of certain colonial produce to be remitted; and added, that "on receiving these documents, and no irregularity appearing, they would accept his drafts at the usual date, to the extent of 30,000*l*." In pursuance of this agreement, two several cargoes were remitted in different ships, and shortly afterwards the consignor drew a bill at six months sight upon the credit of the cargoes remitted, and in the bill directed the same "to be charged to account as advised," without specifying to the account of which cargo it was to be placed, and the consignees refused to accept:—Held, that they were liable upon their agreement in damages for not accepting. *Laing v. Barclay*, 2 D. & R. 530; 1 B. & C. 398; 3 Stark. 38.

The words, "There is your bill, it is all right," are no acceptance. *Powell v. Jones*, 1 Esp. 17—Kenyon.

A mere acceptance without delivery to the holder is not sufficient to make the contract binding. *Cox v. Troy*, 1 D. & R. 38; 5 B. & A. 474.

A bill being presented by the indorsee to the drawee for acceptance, the latter on accepting it said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands, which would be paid, he would take all risks:—Held, that this conversation, together with the bill accepted by the drawee, did not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill accepted, on a count for money had and received. *Whitwell v. Bennett*, 3 B. & P. 559. And see *Bishop v. Rowe*, and *Same v. Bailey*, 3 M. & S. 362.

But a direction to a third person to pay a bill, was held to be prima facie a complete acceptance. *Moor v. Whitby*, Bayl. Bills, 142; Bull. N. P. 270.

Upon a request to A. to accept a bill, and draw upon B. for the like sum; the mere act of drawing upon B. does not amount to an acceptance. *Smith v. Nissen*, 1 T. R. 269.

#### 8. Conditional or qualified.

A conditional acceptance of a bill is good. *Jules v. Shalrooke*, 2 Wills. 9.

A conditional acceptance is as effectual as an absolute one, if the condition be complied with. *Miln v. Prest*, Holt, 181; 4 Camp. 393—Gibbs.

If the drawee of a bill drawn on account of a cargo of wheat consigned to him, says, when presented, "it will not be accepted until the ship

with the wheat arrives," on the arrival of the ship with the wheat, this amounts to an actual acceptance. *Id.*

So, if he says that he cannot accept till stores are paid for, it is an undertaking to accept when the stores are paid for. *Pierson v. Dunlop*, Cowp. 571.

Whether a conditional or an absolute acceptance, is a question of law. *Sproat v. Matthews*, 1 T. R. 182.

Where a bill was drawn upon A. residing in London, by a consignor of goods living abroad, and on its being presented to A., who said he could not then accept, because he did not know whether the ship would arrive at London or Bristol, B., the holder of the bill, agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance, in case A. did not accept: on a second application A. said the bill would be paid even if the ship were lost:—Held, that this was only a conditional acceptance, depending on two events, the ship's arriving in London, or being lost: and that B., having the liberty of refusal, precluded himself from recovering against A., by afterwards noting the bill for non-acceptance. *Id.*

If A. accept a bill payable on condition to be performed by B., the performance of this condition by C. will not support an action by the holder of the bill against A. *Swan v. Cox*, 1 Marsh. 176. And see *Harrison v. Hannel*, 1 Marsh. 349; 5 Taunt. 780.

Where the drawee of a bill, who had once refused to accept it, said to the holder, "if you will send it to the counting-house again, I will give directions for its being accepted," he is not liable as acceptor, without evidence that the bill was so again sent back. *Anderson v. Hick*, 3 Camp. 179—Ellenborough.

An agreement to accept a bill on certain conditions, is discharged if the conditions are not complied with. *Mason v. Hunt*, 1 Dougl. 297.

If the payee of a bill annex a condition to his indorsement, the drawee, who afterwards accepts it, is bound by that condition; and if it is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor. *Robertson v. Kensington*, 4 Taunt. 30. And see *Prevôt v. Abbott*, 5 Taunt. 786.

If a person to whom a bill is directed generally, accept it, payable at a particular place, the holder need not receive such a qualified acceptance, but may resort to the drawer as for non-acceptance. *Gammon v. Schmoll*, 5 Taunt. 344; 1 Marsh. 80.

Because it amounts to a contract to pay at that particular place and no where else, and narrows the general liability of the acceptor. *Id.*

The holder of a bill may insist upon the drawee accepting it generally in the very words in which it is drawn, or may protest it for non-acceptance. *Boehm v. Garcias*, 1 Camp. 425, n.—Ellenborough. And see 7 East, 387.

And without considering whether a payment in the terms of the acceptance might not have

satisfied the terms of the bill, the acceptance otherwise is not sufficient. *Id.*

Before the statute, a part acceptance was considered good. *Julian v. Sholrooke*, 2 Wills. 9.

### 2. Proof of.

The date of the acceptance of a bill payable after sight, over the defendant's acceptance, although in a different handwriting, will be presumed to have been written by his authority. *Glossop v. Jacob*, 4 Camp. 227; 1 Stark. 60—Ellenborough.

Although an acceptance is prima facie an admission of the handwriting of the drawer, in an action against the acceptor, it is not conclusive so as to prevent him from proving the contrary. *Smith v. Sear*, Bull. N. P. 270.

The acceptance of the drawee is prima facie evidence of his having effects of the drawer in his hands. *Vere v. Lewis*, 3 T. R. 182.

For every bill of exchange implies a command to the drawee to pay, and his acceptance is not only an admission of money or effects in his hands sufficient to pay, but is an undertaking by the acceptor, as well with respect to the drawer as the payee, to pay the bill. *Parminster v. Symons (in error)*, 2 Bro. P. C. 43.

Where the acceptors of a bill are partners, and one partner accepts for the firm, his admission of his acceptance, although not evidence of the partnership against the others who appear and defend, will be good evidence of his acceptance as against the whole aggregate body. *Hodenspyl v. Wingerhoed*, 2 Phil. Evid. 26.

In an action against the drawers of a bill drawn by a firm upon one partner, if it is proved that the bill was accepted by the drawee, this is evidence of its having been regularly drawn. *Porthouse v. Parker*, 1 Camp. 82—Ellenborough.

In an action by a second indorsee against the drawer of a bill payable by his own order, proof that the bill purported to have been accepted when it was indorsed to the plaintiff, does not render it unnecessary to prove an actual acceptance. *Smith v. Bellamy*, 2 Stark. 223—Ellenb.

In an action against the acceptor of a bill, where defendant's attorney had given notice to the plaintiff to produce all papers relating to a bill described as the bill in question, and said to be "accepted by the said defendant:"—Held, that such notice was prima facie evidence of the defendant's acceptance. *Hott v. Squire*, R. & M. 262—Abbott.

Where a bill is by the acceptor made payable at a particular place, which is not his residence, proof of presentment at that place is not sufficient evidence of dishonour, in an action against the drawer, without proof of the acceptor's handwriting. *Sedgwick v. Jager*, 5 C. & P. 199—Parke.

The drawee (who was also payee) of a foreign bill drawn in three parts, accepted, and indorsed one part to a creditor, to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part for



value to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him:—Held, that, under these circumstances, the holder of the part secondly accepted was entitled to recover on the bill against the acceptor, and that the bill being foreign did not require a stamp:—Held, also, by Lord Tenterden, C. J., and Parke, J., that the acceptor would have been liable on the part secondly accepted, even if the first part had been indorsed and circulated unconditionally. *Holdswoorth v. Hunter*, 10 B. & C. 449.

### 10. Revocation and Cancelling

If the drawee of a bill has put his name on it as acceptor, he cannot afterwards, by erasing his name, discharge his acceptance. *Thornton v. Dick*, 4 Esp. 270—Ellenborough.

So, where a bill was left for acceptance, and accepted, but the acceptance was afterwards cut off, and the bill returned in that mutilated state: Held, that the acceptance being once made, it could not be revoked, and that the acceptor was still bound. *Trimmer v. Oddie*, Bayl. Bills. 161. Kenyon.

Quære, whether an acceptance of a bill once made by the drawee may be cancelled or recalled by him before the bill be delivered back to the holder; yet, if the acceptance be so cancelled, and the bill noted for non-acceptance, the holder cannot afterwards sue upon it as an acceptance. *Bentinck v. Dorrien*, 6 East, 199; 2 Smith, 337.

A bill of exchange having been accepted, payable at Ladbroke's, with a direction in writing on it, "in case of need to apply at Boldero's," and having been dishonoured when due at Ladbroke's, and therefore brought to Boldero, who, thinking that it had been made payable at his house, under that mistake cancelled the acceptance; but presently, observing the mistake, wrote under it, "cancelled by mistake," and signed his initials to it, yet nevertheless paid the bill for the honour of the plaintiffs, whose indorsement was on it:—Held, that the plaintiffs, on proof of such cancellation by mistake, might recover upon the bill against prior indorsors. *Raper v. Birkbeck*, 15 East, 17.

Where a bill was left for acceptance at the house of a banker, and was in fact, accepted; but, before delivery to the holder, the acceptance was cancelled:—Held, that the banker might so cancel his acceptance; and that, before delivery to the holder, the contract was not complete. *Cox v. Troy*, 1 D. & R. 38; 5 B. & A. 474. And see *Paton v. Winter*, 1 Taunt. 420.

By the usage of trade, a check may be returned by the banker on whom it is drawn till five in the afternoon of the day on which it is presented for payment; even although it has previously been cancelled by mistake. *Fernandey v. Glyn*, 1 Camp. 426, n.—Ellenborough.

The obligation of a complete acceptance may be waived. *Whalley v. Tricker*, 1 Camp. 35—Ellenborough.

Defendant, in discharge of a debt to plaintiff, indorsed bills to him, which had been drawn and

indorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here; plaintiff indorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them "cancelled by mistake;" and the bills were not, however, paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling; they would otherwise have honoured them. A reacceptance was obtained from the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them, regularly protested, to the defendant, who applied to the prior indorsors for payment, but they refused. The defendant, who resided abroad, cited the drawers, the intermediate indorsors, and the plaintiff, before the Tribunal of Commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted him by the holders, with whom the plaintiff was identified, and, consequently, that the other parties to the bills were discharged; Held, that the French courts had mistaken the law of England as to the effect of the cancellation; and, therefore, that the defendant was still liable at the plaintiff's suit for the debt in respect of which the bills were given, notwithstanding the decree. *Novelli v. Rossi*, 2 B. & Adol. 757.

## IX. PRESENTMENT FOR PAYMENT.

### 1. Necessity.

Although, on the day before a bill becomes due, the holder applies to the drawee, who informs him that he has no effects of the drawer's in his hands, but that they will probably be supplied before the next day, and on that day the drawer informs him that he will endeavour to provide effects, and will call upon him again, it does not supersede the necessity of a presentment on that day. *Prideaux v. Collier*, 2 Stark. 57—Ellenborough.

If the drawee goes abroad, leaving an agent in England, with power to accept bills, a bill so accepted must, when due, be presented to the agent for payment, if the drawee continue absent. *Phillips v. Astling*, 2 Taunt. 206.

An acceptance for honour is conditional only, and therefore presentment for payment must be made to the drawee at maturity; even in the case of a bill payable after sight. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394.

An acceptor for the honour of the drawer of a

bill originally accepted by the bankrupts having taken up the bill, ought, if the bankrupts had no effects in their hands, to resort first to the drawer. *Ex parte Wackerbath*, 5 Ves. jun. 574.

The acceptors of a foreign bill, who, after presentment to the drawees for acceptance, and refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsors, are not liable on such acceptance, unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment. *Hoare v. Casenove*, 16 East, 391.

An allegation in a declaration that a bill was presented for payment by I. S. does not render it incumbent on the plaintiff to show that a presentment by I. S. was made. The material allegation is the presentment, and by whom it was made is immaterial. *Boehm v. Campbell*, Gow, 55—Dallas.

### 2. At what Time.

By 39 & 40 Geo. 3, c. 42, bills and notes becoming due on Good Friday are to be payable, and may be noted and protested on the day preceding, in the same manner as bills and notes becoming due on Sunday or Christmas-day.

By 7 & 8 Geo. 4, c. 15, s. 2, the same regulation is made as regards proclamation days of fast and thanksgiving.

By s. 3, Good Friday, Christmas-day, and proclamation days of fast and thanksgiving, are to be considered, as to bills and notes, as in all respects as Sunday.

Three days' grace are allowed on promissory notes, as well as on bills of exchange; for 3 & 4 Ann. c. 9, puts them both on the same footing, in all respects. *Brown v. Harraden*, 4 T. R. 148. And see *Ward v. Honeywood*, 1 Dougl. 61.

Three days' grace are allowed on a promissory note payable to A., without adding, "or to his order," "or to bearer." *Smith v. Kendall*, 6 T. R. 123; 1 Esp. 231.

A presentment for payment on the day before the bill became due, allowing days of grace, is premature. *Wiffen v. Roberts*, 1 Esp. 261—Kenyon.

The three days' grace allowed by the custom of merchants are allowable on bills drawn and payable in Scotland, the limitation of an action on such a bill therefore only begins to run from the third or last day of grace. *Ferguson v. Douglas*, 6 Bro. P. C. 276.

At Hamburg, the holder of a bill is not bound to present it until the eleventh day after the time limited for its payment, where the eleventh day is a post day: if it is not, he must present it on the next preceding post day, unless the drawee reside at Lubec, or Bremen, or other places near Hamburg, which are in daily intercourse with it, in which case the holder need not present it until the eleventh day, although that day be not a post day. *Goldsmith v. Shee*, and *Same v. Blend*, Bayl. Bills, 199.

Quære, whether days of grace are allowed on bills payable at sight? *Janson v. Thomas*, 3

Dougl. 421; S. C. nom. *Anson v. Thomas*, Bayl. Bills, 79.

A bill payable after sight having been refused acceptance and protested, was accepted eight days after by a person for the honour of the drawer; when at maturity, according to that acceptance, it was presented for payment to the drawee and the acceptor for honour: in actions against the latter and the drawer, held, these presentments for payment were made at a proper time. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394.

A bill, payable sixty days after sight, becomes due sixty days after acceptance, or after protest for non-acceptance. *Campbell v. French* (in error,) 6 T. R. 200; 2 H. Black. 163.

The holder of a bill or note is entitled to know on the very day the bill becomes due whether it is to be paid or dishonoured. *Cocks v. Masterman*, 4 M. & R. 676; 9 B. & C. 902.

Therefore, where the bankers of the drawee pay the amount to the holder on the day the bill becomes due, and on the following day discover the acceptance to be a forgery, and give the holder notice of the fact, they cannot recover back the amount from the holder. *Id.*

In the time for the presentment of a bill, the day of presentment is exclusive. *Lester v. Garland*, 15 Ves. jun. 254.

### 3. What are Laches.

If a man accept a note or draft of his debtor upon a third person, and hold it an unreasonable time before he demands the money, and the person upon whom it is drawn becomes insolvent, it is the creditor's own loss, although the note or draft be not a bill of exchange or negotiable. *Chamberlyn v. Delarvie*, 2 Wils. 353.

Where the plaintiff, in Yorkshire, on the 26th of December, received a bill payable in London, which became due on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his bankers at Lincoln, who duly forwarded it to London for presentment, and the bill was dishonoured:—Held, that the plaintiff, by keeping it in his hands until the 29th, was guilty of laches. *Anderton v. Beck*, 16 East, 248.

A bill drawn on Leghorn was not presented in due time, owing to the political state of the country at that time, which rendered it impossible to present it:—Held, that it being afterwards presented for payment with due diligence, and refused for want of presentation at the time when it was due, the holder might recover against the antecedent parties; and evidence of this impossibility of presenting at the time of the maturity of the bill might be given on the ordinary averment that it was duly presented. *Patience v. Turnley*, 2 Smith, 223.

Where a bill, payable on demand, is taken in payment for goods, it is not necessary to present it the same day on which it is received. *Appleton v. Sweetapple*, 3 Dougl. 137; Bayl. Bills, 192.

Seemle, that reasonable time is a question of law. *Id.*

A check should be presented with due diligence to the bankers on whom drawn, but a banker in London who receives a check by the general post, is not bound to present it for payment until the following day. *Rickford v. Ridge*, 2 Camp. 537—Ellenborough.

By the practice of the London bankers, if one banker, who holds a check drawn on another banker, present it after four o'clock, if it is not then paid, but a mark is put on it, to show that the drawee has assets, and that it will be paid; checks so marked have a priority, and are exchanged or paid next day at noon, at the clearing house:—Held, that a check presented after four, and so marked, and carried to the clearing house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking house of the drawee. *Robson v. Bennett*, 2 Taunt. 388.

Such a marking under this practice amounts to an acceptance, payable next day at the clearing house. *Id.*

Neither is it necessary to present for payment a check payable on demand, till the day following the day on which it is given. *Id.*

A person receiving a check on a banker is equally justified in lodging it with his own banker to obtain payment, as he would be in paying it away in the course of trade. *Id.*

The holder of a check is bound to present it for payment on the day following that on which he receives it; but if he pay it to his bankers before the time at which the bankers, by presenting it at the clearing house, might obtain payment of the same, the drawer is not discharged by their omitting so to present it, although, according to the custom of London, it may be imperative upon the bankers, as between them and their customers, so to present it. *Boddington v. Schlencker*, 1 Nev. & M. 541.

The holder of a banker's note, payable at two places, has a right to present it at either, and if payment be refused at one, there are no laches if it be proved, that, if payment had been demanded at the other, which was more convenient, the note would have been paid. *Beeching v. Gower*, Holt, 313—Gibbs.

The not presenting a draft upon the same day on which it is received is not laches. *Medcalf v. Hall*, 3 Dougl. 113.

Where a note was given in London at one o'clock, and not presented till next morning, the jury held it unreasonable, against the opinion of the court. *Appleton v. Sweetapple*, Bayl. Bills, 192; 3 Dougl. 137: *S. P. contra*, *Williams v. Smith*, 2 B. & A. 496.

Where a servant received on behalf of his master, in payment of goods sold, country bank notes, at one o'clock on Friday afternoon, and paid them to his master after banking-hours on Saturday evening, and between three and four in the afternoon of Saturday the bank stopped payment:—Held, that there was no laches in not presenting the notes before the bank stopped on the Saturday. *James v. Holditch*, 8 D. & R. 40.

#### 4. Within what Hours.

The holder of a bill accepted, payable at a banker's, impliedly agrees to present it for payment within the usual banking hours. *Perker v. Gordon*, 7 East, 385; 3 Smith, 358; 6 Esp. 41: *S. P. Jameson v. Swinton*, 2 Taunt. 224; 2 Camp. 373.

Overruling a former case, in which it was held, that the court would not take notice of banking hours. *Lafley v. Mills*, 4 T. R. 170.

But the presentment of a bill after the usual hours, is sufficient, provided there be somebody at the place, who sees the bill, or gives an answer; otherwise it would not be sufficient. *Henry v. Lee*, 2 Chit. 124. See also *Bynner v. Russell*, 7 Moore, 287; 1 Bing. 23; *Hill v. Hoop*, D. & R. N. P. C. 57.

So, a presentment at the banking-house where payable, after banking hours, is sufficient, if a person be stationed at the banking house, and return for answer, no orders. *Garnett v. Woodcock*, 6 M. & S. 44; 1 Stark. 475.

It would have been otherwise if the bank had been shut. *Id.*

And a presentment at a banking house after banking hours, when the house is shut, is not sufficient to charge the drawer; and no inference is to be drawn from the circumstance of the bill being presented by a notary, that it had been before presented within banking hours. *Elford v. Teed*, 1 M. & S. 28.

Where a bill was drawn and accepted for the accommodation of the indorser, which was not duly presented for payment when due, by reason that the bill having been accepted, payable at a banking house, was not presented till after banking hours, when the answer given to the holder was "no effects;" and the indorser applied to the indorsee, after declaration filed, for further time to make payment of the bill; which declaration alleged the fact, that the bill was duly presented for payment:—Held, that it was evidence of a waiver of the objection, with notice of the fact, of which he had the means of informing himself. *Hopley v. Dufresne*, 15 East, 275.

A presentment of a bill at a counting house (where it is made payable) between six and seven o'clock in the evening, is sufficient. *Morgan v. Davison*, 1 Stark. 114—Ellenborough.

Or eight in the evening at the house of a merchant in London. *Barclay v. Bailey*, 2 Camp. 527—Ellenborough.

Or the same hour at the office of an attorney, and that in the month of February. *Triggs v. Newham*, 10 Moore, 249; 1 C. & P. 631.

Presentment at the house of a trader or merchant, between eight and nine in the evening:—Held, sufficient. *Id.*

A presentment of a bill for payment at a house in London, where it is made payable, at eight o'clock in the evening of the day when it becomes due, is sufficient to charge the drawer, although at that time the house be shut up, and no person there to pay the bill. *Wilkins v. Jadis*, 2 B. & Adol. 188; 1 M. & Rob. 41.

## 5. To whom and where.

*Bills since statute 1 & 2 Geo. 4.*—The statute 1 & 2 Geo. 4, c. 78, embraces all bills payable at a particular place, whether made so payable by the drawer or by the acceptor.

An acceptance of a bill drawn payable to plaintiff's order in London, is a general acceptance within the statute; and a special presentment need not be alleged or proved. *Payle v. Bird*, 6 B. & C. 531; 9 D. & R. 639; 2 C. & P. 303.

Nor need proof of presentment for payment in London, or of excuse for non-presentment in London, be given. *Selby v. Eden*, 3 Bing. 611; 11 Moore, 511.

Where a bill, drawn with the words "pay to my order in London," in the body of the bill, and directed to the drawees payable in London, was accepted at Messrs. J. L. & Co. bankers in London:—Held, that a presentment at J. L. & Co.'s, was necessary to charge the drawer, although by the statute such an acceptance is general; and that the circumstance of the drawer having negotiated it after such acceptance made no difference. *Gibbs v. Mather* (in error), 2 C. & J. 254; 2 Tyr. 189; 8 Bing. 214; 1 M. & Scott, 387.

A holder of a bill carried it, when due, to the residence of the acceptor stated in the bill, found the house closed, and inquired for the acceptor in the neighbourhood, but could not hear of him: Held, that the bill was dishonoured. *Hine v. Alley*, 1 Nev. & M. 433.

In a declaration on a bill made payable by the acceptor at the house of S. P. & S., an averment of presentment at the house of S. P. & S. is sufficient, without averring a presentment to the acceptor, or to S. P. & S. *Hawkey v. Borwick*, 4 Bing. 135; S. C. not S. P. 1 Y. & J. 376; 12 Moore, 478.

A bill accepted for honour must be presented to the drawee at maturity before the drawer can be charged, and a presentment to the acceptor for honour only is not sufficient. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394.

Presentment of a bill payable at Messrs. A. B. & Co.'s, who are bankers in London, to their clerks at the clearing house, is sufficient. *Reynolds v. Chettle*, 2 Camp. 596—Ellenborough. *S. P. Robson v. Bennett*, 2 Taunt. 388.

*Before the statute.*—Before the statute 1 & 2 Geo. 4, c. 78, if a bill was accepted, payable at a banker's, it must have been presented there for payment, and the neglect so to present it was equally a discharge to the acceptor as to the drawer. *Callaghan v. Aylett*, 3 Taunt. 397; 2 Camp. 549; *S. P. Gammon v. Schmoll*, 1 Marsh. 80; 5 Taunt. 344. And see *Fenton v. Goundry*, 13 East, 459; 2 Camp. 656; and *Sebg v. Abilbol*, 4 M. & S. 462; 1 Stark. 79.

Where a bill was drawn payable in London, and accepted payable at a London banker's, a presentment for payment there must have been proved against the acceptor. *Hodge v. Fillis*, 3 Camp. 463—Ellenborough.

If a bill was "accepted, payable at the house

of P & Co." it was a qualified acceptance, restricting the place of payment, and the holder was bound to present the bill at that house for payment, in order to charge the acceptor of the bill; and as against the acceptor, he must have averred, and proved that he made such presentment. *Rouse v. Young* (in error), 2 Bligh, 391; 2 B. & B. 165.

In assumpsit by indorser against the indorsee of a bill, plaintiff declared that A. B. accepted, and by that acceptance appointed the money in the bill specified to be paid at the house of G. & Co., and averred that the bill was in due manner presented to G. and Co. and to A. B. for payment, and that G. and Co. and A. B. were then and there required to pay the same to plaintiff according to the tenor and effect of the bill, and the acceptance and indorsement. Upon special demurrer, for that it did not appear that the bill was presented at the house:—Held, that the averment was sufficient. *Bush v. Kiamear*, 6 M. & S. 210.

Where persons have received money for the express purpose of taking up a bill, two days after it became due; and, upon tendering it to the holders, and demanding the bill, find that they have sent it back protested for non-acceptance to the persons who indorsed it to them:—Held, that such persons, having received fresh orders not to pay the bill, were not liable in an action by the holders for money had and received, when, upon the bill being reprocedured and tendered to them, they refused to pay the money. *Stewart v. Fry*, 1 Moore, 74; 7 Taunt. 339.

In an action for money had and received by the holder of a bill, against a person who has received a sum of money from the acceptor to satisfy it, any defence may be set up which would have been available, if the action had been brought against the acceptor himself. *Redshaw v. Jackson*, 1 Camp. 372—Ellenborough.

*Promissory Notes.*—A memorandum at the foot of a promissory note indicating a particular place of payment, forms no part of the contract, though shown to be contemporaneous with the note itself. *Williams v. Waring*, 5 M. & R. 9; 10 B. & C. 2.

Where, by such a memorandum, it was made payable at a particular place:—Held, that this did not constitute a part of the contract, so as to make it necessary for a party suing on the note to aver and prove a presentment there. *Id.*

Where the indorsee declared against the maker of a note, that he made the same payable at the house of Messrs. B. & Co., London, and upon production of the note at the trial, it appeared that the address at the house of Messrs. B. & Co. was not a part of the note, but only a memorandum at the foot of the note:—Held, that this was a variance. *Ezon v. Russell*, 4 M. & S. 505.

Payment of a note, made payable at a certain place named in it, must be demanded there before the makers can be sued on it. But upon such demand proved in an action by the holder against the maker, it is no objection to the plaintiff's recovery, that one of the makers, whose real name was John Key, (who had suffered judgment

by default,) was sued on the joint promise by the name of Thos. Kay; it being proved that the real person had been served with the process, though under a mistaken Christian name; and the variance between Kay and Kay, which were sounded alike, not being material. There had also been a part payment on the notes duly presented. *Dickinson v. Bowes*, 16 East, 110.

If by a memorandum at the foot of a note it is made payable at a particular place, it is to be considered as part of the contract and it is not a variance to allege the note to be so payable. *Sproule v. Legge*, 2 D. & R. 15; 1 B. & C. 16; 3 Stark. 156.

If the maker of a note, by a note at the foot, make it payable at a particular place, an allegation, (after stating the promise to pay in the usual manner,) that the defendant then and there made the note payable at the particular place, does not amount to a misdescription of the note. *Hardy v. Woodroffe*, 2 Stark. 319—Abbott.

If a particular house be mentioned in the body of a note, a presentment there is necessary even to charge the maker. *Sanderson v. Bowes*, 14 East, 500; Bayl. Bills, 175: *S. P. Roche v. Campbell*, 3 Camp. 247.

A note of the defendants, promising to pay so much at their banking house at W., requires a demand of payment there, in order to give the holder a cause of action, if it be not paid. *Id.*

But in a case at Nisi Prius it was held, that in an action against the maker of a note, payable at a particular place, there is no necessity to prove that it was presented there for payment. *Wild v. Rennerd*, 1 Camp. 425, n.—Bayley.

Even though the place was in the body, and not by way of memorandum. *Nicholls v. Bowes*, 2 Camp. 498—Ellenborough.

But if the place of payment is mentioned in the margin or foot, it is no part of the contract but a mere memorandum. *Price v. Mitchell*, 4 Camp. 200—Gibbs.

Though if the whole note be printed except names, &c. and the place of payment be also printed at the bottom, a special presentment there is necessary. *Trecothick v. Edwin*, 1 Stark. 468—Ellenborough.

If a country banker's note is made payable both in the country and in town, and the holder only present it in London, it is no defence that he might with more convenience have presented it in the country, where it would have been paid. *Beeching v. Gower*, Holt, 313—Gibbs.

A note, promising to pay on demand at a particular place, must be presented, and a demand of payment made at that place, unless the makers discharge the holder from the presentment and demand; and the presentment and demand must be alleged, unless a discharge is shown. *Bowes v. Howe* (in error,) 5 Taunt. 30. And see 3 Taunt. 399, n.

An allegation that the makers of a note became insolvent, and ceased, and wholly declined, and refused then and thenceforth to pay at the place specified any of their notes, does not show a dis-

charge of presentment and demand. Nor can it be intended from the allegation of refusal, that there was a presentment. *Id.*

But if the makers (who had become insolvent) shut up and abandoned their shop, that is evidence of a declaration to all the world of their refusal to pay their notes there. *Howe v. Bowes*, 16 East, 112.

If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker. *Saunderson v. Judge*, 2 H. Black. 509.

A. makes a note payable to B. or order with a memorandum upon it that it will be paid at the house of C., who is A.'s banker; in the course of business the note is indorsed to C.; in an action by C. against the indorser, it is not necessary to prove an actual demand on A. *Id.*

**Allegation and Proof.**—Where the acceptor of a bill accepts, payable at a banker's, it is not necessary, even since the stat. 1 & 2 Geo. 4, c. 78, in an action against the drawer, to allege that the bill was presented to the acceptor in person, if there be an averment that it was duly presented at the banker's. *De Bergareche v. Pillin*, 3 Bing. 476; 11 Moore, 350.

In an action against an indorser of a bill, though it is necessary to prove a presentment at the place pointed out by the acceptance, it is not necessary to allege in the declaration that the bill was accepted at that place; though, if such special acceptance is stated, there must be a corresponding allegation of presentment. *Parker v. Ade*, 1 Dowl. P. C. 643: *S. C. nom. Parker v. Edge*, 1 C. & M. 429.

Where the place of payment is stated in the body of the note, such statement is a material one, and must be averred in the declaration, and the omission is not cured by an averment that the note was duly presented. *Roche v. Campbell*, 3 Camp. 247—Ellenborough.

If a declaration in an action by the indorsee of a bill against the acceptor, allege that it was directed to the defendant; this allegation is not supported by proof that the drawer drew the bill payable to his own order at a specified place, although the defendant, when it was presented there, wrote his name upon it as the acceptor. *Gray v. Milner*, 3 Moore, 90; 8 Taunt. 739; 2 Stark. 336.

A presentment of a note made payable at G. at a banker's at G., the maker being absent from G. when the note became due, is sufficient evidence of a presentment to the maker at G. as alleged in the declaration. *Hardy v. Woodroffe* 2 Stark. 319—Abbott.

It has been held at Nisi Prius, that if a bill is accepted payable at a particular place, in an action against the acceptor, this addition does not require to be noticed in the declaration, being no part of the contract, but merely a memorandum where payment may be demanded. *Lyon v. Sundius*, 1 Camp. 423—Ellenborough. *S. P. Head v. Sewell*, Holt, 363; and *Macbride v. Woodroffe*, 2 Stark. 253.

of, and that as well as the bankers as the acceptor refused payment, shall be supported after judgment on a sham plea. *Huffam v. Ellis* (in error,) 3 Taunt. 415.

And semble, that it shall be intended that the bill was presented for payment to the acceptor himself at the house of those persons; for evidence of those facts would be admissible under such an allegation, and not repugnant to it. *Id.*

In a declaration against the drawer and acceptor of a bill accepted for honour, it is necessary to aver that presentment for payment was made to the drawee, and for want of such averment judgment was arrested. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394, 403.

The plaintiff declared on a bill of exchange, averring a general acceptance. The defendant pleaded, that the acceptance was a qualified acceptance, and that he did, according to the form of the statute in such case made and provided, in his said acceptance express that he accepted the same payable at a certain place only, to wit, at No. 32, Albany street, Regent's Park, that is to say, and not otherwise or elsewhere. The plaintiff replied that the said acceptance was a general acceptance, as in the count set forth, "and that the defendant did not, in his acceptance, express that he accepted the said bill payable at a certain place only, in manner and form as the defendant in his plea alleged:"—Held, on special demurrer, that the traverse sufficiently incorporated the particular mode of acceptance alleged in the plea, and was therefore good. *Lyon v. Walls*, 2 M. & Scott, 736; 9 Bing. 660.

And semble, that the defendant should have negatived in his plea a presentment of the bill, at the place at which it was alleged to have been made specially payable. *Id.*

## X. NOTICE OF DISHONOUR.

### 1. No Effects.

Notice of dishonour need not be given to the drawer, when he had no effects in the hands of the drawee, either at the time of drawing the bill, or when it became due. *Bickerdike v. Bollman*, 1 T. R. 405; *S. P. Clegge v. Cotton*, 3 B. & P. 239.

But nothing but that circumstance will dispense with the necessity of notice; it is not enough to show that the drawer has not been damnified. *Dennis v. Morrice*, 3 Esp. 158—*Kenyon*. And see *Van Wart v. Woolley*, 5 D. & R. 374; 3 B. & C. 439; R. & M. 4. And *Rogers v. Stephens*, 2 T. R. 713.

Nor that there was an understanding between the drawee and drawer, that the latter should provide for the bill. *Staples v. Okines*, 1 Esp. 332—*Kenyon*; *S. P. Nicholson v. Gouthit*, 2 H. Black. 609.

But if the drawer have no effects in the hands of

Nor is the indorser of a note, when there are no effects in the maker's hands. *Corney v. Mendez da Costa*, 1 Esp. 302—*Buller*.

Nor the drawer of an accommodation bill, because he can suffer no injury from the want of notice. *Callot v. Haigh*, 3 Camp. 281—*Ellenb.*

But it is otherwise if the drawer has reasonable expectation of having assets in the hands of the drawee, as by having shipped goods on his own account, which were on their way to the drawee, but without the bill of lading or invoice. *Rucker v. Hiller*, 16 East. 43; 3 Camp. 217; *S. P. Robins v. Gibson*, 3 Camp. 334; 1 M. & S. 188.

A drawer, who has no effects in the hands of the drawee, except that he has supplied him with goods upon credit, which credit does not expire until long after the bill would become due, is not discharged by want of notice of the dishonour. *Claridge v. Dalton*, 4 M. & S. 226.

And if the drawer have any effects in the hands of the drawee, at any time between the drawing the bill and its becoming due, he is entitled to notice. *Hammond v. Dufrene*, 3 Camp. 145—*Ellenborough*.

But if the drawer have no effects in the hands of the drawee, though the indorser have, the former is not entitled to notice. *Walwyn v. St. Quintin*, 1 B. & P. 652; 2 Esp. 515.

If the drawer at the time of presentment have effects, but is indebted to the drawee to a larger amount, and they without his privity have appropriated the effects in their hands to the satisfaction of the debt, he is entitled to notice. *Blackham v. Doren*, 2 Camp. 503—*Ellenborough*.

Where the drawer had no effects in the hands of the acceptor, from the time of drawing until the bill became due; but, previously to the delivery of the bill, had given some acceptances of his, upon which the acceptor had raised money, part of which acceptances had been returned dishonoured, and others were outstanding:—Held, that the drawer was entitled to notice of its dishonour by the acceptor. *Spooner v. Gardner*, R. & M. 84—*Best*.

Where a bill was drawn and accepted for the accommodation of an indorsee, who, as well as the drawer, had no effects in the hands of the acceptor:—Held, that a subsequent indorsee, in order to entitle himself to recover in an action against the drawee was bound to give notice of the dishonour, as the drawer might have called on the acceptor, or the previous indorsee for payment, if he had had such notice. *Cory v. Scott*, 3 B. & A. 619; *S. C.* not *S. P.* Bayl. Bills, 329.

A bill was drawn by A. upon B. for the accommodation of C., who indorsed it for value to D. Neither A. nor C. had any effects in the hands of B. The bill was dishonoured by B. —Held, that the drawer was entitled to notice. *Norton v. Pickering*, 8 B. & C. 610; 3 M. & R. 23.

Where a bill was drawn, accepted, and indorsed by several indorsors for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, who was one of the prior indorsors:—Held, that he was entitled to notice of the dishonour, before the holder could maintain an action against him, in order to enable him (even if he had no remedy upon the bill) to call immediately upon the last indorser, to whom in fact he had lent the security of his indorsement, without value received, and who had in fact, received the money upon that security. *Brown v. Maffey*, 15 East, 216.

A bill drawn, payable at the house of the drawer, must be presumed to be an accommodation bill, and the drawer is not entitled to notice of its dishonour. *Sharpe v. Bailey*, 4 M. & R. 4; 9 B. & C. 44.

The drawer of a dishonoured bill is entitled to notice of dishonour, although he knows the bill will not be paid by the acceptor, provided he has reason to expect it will be paid by any other person, or has a remedy over against such person; therefore, where the defendant drew a bill upon one T. for the accommodation of one R., who was considerably indebted to the plaintiff, and who procured T.'s acceptance:—Held, that the drawer was entitled to notice of the dishonour of the bill notwithstanding the acceptor had no assets of his in his hands, and had informed him, prior to the bill becoming due, that he would not provide for it, he having a reasonable expectation that it would be provided for by R., and having a remedy over against him in case he was called upon to pay it. *Lafitte v. Slatter*, 4 M. & P. 457; 6 Bing. 623.

It is no excuse for not giving notice to the indorsee of a bill that the acceptor had no effects. *Wilkes v. Jacks*, Peake, 202—Kenyon.

An indorser who has given no consideration for a bill, and knows that the drawer has no effects in the hands of the drawee, is not entitled to notice of non-payment. *Sisson v. Tomlinson*, 1 Selw. N. P. 346—Ellenborough.

A. draws a note payable to B. or order, which B. indorses, having given no value for it, and knowing that A. is insolvent: in an action by the indorsee against B., it is not necessary to prove that the note was presented for payment to A. immediately when it became due, or that notice was given to B. of A.'s refusal to pay it. *De Berdt v. Atkinson*, 2 H. Black. 336.

Quære, whether securities, as title deeds and short bills, are not effects for this purpose? *Ex parte Heath*, 2 Ves. & B. 240.

## 2. Bill or Note specially payable.

In an action against the drawer of a bill, payable at a particular place, it is no defence that no notice of the dishonour had been given to the acceptor. *Edwards v. Dick*, 4 B. & A. 212.

The acceptor of a bill, having made it payable at Messrs. C. & Co.'s, and not having sufficient effects in their hands to pay the bill when it became due, is not entitled to notice of its dishonour.

hour; and it is doubtful, whether in the case of such an acceptance, any notice whatever is necessary. *Smith v. Thatcher*, 4 B. & A. 200.

And afterwards held, that in an action against the acceptor, on a bill payable at a banker's, it is not necessary to prove notice of non-payment to him. *Treacher v. Hinton*, 4 B. & A. 413.

So, upon a note payable at a banking-house, it is not necessary to prove that the maker had notice of its dishonour. *Pearce v. Pemberty*, 3 Camp. 261—Ellenborough.

## 3. Ignorance of Place of Residence.

Ignorance of the place of residence of the drawer is a sufficient answer to an objection arising out of the want of due notice of the dishonour of a bill, provided due diligence be used to discover his place of residence. *Browning v. Kinnear*, Gow, 81—Dallas. And see *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394.

Whether the holder has used due diligence to find out the place of residence, is a question of fact to be left to the jury. *Bateman v. Joseph*, 12 East, 433; 2 Camp. 461. And see *Goodall v. Dolley*, 1 T. R. 712.

But it was held in the Exchequer, that what is due diligence in such a case is a question of law. *Sturges v. Derrick*, Wightw. 76.

It is not enough to show that the holder, being ignorant of the drawer's residence, made inquiries upon the subject at the place where the bill was payable. *Beveridge v. Burgis*, 3 Camp. 262—Ell.

But where, in the case of a notice required by a bond, the party had left his house, it was held sufficient for the obligee to make reasonable inquiries after him, and that laches were not imputable to him if he did so. *Harrison v. Fitzherry*, 3 Esp. 240—Le Blanc.

So, where the ignorance of residence arises from the drawer having a few days before the bill was due, stated to the holder that he had no regular place of abode, and that he would call and see if the bill was paid. *Phipson v. Kneller*, 4 Camp. 285; 1 Stark. 116—Ellenborough.

An indorsee not knowing the indorser's address, employs his attorney to discover it, and give notice of dishonour. The attorney discovers the address one day, consults his client the second, and gives notice the third:—Held, a valid notice. *Firth v. Thrush*, 2 M. & R. 359; 8 B. & C. 387.

On an allegation that a bill or note was presented, and that acceptance or payment was refused the plaintiff cannot give in evidence that the drawer or maker could not be found. *Leeson v. Pigott*, Bayl. Bills, 324.

Seemeth, that such an allegation is not satisfied by proof of the use of due diligence in endeavouring to find the party, where no notice has been given at all. *Harris v. Richardson*, 4 C. & P. 522—Tenterden.

## 4. In other Cases.

Bankruptcy of the acceptor does not dispense

insolvency of the acceptor, before and at the time when the bill became due; and, within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders, communicated such their knowledge to the bankers in Liverpool, with whom they had before discounted the bill, and who had transmitted it to the holders in London:—Held, that it did not dispense with such holders giving notice of the dishonour in due time to the indorsors. *Esdaile v. Sowerby*, 11 East, 114.

The drawer of a bill became bankrupt, and absconded before it was due, but his house remained open, in the possession of the messenger under a commission of bankruptcy issued against him, for some time after the bill became due, and before that time the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer:—Held, that the drawer was discharged. *Ex parte Rohde*, 1 Mont. & Mac. 431.

A., the agent in America of B. in England, drew a bill upon him, and indorsed it to C., also residing in America, who indorsed it over. Before the bill became due, A., having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned, C. undertaking to restore the same whenever it should appear that he was exonerated from the bill: acceptance and payment of the bill were refused, but no notice was given to A.:—Held, that A. was discharged. *Clegg v. Cotton*, 3 B. & P. 239.

The holders of a bill, having presented it for payment to the acceptor without effect, gave regular notice of the dishonour to the drawers, who lived at a distance, but informed them at the same time, that having reason to believe that a friend of the acceptor's would take it up in a few days, they would, in order to save expense, hold the bill till the latter end of the week, unless they heard from the drawers to the contrary:—Held, that such notice gave the holders a remedy upon the bill against the drawers, though no further notice of non-payment was given to them at the end of the week; but if the construction of the letter bound the plaintiffs to give such further notice at the end of the week, they were only answerable for the neglect in their implied character of agents for the drawers, which they had taken upon themselves, without disturbing their remedy upon the bill itself. *Forster v. Jurdison*, 16 East, 105.

Where the defendant lent his indorsement to the drawer of a note payable on demand, to enable him to raise money from the plaintiffs, who were bankers and had agreed to advance money thereon for six months:—Held that the bankers,

and regular notice of the dishonour given to the defendant. *Smith v. Becket*, 13 East, 187.

The drawer of a bill, who before it becomes due receives notice that it was accidentally destroyed, and is called upon to give another in its stead according to stat. 9 & 10 Will 3, c. 17, is nevertheless entitled to notice, though the drawee was insolvent. *Thackray v. Blackett*, 3 Camp. 164—Ellenborough.

And if there are several bills in the hands of the same owner, becoming due on different days, the drawer is entitled to notice as to each, though the drawee was only indebted to him to an amount less than any one of the bills. *Id.*

Where a bill is drawn by a firm upon one of the partners, who accepts it, notice to the drawers is unnecessary. *Porthouse v. Parker*, 1 Camp. 82—Ellenborough. And see *Jacaud v. French*, 12 East. 317.

Persons who were bankers both for the drawers and acceptor of a bill, and had received it from the drawer, and given credit for it in an account current between them, before it became due received directions from the acceptor to stop the payment of it at the place of payment, and did so accordingly:—Held, that they were not bound to give notice of this circumstance to the drawer, but upon non-payment of the bill might look to the drawers, notwithstanding they have not given such notice; and that they were not bound to apply the money of the acceptor in their hands in discharge of the bill; but if the drawers had become bankrupt, it would have constituted an item in the account between them and the bankers. *Crosse v. Smith*, 1 M. & S. 545.

The holder of a check is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it: he does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of dishonour to those only against whom he seeks a remedy. *Rickford v. Ridge*, 2 Camp. 537—Ellenborough.

The vendee of goods gave in payment an instrument purporting to be a bill of exchange, but it was written on a paper which had not affixed to it a sufficient stamp. It was not paid by the acceptor, but the vendor (the indorser of the bill) did not give any notice of dishonour to the vendee, who was the indorser:—Held, that the instrument being of no value for want of a sufficient stamp, notice of dishonour was unnecessary. *Cundy v. Marriott*, 1 B. & Adol. 696.

##### 5. By and to whom.

Notice of dishonour must come from the holder. *Tindal v. Brown*, 1 T. R. 167: *S. P. Ex parte Barclay*, 7 Vea. jun. 597.

It is not sufficient unless it be given to the drawer and indorsors by the holder himself, or some person authorized by him. *Stewart v. Kennett*, 2 Camp. 177—Ellenborough.



But notice to the drawer by any party to the bill enures to the benefit of all. *Wilson v. Swaney*, 1 Stark. 34—Ellenborough.

Even a notice to the drawer from the acceptor has been held good. *Rosher v. Kieran*, 4 Camp. 87—Ellenborough.

But notice from the drawee to the drawer the next day, will not suffice for notice by the holder. *Hopes v. Alder*, 6 East, 16.

If the drawer or indorser of a bill receive due notice of its dishonour from any person who is a party to it, he is directly liable upon it to a subsequent indorsee, from whom he had no direct notice. *Jameson v. Swinton*, 2 Taunt. 224; 2 Camp. 373.

A person who is a stranger to the transaction by not being a party to a bill or note, is not entitled to notice of dishonour. *Swinyard v. Bowes*, 5 M. & S. 62; *S. P. Warrington v. Furber*, 8 East, 242.

Where defendant being indebted to plaintiffs for goods sold, and C. being indebted to defendant, plaintiffs, with the consent of defendant, drew a bill on C. payable at two months, which C. accepted, but afterwards dishonoured:—Held, that defendant was not entitled to notice of the dishonour, his name not being on the bill, and that the bill was not to be esteemed a complete payment of the debt under stat. 3 & 4 Anne, c. 9, s. 7. *Id.*

A., residing at New York, having ordered goods of B., residing at Birmingham, sent to B., on account of the goods, a bill drawn by C. in New York, upon D. in London, payable to the order of B., but not indorsed by A. B., through his bankers, presented the bill for acceptance to D., who refused to accept, but no notice of the non-acceptance was given until the day of payment, when the bill was presented for payment, and dishonoured. C., the drawer, became bankrupt before the bill reached B.'s hands, and never had any funds in the hands of D., the drawee, to meet the bill. In assumpsit by B. against his bankers for neglecting to give notice of the non-acceptance:—Held, that A., not having indorsed the bill, was not entitled to notice of dishonour, and remained liable to B. for the amount of the goods; that C., the drawer, never having had any funds in the hands of D., the drawee, was likewise not entitled to notice; and therefore that B. could not recover the full amount of the bill, but only such damages as he had sustained by being delayed in pursuit of his remedy against the drawer. *Van Wurt v. Woolley*, 5 D. & R. 374; 3 B. & C. 439; R. & M. 4.

One who without consideration, but without fraud, indorses a bill in which both the holder and acceptor are fictitious persons, is entitled to notice of the dishonour of the bill. *Leach v. Hewitt*, 4 Taunt. 731.

Semble, that if a man make another his agent for the purpose of indorsing the bill, he also makes him his agent for the purpose of receiving notice of dishonour, and that a notice given to him will be good. *Firth v. Thrush*, 2 M. & R. 359; 8 B. & C. 387.

Upon a guarantee of the price of goods, to be paid for by a bill, due notice of the non-payment of the bill must be given both to the drawer and person who guarantees, unless both drawer and acceptor are bankrupts when the bill becomes due. *Philips v. Aelling*, 2 Taunt. 206.

W., a broker, sold twenty bags of wool for H. to C., to be paid for by a bill accepted by the latter; and offered to his employer, for an allowance of one per cent., to guarantee half the amount: H. confirmed the sale, and informed W. that if he could not procure from C. acceptances of approved houses, that they would take his guarantee on the terms proposed: the wool was delivered without the intervention of the broker, and the acceptance of the vendee taken for the amount, payable at a banker's; before the bill was at maturity, the vendee became insolvent, and the vendors resorted to the broker upon his guarantee:—Held, that the latter was liable on such guarantee, though the bill had not been presented for payment, and though there was no proof that it would not have been paid, if presented; and supposing it to have been presented and dishonoured, he would not have been entitled to notice of non-payment. *Holbourn v. Wilkins*, 2 D. & R. 59; 1 B. & C. 10.

Notice of a dishonoured bill to a bankrupt, as drawer, before the choice of assignees, is good. *Ex parte Moline*, 19 Ves. jun. 216.

#### 6. What must be stated in Notice.

The notice of dishonour should at least inform the party, either by express terms, or by necessary implication, that the bill has been dishonoured, and that the owner looks to him for payment of the amount. Where, therefore, the attorney of the holder of a bill, the day after it had been dishonoured, sent a letter to the indorser, stating that a bill for 683*l.*, drawn by J. K. upon Messrs. D., J., & Co., bearing the indorsement of the person to whom the letter was addressed, had been put into the hands of the attorney by the holder, with directions to take legal measures for the recovery thereof, unless immediately paid to the attorney:—Held, not to be a sufficient notice of the dishonour, to enable the holder to recover against the indorser in an action upon the bill. *Solarte v. Palmer*, 5 M. & P. 475; 7 Bing. 530; 1 Tyr. 371; 1 C. & J. 417.

In a letter, intended as a notice of dishonour of a bill, the presentment and dishonour ought to be stated as specific facts; and it is not sufficient for the letter merely to demand the money of the drawer, and leave him to infer from that circumstance that the bill has been dishonoured. *Hartley v. Case*, 6 D. & R. 505; 4 B. & C. 339; 1 C. & P. 555.

A notice in the following terms, "I give you notice that a bill for &c., drawn by you upon &c., lies at &c., dishonoured," is not sufficient to sustain an action against the indorser, who was not also the drawer. *Beauchamp v. Cash*, D. & R. N. P. C. 3—Abbott.

#### 7. At what Place given.

Where a bill is indorsed abroad, yet if the

A letter, directed "Mr. Haynes, Bristol," containing notice of dishonour, was proved to have been put into the post-office:—Held, that this was not sufficient proof of notice, the direction being too general to raise a presumption that the letter reached the particular individual intended. *Walter v. Haynes*, R. & M. 149—Abbott.

But in an action against the drawer of a bill, dated "Manchester," held, that it was sufficient evidence of his having had notice of its dishonour to prove that a letter, containing such notice, had been put into the post-office in London, directed to him, "Manchester." *Mann v. Moors*, R. & M. 249—Abbott.

Sending a verbal notice of dishonour to a merchant's counting-house is sufficient; and if no person be there in the ordinary hours of business, it is not necessary to leave or send a written one. *Goldsmith v. Bland*, Bayl. Bills, 224.

A notice given at the counting-house of a merchant or manufacturer, between the hours of six and seven in the evening, is not too late. *Bancroft v. Hall*, Holt, 476—Bayley.

Notice to the drawers, by sending to their counting-house, during the hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. *Croese v. Smith*, 1 M. & S. 545.

A copy of a letter, containing notice of dishonour of a bill, delivered at the house in which the defendant lodged, is sufficient notice to the defendant. *Stedman v. Gooch*, 1 Esp. 4—Ken.

#### 8. Transmission by Post.

The twopenny post may be used as a means for sending notice, whether the parties reside near or at a distance from one another. *Hilton v. Fairclough*, 2 Camp. 633—Lawrence.

Notice of the dishonour of a bill is sufficiently given by proving that a letter was regularly put into the post informing the party of the fact. *Kufh v. Weston*, 3 Esp. 54—Kenyon.

And putting a letter in the post office to the indorser in proper time, informing him that the maker had not paid a note when due, is sufficient evidence of notice to the indorser. *Saunderson v. Judge*, 2 H. Black. 509.

But it is not sufficient *prima facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting-house, and put upon a table for the purpose of being carried from thence to the post-office, and that, by the course of business in the counting-house, all letters deposited on this table were carried to the post-office by a porter. *Hetherington v. Kemp*, 4

letter in question, he invariably carried to the post-office all the letters found upon the table, that might have done; but mere general evidence of the course of business in the counting-house is not sufficient. *Id.*

The plaintiff's clerk proved that the letter giving notice of the dishonour of a bill was copied by him on the Monday into a book kept for that purpose; and said, that, by the course of business at their house, all letters copied into that book were sent to the post-office in the evening of the day on which they were so copied, but that he himself did not carry the letter in question to the post, it being the duty of one of the other clerks to do so:—Held, not sufficient evidence that the letter was sent. *Hewkes v. Salter*, 4 Bing. 715; 1 M. & P. 750.

It is sufficient, if notice of a bill drawn in England on a person in the East Indies being dishonoured, is sent to England by the first direct and regular mode of conveyance, whether it be by an English or a foreign ship; the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship, not destined to this country. *Mutlman v. D'Egrius*, 2 H. Black. 565.

Notice need not be sent by the mail or first conveyance, it is sufficient if there be no essential delay if it be sent by private hand, though it would arrive later in the day than by mail. *Bancroft v. Hall*, Holt, 476—Bayley.

Where notice of the dishonour of a bill by the acceptor in London was sent by the post to the holder in Manchester, where the letter was delivered out between eight and nine in the morning, and the post went out for Liverpool, where the drawer lived, between twelve and one, and the holder did not send notice to the drawer by the post either of the same day or the next, but sent it in a letter by a private person on the latter day, who did not deliver it to the drawer till two hours after the post delivery, and only about one hour before the post left Liverpool for London:—Held, that at all events the holder had made the bill his own by his laches, and that he should have written by the post of the next day after notice received by him. *Darbishire v. Parker*, 6 East, 3; 1 Smith, 195.

If a letter giving notice of the dishonour of a bill is put into the twopenny post office, in time to be delivered on the proper day, in the ordinary course of business, but from some delay in the office does not reach its destination till afterwards, such delay in the office will not prejudice the party by whom the notice was given. *Debre v. Eastwood*, 3 C. & P. 250—Burrough.

Where a postmaster agreed to deliver letters in a particular mode, and by mistake omitted to deliver one for two days, which contained a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonour in time, by sending a special messenger for that purpose, though he might be

too late to do so by post. *Hardern v. Dalton*, 1 C. & P. 181—Abbott.

### 9. Within what Time.

By 7 & 8 Geo. 4, c. 15, s. 1, where bills or notes become due on the day preceding Good-Friday or Christmas-day, notice of dishonour need not be given until the day next after those days respectively; and if Christmas-day happens on a Monday, when the bill or note would be due on Saturday, notice may be given on the Tuesday.

Quære, whether a notice of dishonour, given on the same day the bill is presented and dishonoured, be premature? *Hartley v. Case*, 6 D. & R. 505; 4 B. & C. 339; 1 C. & P. 553: *S. P. Barbridge v. Manners*, 3 Camp. 193.

Immediate notice of a bill dishonoured at an early hour is good. *Ex parte Moline*, 19 Ves. jun. 216.

What shall be deemed a reasonable time for notice of dishonour, must depend upon the circumstances of the case, and is a question of law arising out of the facts. *Tindal v. Brown*, 1 T. R. 167; *S. P. Metcalf v. Hall*, Bull. N. P. 275. And see *Parker v. Gordon*, 7 East, 385; 3 Smith, 358; 6 Esp. 41.

Although it was at one time doubtful whether the question of reasonable notice was not a question of fact to be submitted to the jury under all the circumstances of the case. *Hilton v. Shepherd*, 6 East, 14, n.: *S. P. Hopes v. Alder*, 6 East, 16.

The general rule as to what shall be a reasonable notice seems to be, that, with respect to persons living in the same town, the notice must be given by the next day. *Darbishire v. Parker*, 6 East, 3; 1 Smith, 195: *S. P. Smith v. Mullett*, 2 Camp. 208.

And with regard to persons living at different places, that a party, in order to avoid laches, must give notice by the next post,—which does not mean the next possible post, but the next post at which it would be reasonably practicable to give notice. *Williams v. Smith*, 2 B. & A. 496.

A bill indorsed in blank, and deposited by the holder with his bankers, became due on Saturday, and was presented for payment about two o'clock on that day; payment being refused, the bill was noted and again presented between nine and ten in the evening by a notary: on Monday, the bankers informed the holder that the bill was dishonoured, who on Tuesday about noon gave notice to the indorser; the holder lived at Knightsbridge, and the indorser in Tottenham-court-road:—Held, that this notice was sufficient to entitle the holder to recover against the indorser. *Haynes v. Birks*, 3 B. & P. 599.

A bill was presented and dishonoured on the 3d; on the 4th a letter was written to the plaintiff, informing him of it, which he received on the 6th, being Sunday, and on the Tuesday evening sent notice by the post to the defendant:—Held, that the plaintiff was not bound to open the letter till the Monday morning, and that therefore he had given the defendant notice by the next day's post. *Wright v. Shazcross*, 2 B. & A. 501, n.

Notice of non-payment given by an indorsee,

living in Holborn, to an indorser living at Islington, by nine on the night of the day following the day on which the indorsee knew it, is reasonable notice. *Jameson v. Swinton*, 2 Taunt. 224; 2 Camp. 373.

Where a bill was dishonoured on Saturday, in a place where the post went out at half-past nine in the morning:—Held, that it was sufficient notice to send a letter by the following Tuesday morning's post. *Hawkes v. Satter*, 4 Bing. 715; 1 M. & P. 750.

A party receiving notice of dishonour of a bill of exchange, need not give notice to the person above him till the next post after the day on which he himself receives the notice, although he might easily give it that day, and there is no post the day following. *Grill v. Jeremy*, M. & M. 61—Tenterden.

A bill due on the 4th was presented for payment that day by the payees' bankers. On the 5th it was returned dishonoured to the payees, who, in the course of the 6th, sent a letter to the drawer by the two-penny post:—Held, that this was sufficient notice. *Scott v. Lifford*, 9 East, 347; 1 Camp. 246—Ellenborough.

It is sufficient if the letter conveying the notice be proved to have been put into a receiving-house at such an hour, that, according to the course of the two-penny post, it would be delivered on the day in which the party was entitled to notice. *Hilton v. Fairclough*, 2 Camp. 633—Lawrence.

But it is not sufficient where the party received notice on the 20th, and gave notice by a letter put into the two-penny post on the evening of the 21st, but so late that it was not delivered until the morning of the 22d. *Smith v. Mullett*, 2 Camp. 208—Ellenborough.

A country banker has an entire day, after receiving notice of the dishonour of a bill payable in London, to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough; therefore where a bill was dishonoured on the 14th, and notice sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th, (being Sunday,) and they on the next day sent notice by the post to the indorsee, but not before twelve at noon, at which time the post set out for the place where the indorsee resided:—Held, that this notice was within time. *Bray v. Hadwen*, 5 M. & S. 68.

Where the defendant paid the plaintiff notes on Friday, several hours before the post went out, and the plaintiff transmitted them partly by a coach on Saturday, and partly by Sunday night's post, and both parts arrived in London on Monday, and were presented for payment and dishonoured on the Tuesday:—Held, that the plaintiff, in so transmitting these notes, had been guilty of no laches, and might consider them as no payment, and recover for the original debt. *Williams v. Smith*, 2 B. & A. 496: *S. P. Wright v. Shazcross*, 2 B. & A. 501, n.

Where a bill of exchange passed through the hands of five persons, all of whom lived in London or the neighbourhood, and the bill when due

A banker in London, corresponding with a banker abroad, has the same right, with respect to English bills of his correspondent becoming due while in his hands, as an English banker has with respect to his customer in England; and therefore, if such a bill be dishonoured, he may send it, when returned, to his correspondent abroad; but seems, that if the foreign correspondent be afterwards in London, in possession of the bill, he ought not to send it again to the London banker, but should himself give notice of dishonour to the party who indorsed it to him. *Daly v. Slatter*, 4 Car. & Payne, 200—Tenterden.

If there are several indorsors of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsors, he is not entitled to as many days as there are indorsors to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser. *Dobree v. Eastwood*, 3 C. & P. 250—Burrow.

It is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsees, unless it is shown that each indorser gave notice within a day after receiving it. *Marsh v. Maxwell*, 2 Camp. 210, n.—Ellenb.

A bill was presented for payment at a banking house in London, where it was made payable on the 25th, when it was dishonoured; but under a doubt whether the presentment was not made too early on that day, it was again presented shortly before 5 o'clock on the 26th, and again dishonoured; it was returned to the indorser in London, on that day, and notice sent of the dishonour by the post of the 27th, into the country, where the indorser lived:—Held, that this was due diligence, and due notice of the dishonour. *Langdale v. Trimmer*, 15 East, 291.

As the law of merchants respects the religion of different people, a Hebrew indorsee was held not guilty of laches, who neglected to give notice on the regular day, that day being a festival, whereon he was forbid to attend to secular business. *Lindo v. Unsworth*, 2 Camp. 602—Ellenb.

The time consumed in making necessary inquiries relative to the parties to a note, is not to be imputed as laches. Thus, where the plaintiff became acquainted with the dishonour on the 5th, and, not knowing the parties, notice was not despatched to them till the 16th, the original indorser was still held liable. *Baldwin v. Richardson*, 2 D. & R. 285; 1 B. & C. 245.

In an action on a bill, where the declaration alleges that notice of dishonour was given to the defendant, it will satisfy the allegation, to show that notice was given before action brought, although from the parties not being to be found it was not given at the proper time. *Harris v. Richardson*, 4 C. & P. 522—Tenterden.

Proof that duplicate notices of the dishonour of a bill were written, and that a letter was delivered to the defendant upon the dishonour of a bill, together with proof of notice to produce the letter so delivered, as containing notice of dishonour, is evidence (on default of production) that the defendant had notice. *Id.*

And it seems that there is no substantial distinction between a duplicate original and a copy made at the time, and authenticated on oath. *Kine v. Beagmont*, 7 Moore, 112; 3 B. & B. 288.

A duplicate copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence without any notice to produce such original letter. *Id.*

Although it has been held at Nisi Prius, that a copy of the letter cannot be given in evidence, without notice to produce the original. *Langden v. Hulle*, 5 Esp. 137—Ellenborough.

So, also, that parol evidence of its contents is inadmissible. *Shaw v. Markham*, Peake, 165—Kenyon.

The plaintiff being required to prove notice, it is not sufficient to show that a letter was sent on the second or third day, and the non-production of the letter of notice by defendant affords no presumption in plaintiff's favour. *Lawsen v. Sherwood*, 1 Stark. 314—Ellenborough.

If a letter, giving notice of the dishonour of a bill, contain this passage, "I did not know till within these few days where you were to be found;" such passage is not to be taken as proving that the notice was not given on the next day after the residence of the party was discovered. *Kerby v. England*, 2 C. & P. 300—Abbott.

Where the assignees of a bankrupt declared as indorsees against the drawer, and, to prove notice to the latter of the dishonour by the acceptor, produced an agreement between the drawer and K. (an intermediate indorsee), reciting that the bill was, amongst other bills to which the drawer was a party, over-due, and was or ought to be in the hands of K., was evidence to satisfy the averment of due notice of the dishonour to the drawer, though the assignees were no parties to the agreement. *Gunson v. Metc*, 2 D. & R. 334; 1 B. & C. 193.

An indorsee, three months after a bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said that he had not had regular notice, but as the debt was justly due he would pay it:—Held, that the first conversation, being an absolute promise to pay the bill, was, prima facie, an admission that the bill had been presented to the acceptor for payment in due time, and had been dishonoured, and that due notice had been given of it, to the indorsee, and superseded the necessity of other proof to satisfy those averments in the declaration. *Lundie v. Robertson*, 7 East, 231.

to excuse notice, or whether to let to such evidence the facts should not be specially pleaded. *Correy v. Scott*, Bayl. Bills. 329: S. C. not S. P. 3 B. & A. 619.

Where, in an action against the indorsor of a bill, notice of its dishonour was proved on a particular day, being the second day of the term in which the action was brought, and the memorandum on the record was intitled as of that term generally; it was sufficient for the plaintiff's attorney to produce the draft of the declaration, and prove that it was in fact filed on a day subsequent to that on which the notice of dishonour was proved. *Hove v. Cocker*, 3 Stark. 138—Abbott.

#### 11. Consequence of Neglect.

Want of due notice of non-acceptance of a bill discharges the drawer and indorsor, and if, under ignorance of the circumstances, any indorsor should pay, he does not by that act revive the liability of the previous indorsor or drawer. *Roscoe v. Hardy*, 12 East, 434; 2 Camp. 458.

The indorsor of a bill, which had been dishonoured, and which a subsequent indorsee had made his own by laches, paid the bill and immediately gave notice of its dishonour to the defendant, a prior indorsor:—Held, that the plaintiff could not recover the amount, although it appeared that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period; for the plaintiff by paying the bill could not place the prior indorsors in a worse situation than they would otherwise have been in. *Turner v. Leech*, 4 B. & A. 451.

If the indorsee of an inland bill, not due, present it for acceptance, which is refused, and delay giving notice to his indorsor, the indorsor will be discharged. *Goodall v. Dolley*, 1 T. R. 712.

But where the payee, having presented a bill for acceptance, which was refused, indorses it to the plaintiff for value, without giving notice of the dishonour, either to the drawer or the indorsee, and the latter presents it, when it is again refused acceptance, of which the drawer receives due notice:—Held, that the drawer was not discharged from his liability to the indorsee, by the payee's neglect to give notice of the previous dishonour. *O'Keefe v. Dunn*, 1 Marsh. 613; 6 Taunt. 305. And see *Dunn v. O'Keefe*, (in error,) 5 M. & S. 262.

The drawer of a bill absconded, and was made a bankrupt before the bill was due. His house continued open in the possession of the messenger under the commission after the bill was due. The holder knew of the appointment of the drawer's assignees before the bill was due, before which time the acceptor became bankrupt, and the holder neither gave, nor made any attempt to give notice of the dishonour, either to the drawer or his assignees: Held, that he was guilty of laches, and that his claim against the drawer was barred, and consequently, that he had no right to prove the bills under the drawer's

A, being in insolvent circumstances, B, under took to be a security for a debt owing from A. to C. by indorsing a promissory note made by A. payable to B. at the house of D.; the note was accordingly so made and indorsed with the knowledge of all parties; just before it became due, B. being informed that D. had no effects of A. in his hands, desired D. to send the note to him, and said he would pay it, B. having then a fund in his hands for that purpose; it was not presented at D.'s house till three days after it was due:—Held, that C. could not maintain an action against B. on the note, due diligence not having been used in presenting the note, as soon as it was due, to D. for payment, and in giving immediate notice to B. of the non-payment by D.; for B. had a right to insist on the strict rule of law respecting the indorsor of a note, notwithstanding the particular circumstances of the case. *Nicholson v. Gouthit*, 2 H. Black. 609.

The defendant, being unable to pay a bill when due, which he had accepted, obtained time, and indorsed to the plaintiff, as a security, a bill drawn by himself to his own order, which, when due, was dishonoured by the drawee, but the holder omitted to give the defendant notice:—Held, that by these laches the defendant was not only discharged as indorsor of the one bill, but also as acceptor of the other. *Bridges v. Berry*, 3 Taunt. 130.

#### 12. When waived.

The expression by the drawer, "if I am bound to pay it I will," is no waiver of the want of notice of non-payment by the acceptor. *Dennis v. Morrice*, 3 Esp. 158—Kenyon.

But where the drawer said he had no regular residence, but would call and see if the bill was paid:—Held, that he had waived the objection of want of notice. *Phipson v. Kneller*, 4 Camp. 285; 1 Stark. 116—Ellenborough.

If, after a bill is dishonoured, the indorsor offer to pay the holder so much in the pound on the amount; this dispenses with proof of the notice of dishonour. *Margetson v. Aitken*, 3 C. & P. 338—Tenterden.

An offer on the part of the indorsor of a bill to pay part of the amount, and the costs, and to give a warrant of attorney for the residuum, will not dispense with the proof of notice of dishonour. *Standage v. Creighton*, 5 C. & P. 406—Denman.

It was proved, in an action against the indorsor of a bill, that two months after it was due, it was produced to him, and inquiries were made as to the drawer and acceptor; upon which he said that if the holder would take 10s. in the pound, he would secure it:—Held, sufficient to dispense with proof of notice of dishonour. *Dixon v. Elliott*, 5 C. & P. 437—Park.

In an action against the drawer of a foreign bill, a promise of payment by the defendant after the bill was due, is sufficient evidence of a protest for non-payment, and notice of the dishonour

commodation bill, that the bill will be satisfied before the next term. *Wood v. Brown*, 1 Stark. 217—Ellenborough.

And, semble, that a defence of payment by the drawer is a waiver of laches in the holder not having given due notice of dishonour. *Sturges v. Derrick*, Wightw. 76.

After part payment, with a full knowledge of the default, a party cannot insist upon want of notice or neglect of presentment. *Vaughan v. Fuller*, 2 Stra. 1246.

So, after a promise to pay. *Anson v. Bailey*, Bull. N. P. 276.

But a knowledge of the default is essential. *Blesard v. Hirst*, 5 Burr. 2670.

The indorsee of a note may recover upon it against the payee and indorser, on evidence of a promise to pay it, made some time after the dishonour of the note by him to a subsequent indorsee, who then held it; without direct proof by the plaintiff, that due notice of the dishonour was given to such payee and indorser. *Potter v. Rayworth*, 13 East, 417.

But a subsequent proposal by the indorser to pay the bill by instalments, made without knowledge of the indorsee's laches, is not a waiver of the want of notice. *Goodall v. Dolley*, 1 T. R. 712. And see *Roscoe v. Hardy*, 12 East, 434; 2 Camp. 458.

And where the drawer or indorser, after being arrested, without acknowledging his liability, merely offers to give a bill by way of compromise, it does not obviate the necessity of proving notice. *Cuming v. French*, 2 Camp. 106, n.—Ellenborough.

Where the holder of a bill, upon its being dishonoured, received part payment, and for the residue another bill, drawn and accepted by persons not parties to the original bill; and afterwards sued the drawer and acceptor upon the original bill:—Held, that it was sufficient for him to prove presentment of the substituted bill to the acceptor for payment, and that it was dishonoured, without proving that he gave notice of the dishonour to the drawer of the substituted bill. *Bishop v. Rowe*, and *Same v. Bayley*, 3 M. & S. 362.

In an action against indorser of a note, payable at twelve months after date, a parol agreement entered into between him and the maker when it was drawn, that it was not to be demanded until estates of the maker had been sold, and that the defendant indorsed such note as a surety only, cannot be received in evidence as a waiver of the notice of its dishonour. *Free v. Hawkins*, 1 Moore, 535.

Want of notice to a bankrupt drawer of the dishonour of a bill, may be supplied by evidence of his acknowledgement after the act of bankruptcy, that it would not be paid. *Brett v. Levett*, 13 East, 213; 1 Rose, 102.

to assist him in so doing; and the drawer received the money and promised to take up the bill accordingly:—Held, that in an action by the indorsee against the drawer, the latter might nevertheless set up as a defence that the bill was not duly presented for payment, and that he had not had regular notice of its dishonour. *Baker v. Birch*, 3 Camp. 107—Ellenborough: *S. P. Foster v. Jurdison*, 16 East, 105.

But that the sum paid him by the acceptor was money had and received to the plaintiff's use. *Id.*

A declaration by the payees against the drawers of a bill averred presentment to, and non-payment by the drawees, neither of which averments were proved:—Held, that the notice to the drawers was waived, by proof of an order given by the latter to the drawees not to pay the bill if presented; but aliter as to the fact of presentment, though the payees were informed of such order before the bill became due. *Hill v. Hoop*, D. & R. N. P. C. 57—Abbott.

In an action against the drawer, the court of C. P. left it to the jury to presume from circumstances (such as the payment of a part of a bill without any objection to want of notice,) &c. that due notice had been regularly given. *Horford v. Wilson*, 1 Taunt. 12.

If in an action against an indorser, who is discharged by laches, the holder relies upon a new promise, he must prove he has demanded payment from the acceptor, before the commencement of the action. *Brown v. McDermid*, 5 Esp. 265—Ellenborough.

But it has since been held, that it is sufficient evidence of presentment for payment and notice of dishonour, that the defendant absolutely promised to pay the note or bill after it was due. *Taylor v. Jones*, 2 Camp. 105—Bayley: *S. P. Lundie v. Robertson*, 6 East, 231.

Any admission by a defendant as indorser of his liability, made when he was arrested and ignorant of the facts, and whether he was bound by law to pay, is not binding. *House v. Redwood*, 1 Esp. 155—Kenyon.

Proof that the drawer of a bill knew two days after its maturity that it was unpaid, and is the hands of a particular indorsee, and objected to pay it on the ground of fraud in the obtaining of it, is evidence to go to a jury that he had received regular notice of dishonour. *Wilkins v. Jodis*, 2 B. & Adol. 188; 1 M. & Rob. 41.

## XI. PROTEST FOR NON-PAYMENT.

### 1. When necessary.

By 2 & 3 Will. 4, c. 98, bills expressed to be paid in any other place than the place therein mentioned as the residence of the drawee, if not accepted, may be protested for non-payment in that

place without further presentment to the drawee, unless the amount be paid on the day of payment.

By 9 & 10 Will. 3, c. 17, inland bills for 5l. or upwards, payable after date, may be protested.

The provisions of 9 & 10 Will. 3, c. 17, respecting protests of inland bills, do not apply to such bills as are made payable after sight. *Leftley v. Mills*, 4 T. R. 170.

Therefore an acceptor of such a bill, who refuses payment on the third day of grace, is not liable to any charge for the noting of the bill. *Id.*

To entitle the indorsee of an inland bill to recover interest from the drawer, it is not necessary to protest the same for non-payment. *Windle v. Andrews*, 2 B. & A. 696; 2 Stark. 425.

It is not necessary to set out the protest of an inland bill, unless the party goes for the interest and cost; but if it be set out, it must be proved. *Boulager v. Talleyrand*; 2 Esp. 550—Kenyon.

After a bill has been protested for non-acceptance, a second protest is gratuitous and unnecessary. *De La Torre v. Barclay*, 1 Stark. 7—Ellenborough.

A protest is necessary in the case of the acceptors of a foreign bill for honour. *Hoare v. Casenove*, 16 East, 391.

A party to a bill is not liable for money paid to his use by a person who takes up the bill for his honour, unless a formal protest of payment to his honour be made before payment of the bill, that being the usual custom of merchants. *Vandewall v. Tyrrell*, M. & M. 87—Tenterden.

A person who pays a bill for the honour of any of the parties, becomes, on payment, a holder upon the transfer of the person for whom he made the payment, and not of the person he has paid, and may not only sue the latter but the other parties to the bill. *Mertens v. Winnington*, 1 Esp. 112—Kenyon.

In an action on a bill by a plaintiff, who had paid it under protest for the honour of one of several indorsors:—Held sufficient, on special demurrer to a declaration against the drawer, to state that the plaintiff had paid the bill under protest, according to the usage and custom of merchants, without stating that he had paid it to the last indorsee, or that the plaintiff had any title to the bill. *Cox v. Earle*, 3 B. & A. 430.

Bills were drawn by A. in England, on B. in the East Indies, payable sixty days after sight, and a bond was entered into, conditioned to be void, if the bills should be duly paid in India, or come back to England duly protested for non-payment, and the amount of them paid by the obligor within a certain time after they should be so returned protested for non-payment. The bills were sent to India, but, before they arrived, B., the drawee had left the country, and his agents there refused to accept them; they were then protested in India for non-acceptance, sent back to England so protested, and being presented to the drawer here for payment, were protested for non-payment: this was held to be a substantial performance of the condition of the bond. *French v. Campbell*, 2 H. Black. 163.

But the court of K. B. upon error brought in that court in this case reversed the judgment of the court of C. P. *Campbell v. French* (in error), 6 T. R. 200.

In declaring against the indorser of a foreign bill, the omission of the averment of protest is only matter of form, and cannot be taken advantage of under a general demurrer. *Salomons v. Stavelly*, 3 Doug. 298.

## 2. How made and proved.

Seemingly, if a foreign bill be regularly protested and noted, the protest may be drawn up in form at any time afterwards. *Chaters v. Bell*, 4 Esp. 48—Kenyon. And see *Selw. N. P.* 379.

It is not necessary that notice of non-acceptance or non-payment of a bill should be accompanied with a copy of the protest. *Cromwell v. Hynson*, 2 Esp. 511—Kenyon.

Where the drawer of a foreign bill, at the time of drawing, was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest, was left at the drawer's house:—Held, that this was sufficient. *Robins v. Gibson*, 1 M. & S. 288; 3 Camp. 334.

A promise of payment by the defendant (the drawer) after a bill was due, is sufficient evidence of a protest for non-payment, and notice of the dishonour of the bill. *Gibbon v. Coggon*, 2 Camp. 188—Ellenborough. And see *Greenwoy v. Hindley*, 4 Camp. 52.

A foreign bill was drawn by A. upon C. & Co., who resided at Liverpool, in favour of L. R. & Co., and by A. indorsed to the plaintiffs. The bill was drawn "sixty days after sight, pay to L. R. & Co., in London," &c. It was refused acceptance by the drawees, but accepted under protest for the honour of the drawer by the defendants, as follows:—"Accepted, under protest, for honour of R. L. & Co., and will be paid for their account if regularly protested, and refused when due." This bill was presented for payment at the residence of the drawees in Liverpool, and protested at Liverpool, for non-payment; but it was not presented for payment or protested in London where the drawees had not any house of business:—Held, that the holders were entitled to recover against the acceptors for honour; and that, under these circumstances, a presentment in London, and protest there, were not necessary. *Mitchell v. Baring*, 4 C. & P. 25; M. & M. 381—Tenterden. New trial refused.

In an action by the payee against the drawer of a bill, the declaration stated, that the latter drew it at "St. Helena, to wit, at Westminster," and did not aver a protest either for non-acceptance or non-payment: on the production of the bill, it was dated at St. Helena, and not stamped: on an objection, that it was inadmissible as an inland bill, for want of such stamp, and that the plaintiff had given no evidence of a protest for non-acceptance or non-payment:—Held, that as there was evidence of a subsequent promise by the defendant to pay the amount of the bill, cou-

ing terms for payment, it was a waiver of objection, although such attorney swore that such offer was made without prejudice. *Patterson v. Becker*, 6 Moore, 319.

## XII. ACCEPTOR AND MAKER.

### 1. To what Amount liable.

The acceptor is liable to the full amount of the bill, as between himself and third persons, but only to the sum for which the acceptance was given as between himself and the drawer. *Darnell v. Williams*, 2 Stark. 166.—Ellenborough.

Therefore, in an action brought against him, he may show that he accepted it for value as to part, and as an accommodation as to the rest. *Id.*

And a party who takes a bill from the drawer and knew that it was an accommodation bill, cannot recover from the acceptor more than the amount of the balance as between him and the drawer. *Jones v. Hibbert*, 2 Stark. 304.—Bayley. And see *Solomon v. Turner*, 1 Stark. 51.

The indorsee of an accommodation bill, who takes it knowing it to be such, and advances on it but part of the amount, can only recover as much as he really paid; aliter, where the bill has been regularly drawn, on a fair account, in the course of trade, in such case the indorsee may recover the whole. *Wifen v. Roberts*, 1 Esp. 261.—Kenyon.

The indorsee of a bill, having received part of the contents from the drawer, cannot recover more than the residue from the acceptor. *Bacon v. Searles*, 1 H. Black. 88; And see *Beck v. Robley*, 1 H. Black. 89, n.; Bayl. Bills. 125.

If a bill be given in consideration of the defendant entering into partnership with the plaintiff, and the treaty be afterwards broken off, the plaintiff is entitled to recover a verdict on the bill to the amount of the damages he has sustained, and not to the full amount of the bill. *Ledger v. Ewer, Peake*, 216.—Kenyon.

Where the indorser paid part of the amount of a bill to the holder, it was held he might recover the same against the acceptor as money paid to his use. *Pownall v. Ferrand*, 6 B. & C. 439; 9 D. & R. 603.

### 2. When for Accommodation.

A bill, accepted for the accommodation of the drawer, becoming due, a third person, expecting to have funds in his hands belonging to the son of the drawer, took it up, in order to prevent proceedings against the drawer, on condition that he should be allowed to stand in the place of the holder (the first indorsee,) and sue in his name: this does not discharge the acceptor from an action afterwards brought by such third person in the name of the indorsee, even although the former had declared that he would not trouble the acceptor. *Adams v. Gregg*, 2 Stark. 531.—Abbott.

Although the holder of a bill had notice when he took it, that the acceptor had only accepted it

upon the drawer's payment, it was a waiver of objection, although such attorney swore that such offer was made without prejudice. *Patterson (Bank) v. Bereford*, 6 Dow, 237.

The acceptor of an accommodation bill having delivered it to A. for a special purpose, and the latter, without performing his trust, having quitted the country after committing an act of bankruptcy, was pursued by a creditor, who obtained the bill from him in ignorance of his bankruptcy, and of the circumstances under which the bill was accepted.—Held, that the acceptor was not liable upon the bill at the suit of the creditor who had so possessed himself of it. *Smith v. De Witte*, 6 D. & R. 120.

Where a party accepts bills drawn by one partner on a firm for his private accommodation, upon the understanding that the drawer will provide for the bills when due, no action on the bills lies against the acceptor either by the drawer alone or by his firm jointly. *Sparrow v. Chisman*, 4 M. & R. 206.

Where A. gave an accommodation acceptance to B., which B. gave to C. as a security for some acceptances of his, and these acceptances, when they became due, were paid by B. out of the produce of other acceptances given by C., but A.'s acceptance was not given up, though C. was desired not to present it, and A. informed that it would not be presented.—Held, that the original transaction was continued; and A., not calling for the delivery of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given. *Woodroffe v. Hayne*, 1 C. & P. 600.—Best.

A. having accepted bills for B.'s accommodation, B., by way of collateral security, lodged in his hands a bill of lading of certain goods deliverable to C., who had no interest in them. A. paid his acceptances, and B., being indebted to him to that amount, became bankrupt. D. got possession of the goods and sold them.—Held, that A. might maintain an action for money had and received against D. to recover the proceeds. *Favenc v. Hullett*, 1 Camp. 554.

If A. is under acceptance to B., he may retain money of B.'s in his hands to discharge it, until the bill is delivered up, or he receives sufficient indemnity. *Madden v. Kempster*, 1 Camp. 12.—Ellenborough; *S. P. Morse v. Williams*, 3 Camp. 418.

The acceptor of several bills received a power of attorney from the drawer to receive some money and hold it as a security.—Held, that he could not retain the money after the bankruptcy of the drawer. *Hovill v. Lathwaite*, 5 Esp. 158.—Ellenborough.

A person taking up a bill for the honour of the drawer, has no right against the acceptor without effects. *Ex parte Lambert*, 13 Ves. jun. 179.

A. & Co., bankers in the country, being pressed by B. & Co., bankers in town, to whom they were indebted, to send up any bills they could procure, transmitted for account an accommoda-



due, the balance was in favour of B. & Co., but the bills were not withdrawn, and afterwards the balance between the houses turned considerably in favour of A. & Co., and was so when B. & Co. became bankrupts:—Held, that A. & Co. were entitled to recover against the acceptor. *Atwood v. Cresodie*, 1 Stark. 483—Ellenborough.

A. accepts a bill for the accommodation of B., which B. delivers to C., his creditor, to provide for a bill about to become due; C. before A.'s bill becomes due, returns it to B., as useless, in order that it may be forwarded to A., and abandons all claim upon the bill; C. cannot, by subsequently obtaining possession of the bill, acquire a right of action against A. *Cartwright v. Williams*, 2 Stark. 340—Ellenborough.

A. sold goods to B. in America, to be shipped for a European port, and paid for by bills in different sets, and at different dates, drawn by B. in favour of A. upon C. & Co., a mercantile house in London; D. was appointed supercargo and joint trustee by A. and B. for securing remittances to the house in London, for the honour of the bills. The goods being shipped for Europe, B. and D. respectively advised C. & Co. of the transaction, who effected an insurance upon the cargo, by B.'s direction and at his expense. The ship in her voyage was captured; and B. abandoned the cargo to the underwriters as for a total loss; the amount of, which was paid to C. & Co. in London, who placed it to the credit of B.; and honoured the first set of bills before any fruits were received from the policy, and advised A. of that fact; they subsequently advised him of the payment of a second set, stating that they did not know what would be the fate of the third, which had not then appeared for acceptance, but that they would do all they could to prevent loss to the parties. Part of the remaining set was subsequently paid, but the rest was refused payment by C. & Co. B. became bankrupt, and C. & Co. accounted with him prior to, and with his assignees subsequent to his bankruptcy, for all the money ever received by them on his account. A. received under B.'s commission a dividend upon the bills remaining unpaid; and his administrator brought an action for money had and received against C. & Co. for the balance:—Held, that the action was not maintainable. *Neale v. Reid*, 3 D. & R. 158; 1 B. & C. 657.

Where the indorsee of a bill having notice that it was accepted without consideration, receives part payment from the drawer, and gives him time to pay the residue, he thereby discharges the acceptor. *Laxton v. Peat*, 2 Camp. 185—Ellenborough. Overruled in *Fentum v. Pocock*, 1 Marsh. 14; 5 Taunt. 192.

If the holder of an accommodation bill take a cognovit from the drawer, for payment by instalments, he does not thereby discharge the acceptor, whether at the time of taking it he knew that it was an accommodation bill or not. *Fentum v. Pocock*, 5 Taunt. 192; 1 Marsh. 14.

The acceptor of a bill for the accommodation of the drawer is not discharged by time given to the drawer. *Raggett v. Amers*, 4 Taunt. 730.

holder of a bill, known by him to be for accommodation, gave time to the drawer, without the consent of the acceptor, the latter was not discharged, *Kerrison v. Cooke*, 3 Camp. 362—Gibbs.

One W. drew a bill upon the defendant, to whom he was in the habit of consigning goods for sale; the bill was accepted, but neither party at the time knew the state of the account between them. It afterwards appeared that the balance of the account was considerably in favour of the defendant at the time he accepted the bill:—Held, that, nevertheless, it was not an accommodation bill. *Bagnall v. Andrewes*, 4 M. & P. 839; 7 Bing. 217.

The plaintiff accepted a bill for the accommodation of one H., who deposited it with the defendant as a security for goods bought of him. H. afterwards paid for the goods; but, he being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and compelled him to pay the amount, with costs:—Held, that the plaintiff might recover from the defendant the amount of the bill on account for money paid; and semble, that he might also have recovered the costs of the action brought against him by the holder, had they been mentioned in the particulars of demand. *Blesden v. Charles*, 5 M. & P. 14.

Bills were accepted by A. for the accommodation of B., who being one of the executors of C., and having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in B.'s possession, discounted such bills with the monies belonging to C.'s estate, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box:—Held, that B. could not sever his character of an accommodation holder of the said bills, from his character of executor, so as to enable him and his co-executors to sue as indorsees of the bills of exchange for a valuable consideration. — *v. Adams*, 1 Youngs, 117.

Semble, that an indorsee for value, who receives part payment from the drawer of an accommodation bill, and takes a new bill to give time for the payment of the remainder, does not thereby discharge the acceptor, unless he was aware that the acceptance had been given for the drawer's accommodation. *Rolfe v. Wyatt*, 5 C. & P. 181—Tindal.

Whether, if he knew that fact, it would make any difference, quære? *Id.*

### 3. Discharge by Payment or Release.

Nothing but payment or a release will discharge the acceptor of a bill of exchange. *Pentum v. Pocock*, 1 Marsh. 14; 5 Taunt. 192.

Or an express declaration by the holder. *Dingwall v. Dunster*, 1 Dougl. 247.

And it must be for consideration. *Parker v. Leigh*, 2 Stark. 228—Ellenborough.

And unconditional. *Whalley v. Tricker*, 1 Camp. 35—Ellenborough.

Though the payee receives part of the money from the drawer when the bill becomes due, and takes an undertaking from him indorsed on the bill, by which he promises to pay the remainder at a future time, it does not discharge the acceptor. *Ellis v. Galindo*, 1 Dougl. 250, n.; Bayl. Bills, 166.

If the drawer of a bill payable to his own order, before it is indorsed, give the acceptor a general release; this is no defence to an action by the indorsee against the acceptor unless there be proof that the indorsee knew of the release. *Dod v. Edwards*, 2 C. & P. 602—Tenterden.

Plaintiff declared against the defendant as acceptor of a bill, payable to certain persons using the firm of Messrs. M'Brair, Watson, & Co.; defendant pleaded that the said Messrs. M'Brair, Watson, & Co. had accepted satisfaction; plaintiff replied, that the said persons, so as aforesaid using the firm of Messrs. M'Brair & Co. (leaving out the name of Watson) did not accept satisfaction, and concluded to the country. Semble that this variance could only be taken advantage of on special demurrer. *Bell v. Da Costa*, 2 B. & P. 446.

An arrangement between drawer and drawee which discharges the latter's acceptance as regards the drawer, has not that effect as regards an indorsee for valuable consideration. *Clarke v. Cock*, 4 East, 57.

Where defendant was acceptor of two bills of exchange drawn by C., and by him indorsed to his bankers; payment after they become due by the defendant to C. is not alone sufficient to discharge defendant, as the holders of the bill are entitled to the amount. *Field v. Carr*, 5 Bing. 13; 2 M. & P. 46.

In an action by the payee of a bill, accepted by the defendant for a valuable consideration: evidence that the plaintiff had been discharged as an insolvent debtor, after the bill became due, and had given in a blank schedule, is not sufficient to show that the bill had been satisfied. *Hart v. Newman*, 3 Camp. 13—Ellenborough.

Where the holder of a bill, which was a security for a debt due from A., B., C., and D., indorsed it over and put it into the hands of B., C., and D., who settled their accounts with A., saying that the bill had been satisfied by them: but the bill itself was not produced to nor seen by A. at the time of such settlement:—Held, that this was no defence to A. in an action by the holder against A., B., C., and D., the bill not having been in fact satisfied by the persons to whom it had been indorsed and handed over. *Featherstone v. Hunt*, 1 B. & C. 113, 2 D. & R. 233. See also *Brown v. Leonard*, 2 Chit. 120. *Wright v. Pulliam*, 2 Chit. 121.

H. accepted a bill for the accommodation of B., the drawer, who indorsed it over as a security for a debt, and afterwards became bankrupt. The

estate; and he afterwards gave them a release of all demands, no mention being made, during this transaction, of the bill which had been dishonoured. He knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation:—Held, that notwithstanding the above release, the acceptor was still liable at the suit of the indorsee. *Harrison v. Courtauld*, 3 B. & Adol. 36.

A general receipt on the back of a bill is prima facie evidence of its having been paid by the acceptor, and will not of itself be evidence of a payment by the drawer, though it is produced by him. *Scholey v. Walsby*, Peake, 25—Ken.

The production of a bill from the custody of an acceptor is not prima facie evidence of his having paid it, without proof that it was once in circulation after it had been accepted. *Pfel v. Vanbalenberg*, 2 Camp. 439—Ellenborough.

And payment is not to be presumed from a receipt indorsed on the bill, unless the receipt is shown to be in the handwriting of the plaintiff, or some other person entitled to demand payment. *Id.*

#### 4. Discharge by Non-presentment.

An acceptor of a bill is not discharged by the bill not being presented for payment for three or four years after it becomes due: he is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him. *Farquhar v. Southey*, 2 C. & P. 497: M. & M. 14—Littledale.

And where the indorsees neglected to present bills for payment for several years, and in the mean time charged the drawer with interest, but not with the amount of the bills; and where they did not appropriate balances which they had in their hands, as bankers to the acceptor, to pay the bills, or indeed give the acceptors notice they held the bills: it was held, that the only point to be left to the jury was, whether, from the transactions of the parties, the indorsees had expressly discharged the acceptors, or expressly renounced their liability. *Id.*

The acceptor of a bill payable at a banker's is not discharged from his liability, by the neglect of the holder to present the bill for payment at the time it becomes due, even though the banker failed before the bill was actually presented, which was not until some weeks after it was due, and the acceptor had always, up to the period of their failure, a balance in their hands sufficient to cover the acceptance. *Turner v. Hayden*, 6 D. & R. 5; 4 B. & C. 1; R. & M. 215: S. P. *Rhodes v. Gent*, 5 B. & A. 244.

Where a bill, payable at a banker's in London, which, by reason of being mislaid, was not presented for payment, and the acceptor was some months afterwards informed of its being mislaid, he was held not to be discharged, and the drawer might set off the amount in an action brought against him by the acceptor, although the bankers

at whose house the bill was payable failed in the interval; and the acceptor had at all times, up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. *Sebag v. Abitbol*, 4 M. & S. 462; 1 Stark. 79.

#### 5. Discharge by other means.

The acceptor or maker always remains liable, notwithstanding any change in the circumstances of other parties. *Anderson v. Cleveland*, 13 East, 430, n.

The acceptor is liable to the holder, though the latter has given a discharge to a party on it, which will not discharge one liable prior to himself. *Smith v. Knox*, 3 Esp. 46—Eldon.

If there be a virtual acceptance in consideration that goods shall be consigned to the acceptor to answer the bills, together with a policy of insurance upon them, the holder of the bill, by taking to the goods and selling them, discharges the acceptor. *Mason v. Hunt*, 1 Dougl. 297.

Where the drawer of a bill payable to his own order, and indorsed by him to T., and by T. to B., upon the bill being dishonoured, paid the amount to B., who struck out his own and T.'s indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff:—Held, that the plaintiff might recover against the acceptor. *Callow v. Lawrence*, 3 M. & S. 95; *S. P. Hubbard v. Jackson*, 4 Bing. 390; 1 M. & P. 11; 3 C. & P. 134.

The holder of a bill sued the acceptor, and charged him in execution: the latter having obtained his discharge under the Lord's Act, the holder then sued the drawer, who, after paying the bill, sued the acceptor, and charged him in execution: this was held to be regular, for the defendant's having been charged in execution, at the suit of the holder, was not a satisfaction, as between the drawer and acceptor. *Macdonald v. Bovington*, 4 T. R. 825.

A bill drawn on a factor, and payable out of the produce of goods in his hands, after discharging prior acceptances, and accepted by him generally, is chargeable on him, notwithstanding any balance then due to him in a running account with his principal. *Maber v. Massias*, 2 W. Black. 1072.

Where the payee and holder of a note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note even by a person to whom the executor had indorsed it. *Freakeley v. Fox*, 9 B. & C. 130; 4 M. & R. 18.

A plea of tender after the day of payment of a bill of exchange, and before action brought, is not good though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole money then due, owing, or payable to the plaintiff in respect of the bill, with interest from the time of the default, for the damages sustained by the plaintiff by reason of the non-performance of the promise. *Hume v. Peploe*, 8 East, 168.

Where the maker of a note paid money into the hands of an agent to retire it, and the agent tendered the money to the holder of the note, on

condition of having it delivered up; the note being mislaid, this condition was not complied with; and the agent afterwards became bankrupt with the money in his hands:—Held, that the maker was still responsible on the note; but that interest was not recoverable after the time of the tender. *Dent v. Dunn*, 3 Camp. 296—Ellenb.

The defendant accepted two bills, drawn on him by T. C., which the latter indorsed and paid into his bankers' (the plaintiffs,) who entered the amount as cash to the credit side of T. C.'s account in their books. The bills having been dishonoured, the plaintiffs entered their amount to the debit side of T. C.'s account; and shortly afterwards the defendant paid the amount of both bills to T. C., but did not require them to be delivered up. T. C. continued his banking account with the plaintiffs for three years after the bills became due, and paid in several sums to his credit, sufficient to cover all the items to his debit prior to the date, and including the amount of the bills. T. C. afterwards became bankrupt, and the plaintiffs proved their debt under his commission without noticing the bills, and a year afterwards sued the defendant as acceptor, having made no previous demand on him in respect of them:—Held, that he was not liable. *Field v. Carr*, 2 M. & P. 46; 5 Bing. 13. And see *Clayton's case*, 1 Mer. 572; *Bodenham v. Purchas*, 2 B. & A. 39; *Simson v. Ingham*, 2 B. & C. 65; 3 D. & R. 249.

### XIII. DRAWER AND INDORSOR.

#### 1. Liability.

*On Non-acceptance.*—The drawer of a foreign bill was held liable immediately upon the refusal of the drawee to accept, before the time for payment had expired. *Bright v. Parrier*, Bull. N. P. 269; *S. P. Milford v. Mayor*, 1 Dougl. 55.

If a person, to whom a bill is directed generally, accepts it payable at a particular place, the holder may resort to the drawer as for non-acceptance. *Gammon v. Schmoll*, 5 Taunt. 344; 1 Marsh. 80.

The acceptance or non-acceptance does not vary the responsibility of an indorsor, whose duty it is to pay the bill when due, if the prior parties do not. *Tanner v. Bean*, 6 D. & R. 338; 4 B. & C. 312.

In an action by the indorsee against the indorsor of a bill alleged in the declaration to have been accepted, the plaintiff is not bound to prove the acceptance in order to entitle him to recover. *Id.*

But the indorsee must endeavour to receive the money from the drawer before he can resort to the indorsor. *Hull v. Pitfield*, 1 Wils. 47; Bayl. Bills, 263.

An indorsor is liable upon a bill which is returned for non-acceptance before the expiration of the time limited for payment. *Ballingalls v. Gloster*, 3 East, 481; 4 Esp. 268.

The payee of a bill, having presented it for acceptance, which was refused, without giving no-

dorsee:—Held, that he might still recover on the bill against the drawer, notwithstanding the laches of the payee. *O'Keefe v. Dunn*, 6 Taunt. 305; 1 Marsh. 613. And see *Dunn v. O'Keefe* (in error,) 5 M. & S. 282.

In an action against the drawer or indorser of a bill dishonoured by non-payment after being accepted, although it be unnecessary to state the acceptance in the declaration, if it is stated it must be proved; but a promise to pay after the bill was due, is a sufficient admission of the acceptance, as well as of the handwriting of the defendant himself and of the other parties to the bill. *Jones v. Morgan*, 2 Camp. 474—Ellenb.

**On Dishonour.**—The drawer is only bound to pay within a reasonable time after receiving notice of the bill being dishonoured; therefore, where he received notice the day after the bill became due, a tender on the following day was held to be in time. *Walker v. Barnes*, 1 Marsh. 36; 7 Taunt. 240.

An indorsement by the drawer does not give him a new character as indorser, or divest him of any liability to which as maker of the bill he would have been subject. *Stratton v. Hill*, 3 Price, 253.

Where by the custom of trade, bills are given before the money is received, if the payee's agent, who was to pay the money, becomes insolvent before the money is received, the drawer is not liable on the bill. *Puget de Bras v. Forbes*, 1 Esp. 117—Loughborough.

In actions upon inland bills, by indorsee against indorser, the plaintiff must prove a demand from, or due diligence used to get the money from the acceptor; but need not prove any demand from, or inquiry after the drawer. *Heylyn v. Adamson*, 2 Burr. 669; 2 Ld. Ken. 379.

## 2. Discharge.

**By Payment.**—In an action by the indorsee against the drawer, though the indorser has paid part of the money to the indorsee, he may recover the whole sum in the bill against the drawer. *Johnson v. Kennion*, 2 Wils. 262.

If the drawer of a note be sued by the indorsee, and the bail for the drawer pay the debt and costs, this absolutely discharges the indorser as much as if the drawer himself had paid the note. *Hull v. Pitfield*, 1 Wils. 46; Bayl. Bills, 263.

If the indorsee receive a part of the money due upon a note from the drawer, the indorser is discharged. *Id.*

If the holder receive part payment from the indorser he may still recover the residue against the drawer, if not the whole. *Walwyn v. St. Quintin*, 1 B. & P. 652; 2 Esp. 515.

The holder may sue a subsequent indorser, notwithstanding he has ineffectually taken in execution the body of a prior indorser, and after-

One of two drawers of a joint note, payable twelve months after date, who is surety for the other to the amount, is not discharged by the holder not having demanded payment from the surety when due, nor till after having entered in to a deed of composition with the principal and his other creditors, and received the composition money. *Perfect v. Musgrave*, 6 Price, 111.

The indorser of a bill is not discharged by reason of the holder having given the bill to the acceptor, and received his check for the amount, which check was returned for want of effects. *Ridley v. Blackett*, Peake's Add. Cas. 63—Kenyon.

**Giving Time to Acceptor.**—A mere delay by the holder to sue the acceptor, does not discharge the drawer or indorsors, the right to sue not being suspended. *Philpot v. Bryant*, 1 M. & P. 754; 4 Bing. 717; 3 C. & P. 346.

Therefore, where the executrix of a deceased acceptor verbally promised the holder to pay the bill out of her own private income, and the latter agreed to give her time, provided interest were paid, and accordingly forbore to sue:—Held, that the drawer was not thereby discharged. *Id.*

If the holder, after protest for non-payment, and notice to the drawer, forbear to sue the acceptor, the drawer is not thereby discharged. *Walwyn v. St. Quintin*, 1 B. & P. 652; 2 Esp. 515.

So, after protest only, if the drawer be not entitled to notice. *Id.*

Secus, before protest, or if the holder take security from the acceptor after protest. *Id.*

If the holder give time to the acceptor of a bill or drawer of a note, after it has been dishonoured, the indorser is discharged. *Tindal v. Brown*, 1 T. R. 167; 2 T. R. 186.

So, if the holder receive a composition from the acceptor, he discharges the drawer. *Ex parte Wilson*, 11 Ves. jun. 410.

If the holder of a bill when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder shall keep the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to such agreement; though the drawer might have had no effects in the hands of the acceptor. *Gould v. Robson*, 8 East, 576.

So, if the indorsee having sued the acceptor, receive of him a part payment, and take a security for the remainder, with the exception of a nominal sum only, he is precluded from suing the indorser. *English v. Darley*, 2 B. & P. 61; 3 Esp. 49; Bayl. Bills, 275.

If, after a bill has been dishonoured, and notice of dishonour duly given, the holder take part of the amount of the acceptor, and offer to take a warrant of attorney to secure the payment of the residue by instalments, which offer is not ac-

Goodrick, 2 C. & P. 468—Abbott.

But if the holder had disabled himself from suing on the bill, it is otherwise. *Id.*

Giving time to the acceptor of an accommodation bill, drawn for his own benefit, discharges the drawer in an action by the indorsee; but it is otherwise, where the action is brought against the person for whom the bill is drawn. *Hill v. Read*, D. & R. N. P. C. 26—Abbott. And see *Collett v. Haigh*, 3 Camp. 281.

A., the payee of a bill for 87*l.*, having indorsed it to B. for a valuable consideration, and the bill being dishonoured, C., the acceptor, sent another bill for 126*l.* (which had some time to run) to A., who took up the first bill by means of the second, received the difference in discount, and indorsed the first bill again to D., who sued the drawer before C.'s second bill became due:—Held, that taking the second bill did not amount to giving time and a new credit to the acceptor of the first, so as to discharge the drawer who was no party to the transaction, unless there was evidence of an express consent on the part of A. the payee, to give time, and not to sue upon the first bill until the second was at maturity. *Pring v. Clarkson*, 2 D. & R. 78; 1 B. & C. 14.

Quære, whether, after the indorsee of a dishonoured bill has brought actions against the indorser and acceptor, his taking a cognovit of the acceptor for payment by instalments, is such a giving of time as discharges the other parties to the bill? *Lee v. Levy*, 6 D. & R. 475; 4 B. & C. 399; 1 C. & P. 553, 675.

Quære, whether taking a warrant of attorney from the acceptor, was, under particular circumstances, a giving of time so as to discharge the other parties to the bill? *Id.*

Semble, that taking a cognovit from the acceptor after an action brought against him, and by that giving him three weeks time before entering up judgment, is not such a giving of time as will discharge the other parties to the bill. *Jay v. Warren*, 1 C. & P. 532—Abbott.

The drawer is not discharged, although a *fi. fa.* has been sued out against the acceptor on the same bill. *Pole v. Ford*, 2 Chit. 125.

An agreement between the holder and the acceptor of a bill dishonoured for non-payment, that the acceptor shall pay to the holder the amount of the bill and no more, discharges the drawer, although his assignees (he being then a bankrupt) are parties to such agreement. *De La Torre v. Barclay*, 1 Stark. 7—Ellenborough.

Where the holder allowed the acceptor to renew the bill without consulting the indorser; but he afterwards told the acceptor that it was the best thing that could be done:—Held, that it was not a recognition of the terms granted to the acceptor, and that he was therefore discharged. *Withall v. Masterman*, 2 Camp. 179—Ellenb.

If the holder of a bill of which payment has been refused, inform the drawer of his intention to take security from the acceptor, and the draw-

er (the drawer) was discharged for want of notice, and it appears that due notice had been given; the holder may sue the drawer, notwithstanding that he has taken security from the acceptor; for the drawer under such circumstances must be considered as having assented to the security being taken. *Clark v. Devlin*, 3 B. & P. 363. And see *Gould v. Robson*, 8 East, 576.

The drawer, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, three months after it was due, said, "that he knew he was liable, and if the acceptor did not pay it, he would:"—Held, that he was bound by such promise. *Stevens v. Lynch*, 12 East, 38; 2 Camp. 332.

*Giving time to Drawer or prior Indorser.*—Discharging any of the indorsers will be a discharge of all subsequent, though not of prior indorsers. *Smith v. Knox*, 3 Esp. 46—Eldon.

Time given by an indorsee to the payee does not discharge the drawer. *Claridge v. Dalton*, 4 M. & S. 226.

Where all parties have had due notice of dishonour, a subsequent indorser is not discharged by a treaty between the attorney of the holder, the drawer, (who was also prior indorser,) and the acceptor, that the holder should wait a given time for the payment of the balance, in consideration of receiving from the acceptor and prior indorser, by a certain time, a stipulated proportion of the amount, a part only of which proportion was afterwards paid; although the subsequent indorser has had no notice of such treaty, or the result, nor was informed of the payment of any part of the money due on the bill, or of the ultimate non-payment of the balance, till some months after the original dishonour of the bill. *Badnall v. Samuel*, 3 Price, 521.

A letter written by the holders of a promissory note to the defendant, the indorser, saying, "the maker is not ready to pay, but will be in a week, which is time enough for us," is not giving time so as to discharge the indorser. *Margesson v. Goble*, 2 Chit. 364.

An accommodation note in favour of A. was indorsed to B., with notice of the want of consideration; and upon the insolvency of A., B. accepted a dividend, and covenanted not to sue him:—Held, that, nevertheless, he might sue the maker, although in the event of his recovering the amount from him, A. would again become liable to be sued by the maker. *Mallett v. Thompson*, 5 Esp. 178—Ellenborough.

Where a creditor signed an agreement to accept a composition of so much in the pound in full of his demand, on having a joint note from the debtor and his father, and accordingly received a joint note for the composition on his debt:—Held, first; that this was an accord and satisfaction of the original debt, and that the indorsee of a promissory note, by which the debt was originally secured, could not be sued for the residue of the plaintiff's demand; and second, that

Where an action was brought by several partners as indorsees of a note, against the defendant as indorser:—Held, that a deed of composition, by which one of the partners had discharged a prior indorser operated as a release to the defendant. *Ellison v. Dezell*, 1 Selw. N. P. 372.

If a defendant has entered into a deed of composition with his creditors containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured in the plaintiff's hands. But it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then in the hands of third parties. *Margetson v. Aitkin*, 3 C. & P. 338—Tenterden.

**Waiver of laches.**—A letter written by the indorser of a bill who had been applied to for payment, after several days' laches, telling the plaintiff that he would not remit till he received the bill, and desiring the plaintiff, if he considered the defendant as unsafe, to return the bill to Trevor & Co. (who were prior indorsors on the bill, and also bankers at the defendant's place of residence,) was held not to be a waiver of such laches and promise to pay, but that the defendant, on discovering that in law he was discharged, might refuse payment. *Borradaile v. Lowe*, 4 Taunt. 93.

The holder of a bill before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused, and then immediately returned it to the second indorser, who, not knowing of the laches, took up the bill:—Held, that his ignorance when he paid the bill, of the laches of the former holder, did not entitle him to recover against the first indorser who set up such defence. *Roscow v. Hardy* 12 East, 434; 2 Camp. 458.

#### XIV. ACTIONS ON.

##### 1. Form and Parties.

**Form of Action.**—Debt lies by the payee against the maker of a note expressed to be for value received. *Bishop v. Young*, 2 B. & P. 78.

So, it lies by the drawer against the acceptor of a bill, expressed to be for value received in goods. *Priddy v. Henbrey*, 3 D. & R. 165; 1 B. & C. 674.

So, on a bill payable to the drawer's own order, at the suit of the first indorsee against such drawer. *Stratton v. Hill*, 3 Price, 253; 2 Chit. 126.

**Parties.**—If a bill be indorsed in blank, any number of persons may join in suing upon it,

before the bill had been indorsed to them in blank, before the death of one of the firm, who was a partner with the plaintiffs as bankers:—Held, that the action was well brought, without their describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner. *Secus*, if the bill had been specially indorsed. *Attwood v. Rattenbury*, 6 Moore, 579.

The delivery of a bill indorsed in blank by the direction of the payee to A., B., & Co., who were bankers, on the account of an insolvent's estate vested in trustees for the benefit of creditors, will not enable A. and B., jointly with a third trustee, to maintain an action against the indorser. *Macchell v. Kinnear*, 1 Stark. 499—Ellenborough.

The drawer of a bill accepted generally, and protested by the payee for non-payment, and afterwards by himself, may in his own name, and without any previous assignment or indorsement from the payee, maintain an action against the acceptor. *Parminter v. Symons* (in error,) 2 Bro. P. C. 43; 1 Wils. 185.

Where a bill was indorsed to three partners, in respect of a debt due from the drawer and indorser, and was accepted by the defendant at the request of one of the partners who engaged to provide for it when it became due:—Held, that the assignees of both could not recover against the acceptor, although the one partner was not privy to the engagement of the other. *Johansen v. Peck*, 3 Stark. 66—Holroyd.

If several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill which has been previously indorsed by another person; and, on the bill being dishonoured, pay the party who discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser, to recover the amount of the bill. *Low v. Copestake*, 3 C. & P. 300—Best.

Assumpsit by A., B., and C. against D., as one of the indorsors of a note drawn by E. in favour of C., D. and (himself) E., then in partnership, and by them indorsed to A., B. and C.; a plea in bar, that C., one of the plaintiffs, was liable as an indorser, together with D., was held good on special demurrer. *Mainwaring v. Newman*, 2 B. & P. 120.

##### 2. At what Time.

An action cannot be brought against the drawer of a bill, till notice of the refusal, insolvency, or absconding of the acceptor. *Dugglish v. Weatherby*, 2 W. Black. 647.

An action of debt will not lie on a note payable by instalments, till the last day of payment be passed. *Rudder v. Price*, 1 H. Black. 547.

If a bill be not accepted, an action will lie upon it against the drawer before the time when it is

made payable. *Milford v. Mayor*, 1 Dougl. 55: *S. P. Bright v. Purrier*, Bull. N. P. 369.

So, an action lies by the indorsee against the indorser of a bill immediately on the non-acceptance of the drawee, though the time for which the bill was drawn be not elapsed. *Ballingalls v. Gloster*, 3 East, 481; 4 Esp. 268.

In an action by the drawee against the acceptor of a bill for the freight of a chartered ship, which the plaintiff had agreed to renew for three months, if the charterer did not return before the bill was due:—Held, that where no application appeared to have been made for such renewal, the holder might sue before the expiration of the three months. *Gibben v. Scott*, 2 Stark. 286—Ellenborough.

### 3. When lost or destroyed.

By 9 & 10 Will. 3, c. 17, s. 3, if any inland bill be lost or miscarried within the time limited for payment, the drawee shall give another of the same tenor to the holder, who, if required, shall give security to indemnify him in case the bill shall be found.

Payment of a bill cannot be enforced without producing it. *Davis v. Dodd*, 4 Taunt. 608.

The holder of a bill cannot, by the custom of merchants, insist upon payment by the acceptor, without producing and offering to deliver up the bill; and therefore it was held, that the indorsee of a bill, having lost it after he had shown it to the acceptor, who had promised to pay it, could not recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity. *Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 860; *R. & M.* 404, n.

In another case it was held, that an action might be maintained on a lost bill of exchange, if the loss did not happen till after the bill became due. *Glover v. Thompson*, R. & M. 403—Abbott. This was an undeinted cause.

An action at law cannot be maintained against the acceptor of a bill which was lost after being indorsed, and which does not appear to have been destroyed, although a bond of indemnity has been tendered to the defendant. *Pierson v. Hutchinson*, 2 Camp. 211; 6 Esp. 126—Ellenborough.

Nor where one half a bank note was stolen, and the other received. *Mayor v. Johnson*, 3 Camp. 324—Ellenborough.

In an action by indorsee against acceptor, it appeared that, after action brought and notice of trial, the bill which had been indorsed in blank had been lost:—Held, that although the bill had been drawn more than six years, the plaintiff was not entitled to recover without producing it at the trial. *Poole v. Smith*, Holt, 144—Gibbs.

Where an unindorsed bill has been lost by the drawer, he may recover against the acceptor, in respect of consideration. *Rolt v. Watson*, 12 Moore, 510; 4 Bing. 273.

The bearer of a bill, which was lost, may maintain an action against the drawer. *Grant v. Vaughan*, 3 Burr. 1516; 1 W. Black. 485.

The defendant, being indebted to the plaintiff for goods sold, gave him a bill, not due, drawn and accepted by two other persons, to a greater amount than the price of the goods; and the plaintiff gave the defendant the difference in money, who indorsed the bill in blank, the plaintiff having lost the bill before it was paid:—Held, that he could not sue the defendant on it, or recover the price of the goods, as the defendant had given full value for the bill, and might still be compelled to pay its amount to a bona fide holder. *Champion v. Terry*, 7 Moore, 130; 3 B. & R. 295.

A check given for stock sold is lost by the vendor in going home; the purchaser is immediately informed of this fact, but refuses to pay without an indemnity. Four months after, the bankers on whom the check was drawn stop payment with sufficient money of the drawer's in their hands to answer it:—Held, that under these circumstances an action would not lie for the price of the stock. *Bean v. Hill*, 2 Camp. 384—Ellenborough.

It is a good defence to an action on a bill, that it was not produced, or shown to be lost or destroyed, though the party promised to pay it. *Powell v. Roach*, 6 Esp. 76—Ellenborough.

An express promise to pay the contents of a lost bill, if given without some new consideration, is void. *Davis v. Dodd*, 4 Taunt. 602.

An averment that the defendant was indebted on a bill, and that the plaintiff having lost the bill, had at his request given him a bond acknowledging payment, and conditioned to indemnify him against the bill, states a good consideration for a promise by the defendant to pay the contents of the bill. *Williamson v. Clements*, 1 Taunt. 523.

A bill in equity will lie by the last indorsee of a lost bill to recover the amount from the acceptor; and prior indorsees need not be made parties to the suit. *Macartney v. Graham*, 2 Sim. 285.

A bill for payment of a note which had been cut in two parts, one being produced and the other alleged to be lost, and offering an indemnity, was dismissed, as, on proving the loss, an action might be maintained. *Moscop v. Eadon*, 16 Ves. jun. 430.

### 4. Amount recoverable.

#### (a) Interest.

Interest on a bill or note is to be considered as damages for the detention of the principal money, and forms no part of the original debt: where, therefore, a promissory note was made abroad, and the payee did not sue upon it until thirty years afterwards, and the jury refused to give interest:—Held, after verdict, that the court could not increase the amount of the verdict, by adding such interest. *Du Belloix v. Waterpark* (Lord), 1 D. & R. 16; Bayl. Bills, 281.

A jury is not bound to give interest upon a bill or note; and where the instrument has lain dormant for many years, without any claim being made upon it, they may properly refuse it. *Id.*

Interest ought not to be allowed on a bill or note for any time that it has been in the hands of an alien enemy. *Id.*

on failure of payment of any instalments, the whole is to become due, the interest is to be calculated on the whole sum remaining unpaid on default of any instalment, and not on the respective times when they would become payable. *Blake v. Lawrence*, 4 Esp. 148—Ellenborough.

The maker of a promissory note paid money into the hands of an agent to retire it; the agent tendered the money to the holder of the note, on condition of having it delivered up; the note being mislaid, this condition was not complied with; and the agent afterwards became bankrupt with the money in his hands:—Held, that the maker was still responsible on the note, but that interest was not recoverable after the time of the tender. *Dent v. Dunn*, 3 Camp. 296—Ellenb.

In order to entitle the plaintiff to interest against the acceptor, upon a bill specially accepted, it was necessary to prove a presentment at the particular place. *Phillips v. Franklin*, Gow, 196—Holroyd. *But see* 1 & 2 Geo. 4, c. 78.

In an action against the drawer of a foreign bill dishonoured here for non-acceptance, where the plaintiff is allowed a per-centage in the name of damages, he is only entitled to interest from the day when the bill ought to have been paid. *Gantt v. Mackenzie*, 2 Camp. 51—Ellenb.

But where there is no allowance for damages, the plaintiff is entitled to interest from the day the bill was dishonoured for non-acceptance. *Harrison v. Dickson*, 3 Camp. 52, n.—Ellenborough.

Interest is given on a note of hand from the time of its becoming payable. *Lithgow v. Lyon*, Coop. C. C. 29.

When a bill is made payable with interest, it is to be calculated from the date. *Doman v. Dibden*, R. & M. 381—Abbott: *S. P. Kennerley v. Nash*, 1 Stark. 452—Ellenborough. *And see* *Hopper v. Richmond*, 1 Stark. 507.

A bill or note payable on a day certain, carries interest from that day, unless the non-payment has been occasioned by the negligence of the holder. *Laing v. Stone*, 2 M. & R. 561: *S. P. Upton v. Ferrers*, (Lord,) 5 Ves. jun. 801.

The drawer of a bill which is dishonoured by the acceptor, is not liable to pay interest for the time which elapses between the day whereon the bill becomes due, and the day when the drawer receives notice of the dishonour. *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36.

Where an agent having money in his hands belonging to his principal, purchased bills of exchange, which he indorsed specially to the latter, who at the time of the indorsement was dead, but the agent did not know it:—Held, that the administrator of the principal was only entitled to recover interest on bills accepted after the death of the intestate, from the time of the demand of payment made by the administrator, and not from the time the bills became due. *Murray v. East India Company*, 5 B. & A. 204.

Interest accruing before the act of bankruptcy,

*meron v. Smith*, 2 B. & A. 305.

Interest is not recoverable on a bill of exchange, unless it be produced. *Fryer v. Brown*, R. & M. 145—Abbott.

The defendant being under agreement to pay the plaintiffs the value of certain billets issued by the Peruvian government, on a remonstrance by the British government, as a compensation for injury done to the plaintiffs:—Held, that the prothonotary was to estimate the value, as the value of a bill of exchange for the same number of dollars on a house of respectability at Lima, although the billets were at a great discount. *Delegat v. Naylor*, 5 M. & P. 443; 7 Bing. 469.

#### (b) Re-exchange.

The acceptor of a foreign bill is not liable for re-exchange, nor for more than the principal sum, together with interest, according to legal rate of interest where the bill is payable. *Woolsey v. Crawford*, 2 Camp. 445—Ellenborough.

Upon a motion to refer it to the master to compute principal, interest, and costs, upon a bill drawn in Scotland, upon and accepted by the defendant in England, the court will not direct the master to allow re-exchange. *Napier v. Schneider*, 12 East, 420. *And see* *Goldmid v. Tate*, 2 B. & P. 55.

A deposited a sum of money at the banking-house of B. in Paris, for which B. gave him his note, "payable in Paris, or at the choice of the bearer of the Union Bank in Dover, or at my usual residence in London, according to the course of exchange upon Paris;" after this note was given, the direct course of exchange between London and Paris ceased altogether, having been, previous to its total cessation, extremely low: the note was at a subsequent period presented for acceptance and payment at the residence of B. in London, at which time there was a circuitous course of exchange upon Paris by way of Hamburg:—Held, that A. was entitled to recover upon the note, according to such circuitous course of exchange upon Paris at the time when the note was presented. *Pollard v. Herries*, 3 B. & P. 335.

A., in England, drew a bill on B. in a foreign country, which, after having been negotiated through another foreign country, was presented to B., who refused to pay it on account of the law of the country in which he resided having prohibited such payment:—Held, that the drawer was liable for the whole amount of the re-exchange between the different countries. *Mellish v. Simeon*, 2 H. Black. 378.

A verdict having passed for the defendants, in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from London on Lisbon, upon evidence that the enemy were in possession of Portugal when the bill became due, and Lisbon was then blockaded by a British squadron, and there was in fact no direct exchange between Lisbon and London, though



bills had in some few instances been negotiated between them through Hamburg and America about that period; the court refused to grant a new trial, on the presumption that the jury had founded their verdict upon the fact that no re-exchange was proved to their satisfaction to have existed between Lisbon and London at the time; the question having been properly left to them, to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country. *De Tasset v. Baring*, 11 East, 265; 2 Camp. 65.

### (c) Costs and Expenses.

Expenses of noting and postage incurred on the return of an inland bill of exchange, are not recoverable by the holder, unless specially laid as damages, and proved accordingly. *Kendrick v. Lomas*, 2 Tyr. 438; 2 C. & J. 405.

Quere, if a charge for noting is in any case recoverable on an inland bill not protested? *Id.*

The accommodation acceptor of a bill, who takes it up and pays it to a bona fide holder after action brought by him, cannot recover the costs of such action against the parties liable to him for the sum paid on the bill. *Roach v. Thompson*, M. & M. 487—Tenterden.

In an action by payee against acceptor of a bill of exchange drawn by a third person, the defendant paid 10*l.* into court on the money counts. Nothing more was due on the bill, and there had been no other account or transaction between the plaintiff and defendant:—Held, that the payment on the account stated was an answer to the whole action, and that the plaintiff could not recover nominal damages on the special counts. *Barty v. Beueman*, 1 B. & Adol. 889.

An indorser of a bill having had an action brought against him by the indorsee, is not entitled to recover from the acceptor the costs incurred in such action. *Dawson v. Morgan*, 9 B. & C. 618.

Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expenses beyond the amount of 5*l.* per cent., if such charges are reasonable, warranted by usage, and not made a colour for usury. *Aurial v. Thomas*, 2 T. R. 52.

The charge of 10*s.* per pagoda on a bill returned protested from India, is not excessive, though it was taken in payment here at the rate of 6*s.* 6*d.* per pagoda. *Id.*

There being a law in Pennsylvania, that bills drawn or indorsed there on persons in England, and protested, should be paid to the holder, with 20*l.* per cent. for damage: bills drawn on a merchant in England were accepted by him, he then becoming bankrupt before they were due, they were protested for non-payment; the drawee having paid the money due on the bills and the 20*l.* per cent. to the holder, was permitted to prove

both under the commission. *Francis v. Rucker* Amb. 672.

### 5. Staying Proceedings.

If separate actions be brought against the acceptor and indorsors of a bill, the court will stay proceedings against any of the indorsors, on payment of the bill and the costs of that action; but not against the acceptor, without payment of costs in all the actions. *Smith v. Woodcock*, and *Same v. Dudley*, 4 T. R. 691.

Where the plaintiff sued the defendant jointly with his partners, as the drawers of a bill, and afterwards sued the defendant alone, as acceptor thereof, the court of Exchequer refused to stay the proceedings in the last action as being vexatious and oppressive; but held that the different character in which the defendant was sued in each action, justified the plaintiff in resorting to both remedies against him. *Wise v. Prowse*, 9 Price, 393.

So, where the original payee of five promissory notes had another demand against the maker, for which he held his acceptance of a bill, brought an action on the notes against the defendant, by serving him with process, but did not declare nor discontinue, the court of Exchequer refused an application on the part of the defendant to stay the proceedings in another action, brought at the suit of the indorsee, till the two actions brought by the payee, and alleged to be for the same cause of action, should be discontinued. *McClure v. Pringle*, 13 Price, 8; *McClel.* 2.

Where the payee indorsed on a note, that if the interest was paid on stipulated days during her life, the note should be given up; and upon a payment of the interest being omitted, an action was commenced on the note:—Held, that the court of C. P. had no power to stay proceedings on payment of the interest and costs. *Steal v. Bradfield*, 4 Taunt. 227.

Where, after the acceptor of a bill had offered to pay the debt and costs of the action commenced against himself, the plaintiff, who was an attorney and indorsee of the bill, brought another action against the drawer, who was his client, the court staid the proceedings, upon payment of the debt and costs of one action only. *Hodson v. Gunn*, 2 D. & R. 57.

The plaintiff in an action against the acceptor of a bill, being called on by rule to deliver up the bill on payment of debt and costs, was, by delivery of the instrument, holden to have complied with the rule, although he had rendered it a nullity by considerable erasures; for if the defendant had sustained an injury by the erasures, he had his remedy by action. *Tomlins v. Lawrence*, 4 M. & P. 54; 6 Bing. 376.

It is no ground for staying the trial of an action on a note, given for the amount of a penalty levied under the revenue laws, that the party on whose evidence the conviction proceeded has been indicted for perjury, and a true bill found. *Aysheford v. Charlott*, 4 Dougl. 210.

A defendant charged as indorser of a note may obtain a rule to inspect it, on affidavit that he

#### 6. For Consideration under common Counts.

The indorsee of a note may maintain an action for money had and received against the maker. *Dimsdale v. Lancaster*, 4 Esp. 201—Ellenborough. And see *Bolton v. Richard*, 6 T. R. 139; 1 Esp. 106, and *Brown v. Kewley*, 2 B. & P. 518.

A promissory note is not evidence under the money counts in an action by the indorsee against the maker. *Bently v. Northouse*, M. & M. 66—Tenterden.

Semble, that in an action by payee against acceptor, the bill would not be evidence of an account stated. *Early v. Bowman*, 1 B. & Adol. 889.

Where a plaintiff cannot recover on a count on a promissory note for want of a stamp, he may recover on the common count for money lent, by proving an acknowledgment on a demand made. *Tyte v. Jones*, 1 East, 58, n. And see *Alves v. Hodgson*, 7 T. R. 241; 2 Esp. 528.

Quære, if a promissory note be misdescribed in the declaration in an action of assumpsit, it can be received in evidence, so as to entitle the plaintiff to recover under the common money counts? *Wells v. Girling*, 3 Moore, 79; Gow, 22. And see *Gibson v. Minet*, 1 H. Black. 569; 3 T. R. 481; 2 Bro. P. & C. 48.

But, if a defendant have signed a joint and several note payable by instalments, as a surety for the other maker, the plaintiff cannot, in an action against the former, resort to the common counts. *Id.*

Where the plaintiff declares on a note which has been given for a debt, the party may go into evidence of the debt for which the note is given, if the note has not the proper stamp, so that it cannot be given in evidence itself. *Wilson v. Kennedy*, 1 Esp. 245—Kenyon.

Where a note has been given for money due by the defendant to the plaintiff, who declares on it, together with the money counts, he must prove the note lost, or destroyed, before he can have recourse to the money counts, if it appears that the money so claimed was that for which the note was given. *Dangerfield v. Wilby*, 4 Esp. 159—Ellenborough.

A note is evidence under the money counts, only as between the original parties to it. *Waynam v. Bend*, 1 Camp. 175—Ellenborough.

A bill payable to the order of the drawer, in an action by him against the acceptor, is good evidence under the money counts. *Thompson v. Morgan*, 3 Camp. 101—Ellenborough.

Where a bill is given in payment for goods sold, which upon presentment to the drawee, is refused acceptance:—Held, that the holder having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter count, although the credit on the bill be not expired. *Hickling v. Hardey*, 1 Moore, 61; 7 Taunt. 312.

holder as a consideration for the indorsement, finds its way to the acceptor, it may be recovered as money had and received. *Bennett v. Furnell*, 1 Camp. 130—Ellenborough.

The payment of interest is evidence to show that a principal sum corresponding with and bearing such interest, was due, and a note may be looked at to see the terms on which the deposit was made. *Sutton v. Toomer*, 1 M. & R. 125; 7 B. & C. 416.

An indorsee cannot recover on the money counts from an acceptor, who is discharged by a material alteration in the bill. *Long v. Moore*, 3 Esp. 155, n.—Kenyon.

In an action by the indorsee against the indorser of a bill of exchange, evidence of an acknowledgment of an existing debt, and of a promise to pay by the defendant, is admissible, and sufficient to support a count upon an account stated. *Waggstaffe v. Boardman*, 9 D. & R. 248.

A count for money lent, is supported by evidence of a note of hand, acknowledging the receipt of the money on behalf of the defendant's grandson, and promising to be accountable for it on demand; and a count for money laid out and expended, at the defendant's request, is supported by the evidence of a note of hand, requesting the plaintiff to pay it to a gardener, for the workmen's use. *Harrie v. Huntlack*, 1 Barr. 371; 2 Ld. Ken. 28.

Two unstamped slips of paper, with "I. O. U. 400l." and "I. O. U. 250l." written thereupon, are neither promissory notes nor receipts, and may be therefore received in evidence for money lent. *Childers v. Bulnois*, D. & R. N. P. C. 8—Abbott.

Where there is a promise to pay a bill within a fixed time, if during that time no proof be brought of its being already paid, though the promise be broken (no proof being brought within the time,) and the plaintiff in an action on the bill, with an account stated, gives evidence under it of the special promise; yet the defendant may also prove under that count, that the debt for which the bill was originally given was paid; and thereby avoid the promise by showing it was without consideration. *Elmer v. Wills*, 1 H. Black. 64.

Assumpsit by the plaintiff as indorsee of a bill for 57l. 10s., and upon an account stated against the defendant as acceptor. The bill was upon an insufficient stamp; and the plaintiff, in order to recover upon the account stated, produced two letters written by the defendant after the dishonour of the bill. In the first, which was dated on the day the bill became due, and which was addressed "To the gentleman who calls with the bill," the defendant expressed his regret that it was not in his power to take up the bill for 57l. 10s. In the second letter, which was in answer to one from the plaintiff's attorney, requiring payment of the defendant's acceptance in favour of Tilbury for 57l. 10s., the defendant said, if he had had the money, he should not have let his

acceptance be dishonoured; and he proposed that Tilbury should draw upon him in a month:—Held, that these letters did not amount to an acknowledgment that the sum of 57l. 10s. was due to the plaintiff, but merely that it was due to the person legally entitled to the bill; that it was necessary, therefore, for the plaintiff to prove an indorsement of the bill; and that the bill not being on a sufficient stamp, could not be looked at by the jury for the purpose of ascertaining this fact. *Jardine v. Payne*, 1 B. & Adol. 663.

"Received of A. B. 150l., which I promise to pay on demand with interest," is a promissory note, and requires to be stamped as such: where, therefore, an instrument in these words, on being produced in evidence, was stamped with a receipt stamp:—Held, that an acknowledgment by the defendant that he owed the party to whom it was given the sum mentioned in the note, was held sufficient to entitle the executors of the latter to recover on an account stated, although the consideration for which the note was given was goods sold and delivered, for which there was no count in the declaration. *Ashby v. Ashby*, 3 M. & P. 186.

In an action on a note, and also for goods sold and delivered, if the plaintiff prove the delivery of the goods before the note was given, and do not show the consideration of the note to have been distinct from them, the defendant must have a verdict on one of the counts: the plaintiff cannot take a verdict on one, and have the jury discharged from giving a verdict on the other. *Mutrie v. Harris*, M. & M. 322—Best.

In an action by the indorsee against the acceptor, the bill is not admissible as evidence of money had and received. *Eales v. Dicker*, M. & M. 324—Littledale.

Rule for new trial made absolute. *Id.*

### 7. Pleadings.

It is not necessary to set out the date of a bill; its delivery is its date; and it is a sufficient averment of non-payment of a bill accepted by the defendant, payable at a particular place, to state that it was presented at his house without showing that it was presented to him. *Giles v. Bourne*, 6 M. & S. 73; 2 Chit. 300.

Therefore, where plaintiff declared that J. T., on the 22d of Feb. 1816, made his bill, and thereby required defendant, four months after date, to pay at Messrs. V. & Co. Lombard-street, &c.; it was held sufficient on demurrer, assigning for cause that although the bill was payable after date, no date was stated, and that the non-payment by Messrs. V., as well as by defendant, was not negatived: for it shall be intended that it was dated on the day when it was made, and the bill did not purport that Messrs. V. would pay. *Id.*

If plaintiff declares that on such a day the defendant drew a bill, without alleging that it bore date on that day, the day in the declaration is immaterial, though not laid under a *videlicet*. *Coxon v. Lyon*, 2 Camp. 307, n.—Thompson.

But where the plaintiff declared upon the bill as bearing date on that day, the variance was held fatal. *Aron*, 2 Camp. 308, n.—Ellenborough.

A first count stated, that the defendant heretofore, to wit, on such a day, drew a bill bearing date the day and year aforesaid; and a second count stated, that afterwards, to wit, on the day and year aforesaid, the defendant drew a certain other bill, without mentioning any express date in either count:—Held, that both counts were good. *Hague v. French* (in error), 3 B. & P. 173.

Quære, where the declaration stated that the defendants made the bill, "their own proper hands being thereunto subscribed:" when, in fact, the bill bore the subscription of A. & Co., whether the variance was fatal or not? *Jones v. Mars*, 2 Camp. 305—Ellenborough.

And a bill which expressed on the face of it to be for value delivered, may be stated to be for value received. *Id.*

In an action on a note alleged to have been made by the defendant, "his own proper hand being thereunto subscribed," if it appear that defendant's name was written by another person under his authority, it is sufficient, and the allegation of the defendant's hand-writing may be rejected as surplusage. *Booth v. Grose*, M. & M. 182: S. C. nom. *Booth v. Grover*, 3 C. & P. 335—Tenterden.

It is not necessary in a declaration on a bill, to aver that the maker delivered it; it is sufficient to state that he made it. *Churchill v. Gardner*, 7 T. R. 596.

A bill payable to the order of A. is payable to A., without alleging any order made; and it is sufficient to declare that A. delivered the bill to the defendant, which he accepted, and, by reason thereof, became liable to pay the contents to A., without alleging a redelivery of the bill by the defendant: for if a redelivery, or something tantamount, to show the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the redelivery, &c. *Smith v. McClure*, 5 East, 476; 2 Smith, 43: S. P. *Sheldon v. Occarsen*, Bayl. Bills, 329.

An averment, that when the bill became due, according to the tenor, to wit, on the 31st of March, 1822, it was duly presented for payment:—Held, sufficient on a special demurrer, assigning for cause, that the 31st of March was on a Sunday, as it was enough to state that the bill was presented when it became payable according to its tenor, without mentioning any particular day. *Bynner v. Russell*, 7 Moore, 267; 1 Bing. 23.

In an action against the indorsee of a bill of exchange, if the plaintiff do not allege a demand on, and refusal by the acceptor, on the day when the note was payable, it is error, and not cured by verdict. *Rushton v. Aspinall*, 2 Dougl. 679.

In like manner it is error, and not cured by verdict, if he do not allege notice to the defendant of the refusal by the acceptor. *Id.*

The day upon which a promise to pay a bill of exchange is alleged, is matter of form only; and no objection can be raised on error, that the day stated is more than six years before the action is brought. *Hawkey v. Borwick* (in error), 1 Y. & J. 376; 4 Bing. 135.

person deceased, is mere surrogage, and does not require proof. *Agutter v. Moses*, 2 Stark. 499—Abbott.

If a bill drawn by John Couch be declared upon as drawn by John Crouch, the variance is fatal. *Whitwell v. Bennett*, 3 B. & P. 559.

It seems that an averment in a declaration on a bill, drawn in Ireland, and made payable in England, treating the sum mentioned in the bill as Irish currency, and stating it to be of the value of 232l. 4s. of lawful money of Great Britain, is material, and will prevent the plaintiff from recovering more than that sum; although without such an averment he would be entitled to treat the bill as of English currency. *Taylor v. Booth*, 1 C. & P. 286—Best.

In an action by indorsee against indorser, the special facts rendering valid a deferred notice of dishonour, need not be specially averred, the common averment of notice will be sufficient. *Firth v. Thrush*, 2 M. & R. 359; 8 B. C. 387.

A declaration on a note stated that the defendant thereby promised to pay to the plaintiff 10l., on account of W. H. D., fourteen days after the date thereof, which period had elapsed; and then averred that the defendant, in consideration of the premises, "then and there promised to pay the amount of the note to the plaintiff, according to the tenor and effect thereof."—Held, sufficient on special demurrer. *Banks v. Camp*, 2 M. & Scott, 734; 9 Bing. 604.

A similar promise in a special declaration was held in K. B. to be bad on special demurrer. *Price v. Easton*, 4 B. & Adol. 433; 1 Nev. & M. 303.

If a conditional acceptance is declared upon, it must be set forth specially, with an averment that the condition has been performed. *Ralli v. Sarrell*, D. & R. N. P. C. 33—Abbott.

Where a promise has been given to pay a bill presented for acceptance conditionally, it cannot be declared upon as an absolute acceptance, even though the condition has been complied with. *Langston v. Corney*, 4 Camp. 176—Gibbs.

If the holder consents to take a bill payable at a particular place, the plaintiff must aver performance of this, like other conditions precedent, by showing a presentment to the acceptor at the place specified; whether the action be against the drawer or acceptor. *Gammon v. Schmoll*, 5 Taunt. 344; 1 Marsh. 80.

In a count against the acceptor of a bill, stated to be "accepted payable at S. & Co.'s," it is sufficient to allege "generally" a request by the plaintiff to the defendant to pay the bill, without alleging that it was presented for payment "at the particular place." *Fenton v. Goundry*, 13 East, 459; 2 Camp. 656. And see *Exon v. Russell*, 4 M. & S. 505.

And no objection can be taken on demurrer, not assigning at least the cause specially, that after stating the day on which the bill was drawn, which was made payable at a future day, the count alleged that "afterwards, to wit, on the

person deceased, is mere surrogage, and does not require proof. *Agutter v. Moses*, 2 Stark. 499—Abbott.

be accepted payable at the house of certain persons at a particular place, it must also aver that the bill was presented for payment at that place, and not to those persons generally. *Ambrose v. Hopwood*, 2 Taunt. 61.

In a declaration against the acceptor of a bill, accepted payable at a particular place:—Held, not necessary to aver a presentment at such place. *Young v. Rowe*, 5 M. & S. 291.

But this judgment was reversed, and it was held that such averment must be made and proved. *Rowe v. Young* (in error), 2 B. & B. 165; 2 Bligh, 391.

In an action by indorsee against acceptor, the declaration stated in the first count, that payment was demanded at the place where the bill was made payable, without averring that payment was there refused; and, after other counts, the declaration stated in conclusion, that the acceptor had not paid any of the sums in the declaration mentioned. Judgment was entered up generally on the whole declaration, and error brought for want of an averment in the first count of a refusal to pay at the place where the bill was made payable:—Held, to be no error. *Benson v. White*, 4 Dow, 334.

In an action against the drawer of a bill payable to certain persons, accepted at a particular place, so as to make a presentment there essential, an averment of a presentment to those persons generally, without saying "at that place," is insufficient; but an allegation that it was presented to them "according to the tenor and effect of the bill, and the acceptance thereof," was held sufficient. *Huffam v. Ellis*, Bayl. Bills, 333.

A declaration against the maker of a note, payable at a particular place, which avers a presentment at the place, need not aver a refusal at the particular place. *Butterworth v. Le Despencer* (Lord), 3 M. & S. 150.

In declaring on a note payable by instalments, if any one of the days on which an instalment is made payable be incorrectly stated, the variance is fatal. *Wells v. Girling*, 3 Moore, 79; Gow, 21.

Where in an action of assumpsit on a bill of exchange with the usual money counts, the defendant pleads nil debet to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant shall not take advantage of his own mispleading in arrest of judgment. *Harvey v. Richards*, 1 H. Black. 644.

Where the four first counts of a declaration in assumpsit were on bills of exchange, and there were a demurrer and joinder to the first and second, and plea of the general issue to the rest, and a venire, tam ad triandum quam ad inquirendum, et unica taxatio, &c.:—Held, that the plaintiff having produced two bills only, they were not necessarily to be applied to the counts demurred to; but that the plaintiff was entitled to nominal damages on those counts (the defendant having admitted the existence of the bills dr

tion from the principal debtor. *Hall v. Wilcox*, 1 M. & Rob. 58—Tenterden.

An indorsee of a bill or note, taking it under an agreement not to sue the indorser, cannot sue such indorser, though the indorsement be unqualified. *Pike v. Street*, M. & M. 226—Tenterden.

If A. and B., being partners, dissolve their partnership, and in the deed of dissolution it is stipulated that A. shall receive all debts due to the firm, and afterwards C., a debtor of the firm, accept a bill drawn by B. for the amount of the debt due to the firm:—Held, that this stipulation in the deed of dissolution is no defence to an action by B. against C. on this bill of exchange. *King v. Smith*, 4 C. & P. 108—Tenterden.

#### (c) *Declarations and Admissions.*

What is said by a third party at the time of the signing of a promissory note as to the consideration for which it is given, is not evidence against the payee, if he was not present. *Healey v. Jacobs*, 2 C. & P. 616—Garrow.

The declarations of a holder of a bill made whilst it is current, are not admissible against a subsequent holder under an indorsement made before the bill became due. *Smith v. Di Wruitz*, R. & M. 212—Abbott.

In an action by indorsee against acceptor, the declarations of a former holder are evidence, if it can be shown that he was the holder at the time, and was making such declarations against his own interest; but it is otherwise, if he made them after he had given up the possession of the bill. *Pocock v. Billing*, 2 Bing. 269; 9 Moore, 499: 1 C. & P. 230; R. & M. 129.

The declarations of a former holder of a note, payable on demand, made while he was the holder, are not evidence for the defendant in an action by a subsequent holder, unless the note had been presented for payment before such declarations were made. *Barrough v. White*, 2 C. & P. 8—Abbott.

In an action by first indorsee against acceptor, the declarations of the drawer made before indorsement, showing that the acceptor received no value for his acceptance, cannot be admitted in evidence, if the drawer be living at the time of the trial, because in such case he might be called as a witness. *Hedger v. Horton*, 3 C. & P. 179—Gaselee.

The declarations of the drawer are admissible in evidence to show that a bill was obtained by fraud: the plaintiff must, however, be shown to be in some way privy to the fraud. *Peckham v. Potter*, 1 C. & P. 232—Gifford.

Where, in an action by the indorsee of a bill, the defence is that the defendant had settled it in account with the holder when due, and that the plaintiff took it after it became due, what was said

The admission by an indorser of his handwriting, is evidence against the maker. *Madocks v. Hankey*, 2 Esp. 647—Kenyon.

In an action against the payee of a note, who was likewise the indorser:—Held, that his indorsement was an admission of the handwriting of the maker. *Free v. Hawkins*, Holt, 550—Gibbs.

The declarations of an indorser of a bill, made whilst he was holder, are evidence to go to the jury against a holder under an indorsement made before the bill was due: if there be evidence which satisfies the judge that the indorsee is merely an agent to sue for the indorser; and the jury are afterwards to judge, first, of the agency, and then of the effect of the declaration. *Welstead v. Levy*, 1 M. & Rob. 138—Parke.

In an action against the maker of a note, letters of an indorser are not admissible evidence to impeach the indorsee's title, though the indorsement was made after the note was payable. *Clipsam v. O'Brien*, 1 Esp. 10—Kenyon.

In an action on a note, a declaration made by the plaintiff, before he became the holder, is evidence to invalidate the note. *Williams v. —*, 5 M. & R. 121.

In an action by the indorsee against the maker of a note, declarations of the payee (not uttered at the time of making the note) are not evidence to prove that the consideration for the note was money lost at play, unless it be previously shown that the indorsee is identified in interest with the payee, as by having taken the note after it was due, or without any consideration. *Beauchamp v. Parry*, 1 B. & Adol. 89.

#### (d) *Proof of Consideration.*

Indorsement being prima facie evidence of a good consideration, the acceptor, (except in the cases of usury and gaming,) is not entitled to call upon a remote indorser to prove the consideration, unless he is implicated and privy to the transaction. *Wyat v. Bulmer*, 2 Esp. 538—Eyre.

Semble, that, as between immediate parties, there is no necessity to give notice of disputing the consideration. *Green v. Deakin*, 2 Stark. 247—Ellenborough.

In an action on a bill, the plaintiff cannot be compelled to prove what consideration he gave for it, by a mere notice that he will be required so to do. *Reynolds v. Chettle*, 2 Camp. 596—Ellenborough.

Where notice has been given, the plaintiff must make the proof of consideration part of his case, and not reserve it for the reply. *Whitlock v. Underwood*, 3 D. & R. 356; 2 B. & C. 157; & *P. Delaunev, v. Mitchell*, 1 Stark. 439.

Where notice of an intention to dispute the consideration has been given, and the plaintiff's witnesses have been cross-examined to that point, the plaintiff must give such evidence as he means

to produce in proof of the consideration, in the first instance; and cannot reserve it for the reply. *Spooner v. Gardiner*, R. & M. 86—Best.

In an action by indorser against indorsee, where the defendant proves usury in a previous transfer of the bill, the plaintiff must prove himself a bona fide holder, though he has received no notice of disputing the consideration, (see 58 G. 3, c. 33.) *Wyatt v. Campbell*, M. & M. 80—Tent.

In an action by the indorsee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what consideration he gave for it. *Rees v. Headfort*, (Marquis), 2 Camp. 574—Ellenborough.

A letter written by the indorser is evidence for the defendant, in an action by indorsee against acceptor. *Coster v. Symons*, 1 C. & P. 148—Abbott.

Therefore, where the acceptor had given the holder notice to prove the consideration, letters of the drawer to show that the transaction between him and the holder was fraudulent, were properly received in evidence. *Id.*

Quere, whether, in such case, it was incumbent on the holder to prove the consideration? *Coster v. Merest*, 7 Moore, 87; 3 B. & B. 272.

Quere, whether even if the acceptor proves a total failure of consideration as between him and the drawer, it is incumbent on the indorsee, even after notice, to prove that he gave consideration for a bill? *Mann v. Lent*, 10 B. & C. 877; M. & M. 149.

In an action by holder against one who had indorsed a bill for the accommodation of the drawer, the drawer proved that he had applied to J., stepfather of plaintiff, to get the bill discounted; that J. took the bill away, and returned with 32l. less than the amount of the bill, the discount being 1l. 19s.—Held, not sufficient, without proof that J. was plaintiff's agent, to cast it on plaintiff to prove the consideration he gave for the bill. *Bassett v. Dodgin*, 10 Bing. 40.

S., being indebted to a firm in which he was a partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees indorsed it over, and the indorsee sued the parties who appeared to be makers:—Held, that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees: and that, at least under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration:—Held also, Parke, J., dissentiente,—that in all cases, where, from defect of the consideration, the original payees cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. *Heath v. Sansom*, 2 B. & Adol. 291.

(c) *Proof of Payment.*

Where a note of twenty years' date is unac-

counted for, it is a presumption of payment. *Duffield v. Creed*, 5 Esp. 52—Ellenborough.

Where a promissory note made abroad was overdue more than twenty years, quere, whether a jury is bound to presume payment, notwithstanding the payee resided abroad during all that time? *Du Belloix v. Waterpark* (Lord), 1 D. & R. 16; Bayl. Bills, 281.

If in an action on a bill given for goods sold, it be proved that the bill was fetched away by the plaintiff's servant from the house of a third person after the commencement of the action, and only a short time before the trial, such evidence will not make it necessary for the plaintiff to prove that he, at the time of action brought, was the holder of the bill, and entitled to sue upon it. *Burdon v. Halton*, 4 Bing. 454; 1 M. & P. 223; 3 C. & P. 174.

A bill of exchange was drawn by A. on B., and indorsed to C. The bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it had become due, D. paid the balance to C., the holder, and the latter indorsed the bill, and wrote a receipt on it in general terms:—Held, that the receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to explain it. *Graves v. Key*, 3 B. & Adol. 313.

9. *Witnesses.*

One joint maker of a promissory note is a good witness to prove the signature of the other. *York v. Blott*, 5 M. & S. 71. And see *Mant v. Mainwaring*, 2 Moore, 9.

In an action on a bill against the acceptor, the drawer who has obtained his certificate is a competent witness for the defendant, to prove that the bill had been usuriously discounted. *Ashton v. Longes*, M. & M. 127—Tenterden.

In an action on a note by the indorsee against the indorser, the maker is a competent witness for the plaintiff, on the ground of equal interest, both ways. *Venning v. Shuttleworth*, Bayl. Bills, 422.

In an action against the acceptor of a bill accepted for the accommodation of the drawer, the latter is not a competent witness to prove that the holder discounted the bill on usurious terms. *Hurdwicke v. Blanchard*, Gow, 113—Dallas.

Nor to prove that the holder came by the bill on usurious consideration; because he does not stand indifferently liable to the holder and the acceptor; for the holder can recover against him only the contents of the bill; the acceptor is entitled to recover against him both the amount of the bill, and also all damages he may have sustained, including the costs of the action against himself. *Jones v. Brooke*, 4 Taunt. 464.

In an action by indorsee against acceptor, the latter may call the payee as a witness to prove that the bill was void in its creation. *Jordaine v. Lashbruke*, 7 T. R. 601. And see *Weldon v. Shelly*, 1 T. R. 296, and *Hart v. M'Intosh*, 1 Esp. 298.

tor to prove it paid. *Humphrey v. Mozon*, Peake, 52—Kenyon.

But quære, whether the drawer can be a witness if he has had regular notice of the bill having been dishonoured. *Id.*

In an action by indorsee against acceptor of a bill misrecited in the declaration, the plaintiff may call the drawer to prove money paid to him by the plaintiff on the bill, and that is good evidence against the acceptor on a count for money had and received. *Le Sage v. Johnson*, Forrest, 23.

In an action by indorsee against acceptor, the latter cannot call the indorser as a witness, to prove that the plaintiff had no right to recover upon the bill, having merely received it from the indorser in trust to obtain payment of it from the acceptor on account of the indorser himself. *Buckland v. Tunkard*, 5 T. R. 578; 1 Esp. 85.

An indorser of a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorsee, to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded; and his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment, makes no difference. *Birt v. Kershaw*, 2 East, 458; *S. P. Charrington v. Milner*, Peake, 6.

In an action on a note by indorsee against the drawer, the payee was admitted to be a good witness. *Cooper v. Davies*, 1 Esp. 463—Kenyon.

The indorsee of a bill, in an action against the acceptor, having called a witness to prove the indorsement, who disproved it, was afterwards allowed to call the indorser himself to prove his own indorsement, as, by his proving the handwriting to be his own, he would make himself liable. *Richardson v. Allan*, 2 Stark. 334.

In an action by indorsee against drawer, a prior indorser is a competent witness to prove that the defendant promised to pay the bill after it had become due. *Stevens v. Lynch*, 12 East, 38; 2 Camp. 332.

In an action by the indorsee against the drawer of a bill drawn without consideration, the payee who indorsed it to the plaintiff, in payment of goods, is a competent witness to prove the consideration for the indorsement. *Shuttleworth v. Stephens*, 1 Camp. 408—Ellenborough.

The acceptor of a bill is a good witness to prove that he had no effects in his hands of the drawer's when the bill was drawn. *Staples v. Okines*, 1 Esp. 332—Kenyon.

But a joint acceptor of a bill is not competent to prove a set-off in an action by the holder against the drawer. *Mainwaring v. Mytton*, 1 Stark. 83—Dampier.

C. to get discounted; B. instead of discounting it, holds the bill as a security for the debt of A., contending that A. gave it to him by way of payment of his debt; in an action upon this bill, brought by B. against C., A. is not a competent witness to prove, on the part of the defendant, that he delivered the bill to B. merely to get it discounted, and not as payment, without a release. *Harman v. Lasbrey*, Holt, 390—Gibbs.

In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him. For the defendant, it was stated that the bill was accepted in discharge of a part of a debt due from the acceptor to the drawer; that it was indorsed and delivered to the acceptor, in order that he might get it discounted, and that he delivered it to the plaintiff, upon condition, that if he procured cash for it, he might retain out of it the amount of the debt due to him from the acceptor, but that he never did get cash for the bill.—Held, that the acceptor could not be examined to prove these facts; for, although he was uninterested as to the amount sought to be recovered on the bill, he was interested as to the costs against which he would have to indemnify the defendant if the plaintiff obtained a verdict. *Edmonds v. Lowe*, 8 B. & C. 407; 2 M. & R. 427.

Action by the indorsee against the acceptor of a bill of exchange; the defendant had taken the benefit of the Insolvent Debtors' Act, and had set down the drawer as a creditor in his schedule:—Held, that the drawer, notwithstanding this, was a competent witness for the plaintiff. *Cregley v. Cerner*, 4 C. & P. 21—Tenterden.

#### XV. DEFENCE TO ACTIONS ON.

##### 1. Indulgence, or Bargain for Renewal.

If one be sued on a bill, and it appear that the plaintiff has agreed with a third person, that if he will advance part of the sum for the defendant, the plaintiff will take that in discharge of the whole debt, and such third person so advances it, it is a good defence to the action. *Welby v. Drake*, 1 C. & P. 557—Abbott.

But in an action against the acceptor, an indorsee for value, who had transferred the bill, which was returned to him after it had become due, may recover, although his indorser before the retransfer received satisfaction from the drawer. *Buzzard v. Flecknoe*, 1 Stark. 333—Ellenborough.

Bills, in lieu of which other bills are given, if permitted to remain with the holder, and the latter bills are not paid, may be enforced. *Ex parte Barclay*, 7 Ves. jun. 597.

An action being brought against the acceptor, it was agreed between the parties, that the defen-

dent should pay the costs, renew the bill, and give a warrant of attorney to secure the debt. The defendant gave the warrant of attorney, and renewed the bill, but did not pay the costs:—Held that the plaintiff might bring a fresh action on the first bill, while the second was outstanding in the hands of the indorser. *Norris v. Aylett*, 2 Camp. 329—Ellenborough.

But where the defendant being indebted to the plaintiffs on a bill which was dishonoured, gave another bill, at a longer date, and also a warrant of attorney to confess judgment, in case the second bill should not be paid when due, and agreed to pay the expenses of executing the warrant of attorney; and the second bill was duly honoured, but these expenses were not paid, and the first bill was retained by the plaintiffs:—Held, that they could not sue the defendant on such original bill. *Dillon v. Rimmer*, 7 Moore, 427; 1 Bing. 100.

The defendant being indebted to the plaintiff, gave him a promissory note for 45*l*, which was dishonoured; the latter afterwards agreed to accept 5*s*. in the pound, to be secured by the acceptance of a bill for 11*l*. 5*s*. by the defendant's brother which was accordingly given, but the original note remained in the plaintiff's possession, and was to revive if the acceptance were not honoured. The bill was not paid the day it became due, but on the following morning the defendant tendered 12*l*. to the plaintiff, including its amount and expenses thereon, which the latter refused to accept, and brought an action on the original note:—Held, that he was not entitled to recover. *Soward v. Palmer*, 2 Moore, 274.

An indorsement of a bill, without notice that a prior action is depending thereon, may, notwithstanding the pendency of such action, commence an action against the same defendant. *Columbies v. Slim*, 2 Chit. 637.

If a bill given for a supposed balance of accounts to be thereafter settled on an appointed day, be dishonoured by the acceptor (the defendant,) and afterwards be duly indorsed by the drawer to the plaintiff, the relative situation of debtor and creditor is not created between the drawer and acceptor, and the plaintiff cannot maintain an action on it as indorsee. *Verley v. Saunders*, 2 Chit. 127.

In an action on a note or bill, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed, and payment not demanded when it became due. *Hoare v. Graham*, 3 Camp. 57—Ellenborough.

A. being indebted to C., A. and B. gave their joint and several note for the amount to C.: A. becoming further indebted, and pressed for further security, by a bill of sale (reciting that C. having demanded payment of the debt, A. had requested him to accept a further security,) assigned his household effects to C. as a further security, with a proviso that he should not be turned out of possession of the effects till after three days' notice:—Held, that C.'s remedy on the note was neither suspended nor extinguished by the bill of sale, but that he might sue A. on

the note at any time, notwithstanding the bill of sale. *Thompson v. Young*, 5 D. & R. 259; 3 B. & C. 208.

Defendant drew bills as surety for C. H., who accepted them, and it was provided by a deed to which the plaintiff, the holder as well as the defendant was a party, that he should not sue defendant on the bills till C. H.'s effects should have been sold, and the proceeds applied in discharge of the bills. C. H.'s effects were seized, and sold under a commission of bankruptcy, the trustee, to whom they had been conveyed by the deed in question, having with the knowledge and assent of the defendant, omitted to take possession of them in time:—Held, that the plaintiff was not barred from suing the defendant on the bills. *Lancaster v. Harrison*, 6 Bing. 726; 4 M. & P. 561.

A., by taking and renewing the acceptance of C., the agent of his debtor B., does not discharge B.; unless A. has elected between the acceptance and cash, or B. is misled or prejudiced by the arrangement. *Robinson v. Read*, 4 M. & R. 349.

Where, on a bill becoming due, the holder agrees to receive another bill in renewal of it, his remedy on the first is suspended till the second is dishonoured, as well for expenses incurred by non-payment of the first as for its amount. *Kendrick v. Lomax*, 2 Tyr. 438; 2 C. & J. 405.

## 2. Want, or Insufficiency of Consideration.

*When a Defence.*—The want of consideration in toto or in part cannot be set up as a defence, if the plaintiff or any intermediate party between him and the defendant took the bill or note bona fide and upon a valid consideration. *Morris v. Lee*, Bayl. Bills, 397.

It is not of itself a defence to an action by the indorser of a bill, to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due. *Charles v. Marsden*, 1 Taunt. 224.

Even if that fact appear to have been known to the plaintiff. *Smith v. Knox*, 3 Esp. 46—Eldon.

Although no consideration passes between the payee and drawer, it is not to be considered an accommodation bill as to the latter, if there was a valuable consideration as between the payee and acceptor. *Scott v. Lifford*, 1 Camp. 246; 9 East, 347.

The right of an innocent indorsee for value, to recover upon a note made payable to the payee "or order, with interest, on demand," cannot be impeached, by evidence of declarations made by the payee whilst the note was in his hands, and before indorsement, that it was given to him by the maker without consideration; nor can such a note be treated as over due at the time of indorsement, without proof of actual presentment and dishonour. *Barough v. White*, 6 D. & R. 379; 4 B. & C. 325.

Nor by evidence of a declaration that the bill had been given for the accommodation of the drawer. *Shaw v. Broom*, 4 D. & R. 780.



originally given without consideration, though he has given no notice of disputing the consideration. *Mann v. Lent*, 10 B. & C. 877; M. & M. 240.

A receiver of the rents of an estate, to a share of which a married woman was entitled, having in his hands money due to her, by the direction of the husband accepted a bill on the faith of that fund, drawn by a creditor of the husband for money lent to him. Before the bill became due, the husband and wife gave a joint direction to the receiver to pay over the money to a third person, which he did before the commencement of the action. When the bill became due, the acceptor refused to pay it unless the drawer would indemnify him against the claims of the husband and wife to have the money paid according to their order. An indemnity was given, but the acceptor still refused to pay:—Held, that the drawer could not maintain an action on the bill, as it would only lead to circuity of action, as the acceptor being bound to pay the money according to the order of the husband and wife, might recover it back by suing on the agreement to indemnify. *Carr v. Stephens*, 9 B. & C. 758; 4 M. & R. 590.

**What is a Consideration.**—A partial failure of consideration for a promissory note, constitutes no ground of defence, if the quantum to be deducted on that account is matter not of definite computation, but of unliquidated damages; as where a note was given for the plaintiff's discharging to the defendant an improvement in certain machinery, which turned out to be less beneficial than was anticipated by the parties. *Day v. Nix*, 9 Moore, 159.

It is no defence to an action by the drawer and payee of a bill against the acceptor, that the consideration has partially failed on account of the badness of the quality, and improper package of goods delivered. *Tye v. Gwynne*, 2 Camp. 346—Ellenborough: *S. P. Morgan v. Richardson*, 1 Camp. 40, n.; 7 East, 482; 3 Smith, 487.

Unless it arise from fraud on the part of the plaintiff in the first instance. *Fleming v. Simpson*, 1 Camp. 40, n.—Ellenborough.

In an action on a bill given for the price of goods sold under a warranty, a breach of the warranty is an answer to the plaintiff's demand, if the defendant has tendered back the goods, although the plaintiff did not accept them. *Lewis v. Cosgrave*, 2 Taunt. 2.

But a defendant who has given his note as the stipulated price of a picture, was not allowed to give in evidence the inadequacy of the consideration, with a view to diminish the damages; although he might have done so for the purpose of showing fraud in order to defeat the contract altogether. *Soleman v. Turner*, 1 Stark. 51—Ellenborough.

Where a note expressed to be for value received, was made in favour of an infant aged nine years; and in an action against the executors of the maker, no evidence of consideration being

proven, the note was held to be void, although consideration existed, and that gratitude to the infant's father, or affection to the child, would suffice:—Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient. *Holliday v. Atkinson*, 8 D. & R. 163; 5 B. & C. 501.

Seemingly, that an intention to evade the legacy duty would not have been a good consideration. *Id.*

Where a note payable on demand, with interest until paid, was given in part consideration for the share of a ship bought by the maker from the payee, without observance of the Ships' Registry Acts, and indorsed by the payee first to J. L., who, on presentment and non-payment, struck out his name and returned it, and afterwards to J. G. P. who indorsed it, upwards of two years after its date, with the name obliterated, to the plaintiff, for a full and valuable consideration, without notice:—Held, although the note was originally void for want of consideration, as the sale of the ship was void, yet as the maker had subsequently recognised it, by paying one year's interest, and otherwise, and as there was a presumption that he had received the share of the subsequent earnings of the ship, and that therefore there was a consideration pro tanto, that the plaintiff, notwithstanding he had taken the note without inquiry, was entitled to recover its amount in an action against the maker. *Coscoyne v. Smith, McClellan & Y.* 338.

In an action by the payee against the acceptor of a bill drawn for the balance of purchase money of articles bought at a sale, it is no defence, that two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that act as a rescinding of the contract, but must bring trespass. *Stephens v. Wilkinson*, 2 B. & Adol. 330.

A. procured a banking company to advance 100*l.* on a bill for 300*l.*, A. giving the company his guarantee for the amount so advanced, but having no other interest in the bill:—Held, that A. might recover the whole amount of the bill in an action against the acceptor, and not merely the amount for which he gave his guarantee. *Reid v. Furnival*, 5 C. & P. 499—Lyndhurst. A rule for new trial refused.

A note cannot be considered as made without consideration, if the maker has received a cross acceptance from the payee, and there has been an exchange of securities. *Kent v. Lowe*, 1 Camp. 179, n.—Ellenborough.

In an action by the drawer against the acceptor of bills given for goods supplied, which were to be "of good quality and moderate price," and were estimated at about 400*l.*, and the bills given for that amount, it is no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor has paid more than the real value of the goods on the bills. *Obbard v. Betham, M. & M.* 483—Tenterden.

If A. gives B. without consideration, a note to be negotiated by B. as a security for money, and

claim and demand touching the matters in respect of which the maker's promises were made, this does not so extinguish the consideration of the note, but that the indorsee may still recover against the maker. *Carstairs v. Rolleston*, 5 Taunt. 551; 1 Marsh. 207.

Quære, whether notice that the maker made it as surety only, would have varied the case? *Id.*

Defendant's partner gave plaintiff his note for 2000*l.* as a security for being allowed to overdraw the partnership account. Defendant thereupon gave his partner his note for 1000*l.* payable to order, as a security for his share; the partner indorsed the note to plaintiff, who had advanced 1300*l.* to the partnership; and two years afterwards plaintiff sued defendant on it. It did not appear that plaintiff had given any consideration for the 1000*l.* note; but he had notice of the circumstances under which defendant gave it to his partner.—Held, that there was a sufficient consideration to entitle plaintiff to recover. *Heywood v. Watson*, 4 Bing. 496; 1 M. & P. 268.

A. agreed to execute a lease of premises to B., who was to pay a certain sum for it; B., who was let into possession, accepted a bill for the consideration money drawn on him by A.: it is no defence to an action on the bill by A. against B. that the former refused to execute the lease: but his remedy is on the agreement. *Moggridge v. Jones*, 14 East, 486; 3 Camp. 38.

A warrant was directed to an officer of excise, by the commissioners, commanding him to apprehend a person convicted in several penalties, and take him to prison, to keep him there until the amount of the penalties was paid; the officer, having arrested the party, discharged him on a promissory note for the amount of the penalties, payable at a future day; and the commissioners afterwards approved of his conduct:—Held, that the discharge was a good consideration for the note, and that an action might be maintained thereon. *Pilkington v. Green*, 2 B. P. 151.

Where the plaintiff distrained for rent on premises let to B.; and the defendant, who had purchased the goods distrained from B., accepted a bill of exchange, payable to the landlord, in consideration of his withdrawing the distress:—Held, the plaintiff, knowing that no rent was due at the time of the distress, and having procured acceptance by misrepresenting the fact, could recover on the bill. *Grew v. Bevan*, 3 Stark. Best.

Where the drawer and payee of a bill for 50*l.*, bound to provide for a bill of 70*l.*, indorsed the bill to the holder of the 70*l.* bill, to enable him to take it up:—Held, that it was an absolute security in his hands, in reduction of a bill which he had on the drawer, and that he recover upon it against the acceptor. *Tyler*, 2 Stark. 288—Ellenborough.

An action by payee against makers of a bill appeared that it had been given on account by one of them to buy crops &c., from

the plaintiff, on condition that possession of the premises should be given up to one of the defendants the next morning, but that the plaintiff was to hold the house for three or four weeks, paying one shilling a week rent. There was evidence of a verbal refusal by plaintiff on the next morning to give up possession, but the defendant's cattle were seen on the land on that day, and remained there. Possession of the house was not obtained till three weeks after. The note, when produced, did not appear to have been attested, and there was no evidence how the plaintiff got possession of it:—Held, that as no act was shown to have been done by the plaintiff to keep possession of the land, the jury might rightly conclude that possession had been delivered up according to the condition; and that the misconduct of the bailor of the note in withholding his attestation to it, or not delivering it to the plaintiff, was no defence to the action thereon. *Evans v. Morgan*, 2 Tyr. 396.

### 3. Forgery.

The acceptor is liable, even though the bill be forged. *Smith v. Chester*, 1 T. R. 654.

If a party to a bill, on being asked if it is his handwriting, answer that it is, and will be duly paid, he cannot afterwards set up a defence of forgery, for he has accredited the bill, and induced others to take it. *Leach v. Buchanan*, 4 Esp. 226—Ellenborough.

So, if he have at any time paid other forged bills of the same party, under similar circumstances. *Barber v. Gingell*, 3 Esp. 60—Ken.

If A., the indorsee for value of a bill to which B. the indorser, had forged the acceptance of C., deliver it up to B., on his solicitation, and receive from him, in lieu thereof, a bill accepted by D., without consideration, A. may maintain an action on this bill against D., unless there was an agreement between him and B. to stifle a prosecution for forgery. *Wallace v. Hardacre*, 1 Camp. 45—Ellenborough.

In an action against an acceptor who defends himself on the ground of his acceptance having been forged by A., evidence that A. forged his acceptance to another bill, and absconded on that account is not admissible. *Ballicetti v. Serani*, Peake, 142—Buller: *S. P. Viney v. Barnes*, 1 Esp. 293.

In an action on a bill which the defendant contends is a forgery, other bills of the defendant may be produced to the jury to compare the hand writing. *Allesbrook v. Roach*, Peake, Add. Cas. 27—Kenyon.

The acceptor who pays under a forged indorsement by a person who had found a lost bill is liable to the real payee. *Cheep v. Harley*, 3 T. R. 127—Buller.

If a forged bill be accepted and paid by the drawee, he cannot recover the money back from the indorsee, to whom he paid it. *Price v. Neal*, 3 Burr. 1354; 1 W. Black. 390.

In an action on a bill against the acceptor,

withstanding, a good witness to prove the defendant's handwriting to the acceptance. *Dickinson v. Prentice*, 4 Esp. 32—Kenyon.

If the holder of a bill agree not to sue the acceptor, provided the latter will make an affidavit that the acceptance is a forgery, and such affidavit be accordingly made and sworn, he cannot afterwards bring an action on the bill, though the affidavit be false. *Stevens v. Thacker, Peake*, 187—Kenyon.

#### 4. Illegality of Consideration.

##### (a) When available.

A bill was drawn by a person who was an entire stranger to the acceptor, and to the person for whose benefit it was afterwards accepted: it was made payable to the drawer, and after being indorsed generally by him, was delivered over, before acceptance, to the person who had prevailed on him to draw it; and by that person given to the party for whose benefit it was ultimately accepted. The bill was afterwards accepted by the drawer, and delivered by him to a person to whom he (the acceptor) had lost money at play, and for that consideration. It then got into the hands of other persons who were partners in trade, and was by them indorsed and paid over to the plaintiffs for a valuable consideration, without notice:—Held, to be within the statute 9 Anne, c. 14, s. 1, on the ground of the acceptance being the act which gives to the bill its validity as a negotiable instrument, and completes its perfection; and that the statute includes acceptances (although the words of the statute are "given, granted, drawn, or entered into") of bills drawn without any consideration; and that therefore the plaintiffs could not recover against the acceptor. *Henderson v. Benson*, 8 Price, 281.

Defendant may set up an illegal consideration against an action on a note of hand. *Grinchard v. Roberts*, 1 W. Black. 445.

Where the consideration of a note was the engraving plates upon which assignats were to be forged:—Held, that if the party did not know that they were made with a fraudulent intention, and supposed them to be issued with the authority of government, he might recover on the note. *Strongithorn v. Lukyn*, 1 Esp. 389—Ken.

If part of the consideration only be illegal, the bill is void for the whole. *Robinson v. Bland*, 2 Burr, 1082.

If a bill or note is given, in part upon a legal, and in part upon an illegal consideration, and several bills or notes are afterwards substituted in lieu thereof, the effect of the illegality may be confined to some only of the substituted bills or notes, and the other stand exempt. As where a bill or note is given, as to half, for a gaming debt, and as to the residue for money lent, and two bills or notes of equal amount are afterwards substituted for it, if the giver does any thing which may be considered an election to ascribe the gaming debt to the one, he will be liable

an election to ascribe the gaming debt to the other. *Hubner v. Richardson*, Bayl. Bills, 409.

In an action by the indorsee of a note against the maker, it was ruled that the defendant should not be allowed to go into evidence to show that the original consideration was illegal, unless he could likewise show that the plaintiff was a party to that illegality. *Newby v. Smith*, 2 Esp. 539, n.—Kenyon.

In an action by second indorsee against the acceptor of a bill of exchange, if the person who indorsed it to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due. *Chalmers v. Lamion*, 1 Camp. 353.

But it is no defence in an action by the indorsee against the acceptor, that the latter has been imposed on, in respect of a contract by the drawer on account of which the acceptance was given, and that the plaintiff was privy to such imposition, where the acceptor did not wholly repudiate the contract on discovering the imposition, but still retained possession of premises under such contract, as the consideration had not altogether failed, so as to render the bill utterly void. *Archer v. Bamford*, 3 Stark. 175; 1 C. & P. 64—Abbott.

An indorser of a note, who, at the request of the holder, has put his name upon it, and thereby been obliged to pay the contents to a bona fide holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration. *Seddons v. Stratford, Peake*, 215—Kenyon.

To justify the jury in giving a verdict for the plaintiff, in an action against an insolvent debtor by the indorsee of a bill, accepted by such debtor as a security for a debt due to the indorser, and from which he had been discharged under the Insolvent Debtors' Act, they must be satisfied not only that the plaintiff gave value for the bill, but that he took it bona fide for his own purpose, without any concert with the indorser, and without any knowledge of the defect in the indorser's title. *Northam v. Latouche*, 4 C. & P. 140—Tindal.

A bill which is void at its creation cannot be revived by a subsequent promise. *Cockshott v. Bennett*, 2 T. R. 765.

But otherwise, if only voidable. *Id.* 766.

Where a note, not void, but voidable—as given for what is *malum prohibitum*—is given up in consideration of another note given at a distant day, the illegality of the former note will be no defence to an action on the latter. *Witham v. Lee*, 4 Esp. 264—Ellenborough.

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## 1. NATURE AND VALIDITY.

All bonds are writings obligatory, although the converse of that proposition will not always hold good. *Rez v. Dunnett*, 2 East, P. C. 985; 2 Leach, C. C. 581.

In debt on bond, conditioned for the performance of several things, if one of them be void at common law, yet the bond may be good for the others; as where it was conditioned to pay money, and to do an act which was perhaps simony: Held, that admitting part of the condition to be simoniacal, yet the bond was good for the payment of the money. *Newman v. Newman*, 4 M. & S. 66.

Where the condition of a bond is entire, and the whole unlawful, it is in most cases void; but where it consists of different parts, some of which are lawful, and others not; it is good for so much as is lawful, and void for the rest. *Yale v. Rez* (in error,) 6 Bro. P. C. 31.

Where there is a condition to do one of two things, and one becomes impossible, it is no reason for not performing the other. *Da Costa v. Davis*, 1 B. & P. 242.

A bond conditioned to take possession of the effects of persons dying intestate in a settlement on the coast of Africa, and sell the same, and remit the produce to the African Company in Europe, to be by them delivered to the lawful administrator, was a legal bond. *African Company v. Torraine*, 6 T. R. 588.

A bond is good, with a condition to be forfeited if defendant shall hire C. so as to give him a parish settlement. *Whiting v. Punchard*, 3 Wils. 50.

A bond given to doctor, canon, master, fellows, &c. of Sidney and Sussex College, with a solvendum to the master, &c. is a bond taken in their corporate capacity. *Sidney College v. Davenport*, 1 Wils. 184.

A post obit bond is a security of a doubtful nature. *Lushington v. Waller*, 1 H. Black. 94.

The illegality of the condition of the bond may be shown by the plaintiff in stating the bond itself, with the condition in his declaration; or if he omit to state the condition, it may be shown by the defendant in his plea, and the court will equally take notice of the illegality in either case. *Duvergier v. Fellowes*, 1 Clark. & Fin. 39; 10 B. & C. 826.

## II. CONSTRUCTION AND OPERATION.

1. *Effect of Recitals.*

The extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Pearce v. Summersett*, 4 Taunt. 593.

The recital in the condition of an indemnity bond, professing to state the agreement between the parties does not confine the responsibility of the sureties to the limits therein specified. *Sansom v. Bell*, 2 Camp. 39—Ellenborough.

his employment, and for so long as he should continue to be employed," he would justly account and obey orders, &c.:—Held, that the obligation was confined to the period of twelve months mentioned in the recital. *Liverpool Water-works v. Atkinson, and Same v. Harpley*, 6 East, 507; 2 Smith, 654.

A bond taken in the penal sum of 1000*l.* cannot be reduced to 500*l.* by a recital in the condition that the parties had agreed to execute a bond in the sum of 500*l.* *Ingleby v. Swift*, 10 Bing. 84.

The omission of the word "pounds" may be supplied in a bond acknowledged "in the sum of 7700 of lawful money of Great Britain," conditioned for the payment of several sums, denominated as pounds, shillings and pence, although the sums secured amount to more than the half of 7700*l.* *Coles v. Hulme*, 3 M. & R. 86; 8 B. & C. 563.

Bond by defendant as surety for W. and H., with a condition, reciting that the obligees were bankers, and W. and H. paper manufacturers, and had overdrawn their account with the obligees 4822*l.*, and, in order to enable them to carry on their business, had applied to the obligees to allow them for a time to overdraw such further sums as they should require, so as that the same, together with the 4822*l.* should not exceed in the whole, at any one time, 5000*l.*; which they had agreed to do; and the condition was for the payment by W. and H. and defendant, or any of them, of the sum of 4822*l.*, and also such further sums as the obligees should or might thereafter advance to W. and H. in the course of their business, not exceeding in the whole 5000*l.*:—Held, not to be avoided by the obligees having allowed W. and H. to overdraw to an amount, together with the 4822*l.*, exceeding 5000*l.*, and, therefore, defendant's plea to that effect was ill-pleaded; for the restrictive words in the recital were not to be construed as conditional, that, if the obligees exceeded the amount, the bond should be void. *Parker v. Wise*, 6 M. & S. 239.

An obligor, sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea that the real transaction was fraudulent or unlawful. *Hill v. Manchester and Salford Waterworks*, 2 B. & Adol. 545.

If a bond in its recital refers to a bill of exchange as the principal security, the bond may be construed to be only a collateral security, although it is a specialty, and of a higher nature than the bill, which is only a simple contract debt. *Ireland (Bank) v. Beresford*, 6 Dow, 234.

A bond is given from A., B. and C. to D., reciting, that "A., having received from D. a certain sum of money in the East Indies, and drawn bills of exchange there, payable to D. on a house in England, and that the obligors had agreed with D., if the bills should not be accepted

of the bills, D. is entitled to recover no more than the amount of them, with interest from the time of their becoming due. *Ord v. Churchill*, 1 H. Black. 227.

A mortgagor, with two sureties, entered into a bond to the mortgagee, the condition of which, after reciting that the mortgagor was seised in tail of premises of which he had covenanted to suffer a recovery, to ensure to the use of the mortgagor in fee, subject to the proviso for redemption, was that the bond should be void if the recovery should be suffered, so and in such manner, as that under and by virtue thereof, and of the mortgage deed, the premises should be vested in the plaintiff in fee "according to the true intent and meaning" of the mortgage deed, subject only to the proviso for redemption. The recitals on the mortgage deed stated a seisin in fee by the mortgagor's maternal grandfather in 1795. A deed of settlement and fine in 1795, by his daughter and devisee and her husband to themselves for their lives with power of appointment by the former, which she, in 1809, executed by a devise to her son, the mortgagor, for life, and his sons in tail; and also a conveyance after the wife's death of the husband's life estate to the mortgagor, were proved. In an action on the bond against a surety:—Held, first, that these recitals were sufficient evidence that the maternal grandfather of the mortgagor had seisin, and that the possession had followed the limitations and power of the deed of 1795. Also, that the meaning of the condition was, that such a recovery should be suffered as would vest an absolute estate in fee in the mortgagor. *Edwards v. Brown*, 1 Tyr. 182; 1 C. & J. 307; 3 Y. & J. 423.

## 2. Effect of Memoranda.

A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay, or be liable to pay, on the obligor's account; and, before the execution of the bond, a memorandum was thereon indorsed, that the obligee "hath given an undertaking not to sue upon the bond till after the obligor's death":—Held, that this memorandum was to be taken as part of the condition; and made the bond in effect payable only by the representatives of the obligor after his death. *Burgh v. Preston*, 8 T. R. 483.

A covenant not to sue upon a bond during the life of the obligor; and that if any person to whom the obligee should assign the bond, should recover the principal, the obligee would pay the obligor during his life interest on the amount recovered:—Held, no bar to an action by the assignee of the bond in the name of the obligee. *Morley v. Freer*, 6 Bing. 547; 4 M. & P. 305.

The plaintiff declared in debt on a bond, conditioned for the payment of 1000*l.* The defendant, in his plea, set out a deed poll, which, after reciting that the plaintiff would become entitled, on the decease of the defendant, to 750*l.* in right

of the plaintiff's wife, by virtue of a deed of settlement on her marriage, and that she had given a bond to the plaintiff for 1000*l.* (the bond declared on,) the plaintiff and his wife released the sum of 750*l.*, and the plaintiff covenanted that he would not require payment of the 1000*l.* secured by the bond, nor claim interest for the same during the life of the defendant; and that in case the bond should be assigned by the plaintiff, and the defendant should be required by the assignee to pay the principal, the plaintiff would pay the defendant interest for the same during defendant's life:—Held, that the deed poll did not operate as a defeasance of the bond, and, consequently, that it was no answer to an action by the assignee in the name of the obligee. *Id.*

At the time of executing a bond to secure a sum of money, the obligors procured a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest was regularly paid: the letter was held to be a binding undertaking. *Norton v. Wood*, 1 Russ. & Mylne, 178.

Payments of interest made one or even two days after they became due, are no defeasance of the undertaking, if the grantor accepts them without objection. *Id.*

### 3. Effect of Penalty.

If an instalment secured by bond be not paid on the day, the bond is forfeited, and the penalty is the debt in law. *Judd v. Evans*, 6 T. R. 399; *S. P. Coates v. Hewitt*, 1 Wils. 80; *Talbot v. Hodson*, 2 Marsh. 527; 7 Taunt. 251.

Where there is a bond for payment of rent, the bond is only a security to the amount of the penalty. *White v. Sealey*, 1 Dougl. 49.

Although generally the debt is the substance and real demand, and the penalty only the security and form; yet, in a bond given to the trustees of a charity to lend money, the penalty is substance. *Anon. Lofft*. 555.

A bond, whereby the obligor bound himself "in the sum of 20*l.* to be paid yearly," is not like a bond with a penalty which can be forfeited, and so become a debt in law. *Morant v. Gough*, 7 B. & C. 206; 1 M. & R. 41.

In debt on a bond, conditioned for payment of the same sum as the penalty, with interest:—Held, that the jury might give interest by way of damages for the detention of the debt. *Francis v. Wilson*, R. & M. 105—*Littledale*.

In an action of debt on bond to secure the repayment of money with interest, the plaintiff can only recover to the amount of the penalty, with 1*s.* for the detention of the debt. *Heller v. Ardley*, 3 C. & P. 12—*Tenterden*.

In an action on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond. *McClure v. Dunkin*, 1 East, 436.

Interest was given in equity beyond the penalty of a bond, upon a mortgage for the same debt, though by a surety. *Clarke v. Abingdon (Lord)*, 17 Ves. jun. 106.

No interest will, however, be allowed, beyond

the penalty of a bond, except, under special circumstances. *Clarke v. Seton*, 6 Ves. jun. 411.

A mortgagee had also a bond, on which the interest due exceeded the penalty, the mortgagor conveyed the equity of redemption for the use of his creditors, paying this bond first; nothing beyond the penalty can be claimed. *Lloyd v. Hatchett*, 2 Anst. 525.

Interest on an old bond cannot be allowed in the master's office beyond the penalty. *Tew v. Winterton (Earl)*, 3 Bro. C. C. 489.

The whole penalty shall not be levied on an annuity bond and judgment, but only the arrears then due; and the judgment shall stand as a security for future arrears. *Ogilbey v. Foley*, 2 W. Black. 1111.

Arrears of annuity, secured by bond, are not allowed beyond the penalty. *Mackworth v. Thomas*, 5 Ves. jun. 329.

On a bond to pay interest half-yearly, and the principal in three years, judgment shall be entered on failure of paying interest, but with a stay of execution on discharging it. *Masfon v. Touchet*, 2 W. Black. 706.

When defendant is charged in execution with the penalty of a bond, it may be reduced to the principal and interest. And interest due on a note of hand, for which no damages were given by the verdict, shall not be covered by the penalty. *Amery v. Smalbridge*, 2 W. Black. 763.

In debt on bond, with a condition to account for money to be received, the court will not stay proceedings upon paying the penalty into court, because damages may be recovered beyond that amount. *Lonsdale v. Church*, 2 T. R. 388.

But the court will order satisfaction to be entered on the record in an action on a bond of indemnity, on the defendant's paying the penalty of the bond and the costs of the action. *Wilde v. Clarkson*, 6 T. R. 303. *And see Shutt v. Procter*, 2 Marsh. 226.

Proceedings were stayed in an action on a bond conditioned for the performance of mortgage covenants, on payment of the principal and interest, and costs to be computed and taxed by the master, on stat. 5 & 6 Anne. *Skinner v. Stacey*, 1 Wils. 80.

The defendant may refer it to the prothonotary before judgment, to ascertain what is due for principal and interest on a common money bond. *Bosworth v. Bosworth*, 3 Moore, 590.

The court of Exchequer will not refer it to the master to take an account of what is actually due on a bond, for principal and interest, and costs, after a verdict for the plaintiff, on the bond having been put in suit. *Eastmond v. Holl*, 3 Price, 219.

It was referred to the prothonotary in C. P. in an action of debt on bond, after judgment by default, to tax interest by way of damages, it being optional with the plaintiff to have interest so taxed, or a writ of inquiry. *Holdipp v. Otsey*, 7 T. R. 447.

Judgment by default having been suffered in an action on a bond, the plaintiff entered up

been executed, damages were assessed at £113. 13s. 4d., and costs 40s.; and the plaintiff entered up another judgment for those damages, together with 31l. 6s. 8d. for costs; but afterwards entered a remittitur on the roll for costs:—Held, that the second judgment was erroneous. *Hankin v. Broomhead* (in error,) 3 B. & P. 607.

Where an obligor has, by vexatious proceedings, delayed the obligee from recovering on his bond, a court of equity will decree payment of the full amount of principal and interest, although it exceeds the penalty of the bond. *Grant v. Grant*, 3 Sim. 341; 3 Russ. 598.

Obligees in a bond held entitled to be paid out of the assets of a deceased obligor a sum exceeding the penalty of the bond. *Jendwine v. Agate*, 3 Sim. 129.

If a man agree not to do an act, and enter into a bond, with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such an act; but the court will relieve by injunction, until the actual damage sustained shall be ascertained by an issue. *Hardy v. Martin*, 1 Cox, 26.

#### 4. When joint or several.

A. executed a bond as the joint and several bond of himself and B., and signed it "A. and B." having no authority from B. so to do:—Held, that the bond was good, as the several bond of A. *Elliott v. Davis*, 2 B. & P. 338.

A surety bond by three obligors, for the payment of 1000*l.*, worded, "for which payment to be well and faithfully paid, we bind ourselves, and each of us for himself, for the whole and entire sum of 1000*l.* each," is a several, and not a joint and several bond, and may be enforced against the obligors severally; and the tearing off the seal of one of the obligors of such a bond by the obligee, does not avoid it as against the others; and if the obligor, against whom it is enforced, is entitled to contribution, it seems his remedy is in equity only. *Collins v. Prosser*, 3 D. & R. 112; 1 B. & C. 682. *And see Same v. Everett*, 3 D. & R. 122.

If the obligee in a joint and several bond make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors. *Cheetam v. Ward*, 2 B. & P. 630.

Though the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed may be pleaded in bar, he may still sue the other obligor. *Dean v. Newhall*, 8 T. R. 168.

If the plaintiff show on his declaration in debt on bond against two, that the bond is executed by three it is good matter of plea in abatement, or in arrest of judgment, but is no ground of nonsuit on the plea of non est factum. *Smith v. Tanner*, 9 Taunt. 254.

If in an action on a bond against one, it be declared on as the joint bond of him and two others, it is no variance that the bond is likewise

deed at the trial, it is only necessary to prove that the bond was executed by the defendant. *Id.*

Where a man executes a bond, meaning it to be the joint bond of himself and another, who does not execute, it is the several bond of the former, but he may have it delivered up as contrary to intention. *Underhill v. Horwood*, 10 Ves. jun. 225.

#### 5. Day of Payment.

A bond, dated on a day certain, in a penal sum, conditioned for payment of a lesser sum generally, without naming any day of payment, is payable on the day of the date; and upon any action brought upon it, the court will refer it to the master, to compute principal, interest, and costs thereon; and on payment of the same, stay the proceedings, by virtue of the 4 Anne, c. 16, s. 13. *Parquhar v. Morris*, 7 T. R. 124.

A bond conditioned to pay money by instalments, is forfeited by making any one default. *Coates v. Hewitt*, 1 Wils. 80; *S. P. Judd v. Eeans*, 6 T. R. 399.

Bond, conditioned for the payment of a principal sum in the year 1820, with interest in the meantime half-yearly: an action having been brought for the penalty upon a breach of the condition in non-payment of half a year's interest on the 29th of September, 1817, the court refused to stay the proceedings before judgment on payment of the interest due, and costs, although the non-payment of the interest was owing to a slip. *Van Sanden v. —*, 1 B. & A. 214.

Proceedings on bond for payment of money by instalments, and on default to stand in force for the whole sum due shall not be staid upon payment of the instalments in arrear. *Gouldett v. Hariforth*, 2 W. Black. 958.

If default be made in payment of the interest on a bond, the principal whereof is not yet due, the court of C. P. will not stay the proceedings on payment of the interest and costs: but semble, that they would restrain the execution to the interest and costs. *Tighe v. Crafter*, 2 Taunt. 387.

A bond conditioned to pay costs on the 29th of November, in Cumberland, when taxed by the Master of K. B., is forfeited by non-payment, though in fact the costs were only taxed on the 25th of November, of which the defendant had no notice on or before the 29th; for the defendant might have had them taxed before, and thus have known their amount in time. *Bigland v. Skelton*, 12 East, 436.

An apportionment of interest upon a bond, according to the general rule, as accruing *de die in diem*, is not prevented by the condition, reserving it by equal half-yearly payments. *Banner v. Lower*, 13 Ves. jun. 135.

#### 2. What a Forfeiture generally.

A bond conditioned for the payment of a sum of money to such person as A. B. shall by will

Where a bill of exchange was drawn by A. in England on B. at Bombay, payable sixty days after sight, and a bond given to C. (the indorsee) with condition to be void if the bill should be paid at Bombay, or paid here by the obligor within thirty days after the bill should be produced to him after being sent back here protested for non-payment; and before the bill arrived at Bombay, the drawee had left that place, and his agent refused to accept it when it did arrive: it was held, that the bond was not forfeited by the obligor refusing to accept the bill thirty days after it was returned to England protested for non-acceptance. *Campbell v. French* (in error,) 6 T. R. 200; 2 H. Black. 163.

The condition of a bond being "to render a fair, just, and perfect account, in writing, of all sums received:" if the obligor neglect to pay over such sums, he is guilty of a breach of the condition. *Bache v. Proctor*, 1 Dougl. 382.

It is not a breach of the bond of a broker in the city of London, to act as a broker concurrently with another. *London (Mayor, &c.) v. Brandon*, 2 Stark. 14; Holt, 438—Ellenborough.

Where a man bound himself in a bond, to leave his children 200*l.* jointly, and left four children, and gave the eldest an estate in land, and the other three 50*l.* apiece at 21:—Held, not a performance of the condition. *Taylor v. Bird*, 1 Wils. 280.

Where, in the condition of a bond, it was recited, that the plaintiffs were shareholders in a public water company, on which shares 30*l.* per cent. had been paid by instalments, and that the plaintiffs had agreed to pay up the remaining instalments forthwith; that three persons therein named had agreed to purchase these shares at a certain sum, to be secured by the joint bond of one of such persons and the defendant; and the condition of the bond was, that he and the defendant should, on a given day, pay the plaintiffs the amount of the shares, together with interest hereon from the time of the advance or payment hereof by the plaintiffs: the latter being also shareholders and treasurers of a stone-pipe company, which was indebted to them in 12,000*l.*, revalued on the water company to purchase the pipes of their company; and to effect payment for them, the plaintiffs, without any calls having been made, entered up in their books as paid, the remaining 70*l.* per cent. due on the water company's shares; and having made this entry, paid the pipe company, deducting, and transferring to their own account, a sufficient sum to discharge the debts due from the pipe company to themselves: in an action of debt against the defendant the sum claimed in respect of the sale of the shares of the water company, the jury having rendered a verdict for the plaintiffs:—Held, that they had advanced or paid the money for the shares, within the terms of the condition of the bond. *Everett v. Eyre*, 2 Bing. 166; 9 Moore, 326.

sum of one pounds be paid," the word hundred having been omitted in the second place where it occurred in the condition:—Held, that the insertion of it by a stranger was an immaterial alteration, and did not avoid the instrument. *Waugh v. Russell*, 1 Marsh. 214, 311; 5 Taunt. 707.

Though this alteration did not avoid the instrument, yet it made such a variance between the aver and the condition, as precluded the plaintiff from recovering. *Id.*

In debt, on a joint and several bond, the obligees declared against one of three obligors, and set out the condition in the declaration to be for payment by the defendant, C. and D., any or either of them. Plea: non est factum. On the production of the bond it was conditioned for payment by the defendant, C. and E.; and it appeared, that, after its execution by the defendant, the name of E. was substituted for that of D., at the request of the party to whom the money for which the bond was given was advanced, and with the assent of the plaintiffs (the obligees,) but without the knowledge or assent of the defendant:—Held, that this was a fatal variance, and avoided the bond as against the defendant, although he afterwards assented to the alteration, and paid some instalments due on the bond. *Adams v. Bateson*, 3 M. & P. 339; 6 Bing. 110.

### 8. Stamp.

By 55 Geo. 3, c. 184, sched. 1, tit. "Bond," bonds given as a security for the payment of any definite and certain sums of money are to have the following stamps:—

|   | £  | s. | d. |
|---|----|----|----|
| If not exceeding 50 <i>l.</i> . . . . .     | 1  | 0  | 0  |
| If above 50 and not exceeding 100 . . . . . | 1  | 10 | 0  |
| 100 . . . . .                               | 2  | 0  | 0  |
| 200 . . . . .                               | 3  | 0  | 0  |
| 300 . . . . .                               | 5  | 0  | 0  |
| 500 . . . . .                               | 10 | 0  | 0  |
| 1000 . . . . .                              | 20 | 0  | 0  |
| 2000 . . . . .                              | 30 | 0  | 0  |
| 3000 . . . . .                              | 40 | 0  | 0  |
| 4000 . . . . .                              | 50 | 0  | 0  |
| 5000 . . . . .                              | 10 | 0  | 0  |
| 10,000 . . . . .                            | 15 | 0  | 0  |
| 15,000 . . . . .                            | 20 | 0  | 0  |
| 20,000 . . . . .                            | 25 | 0  | 0  |

Bonds given as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, where the money secured, or to be ultimately recoverable, shall be uncertain and without any limit. 25 0 0

Bonds not otherwise charged, . . . 1 15 0

Any bond for securing money already advanced, and to be in future advanced on account



current, (although the obligation be under a penalty in a sum certain, however less than 20,000*l.*) could not be received in evidence, unless it bore a 20*l.* stamp, being held, notwithstanding the penalty, to be a bond for the security of money which may become due and payable on an account current, together with sums already advanced, where the total amount of the money secured, or to be ultimately recoverable thereupon, was uncertain and without limit in the words of the 48 Geo. 3, c. 149. Those words are to be construed as applying to the effect of the condition of the bond, without regard to the amount of the penalty, which is not to be considered as limiting the extent of a security where such bond is given to secure the payment of a final balance on account current. *Scott v. Allopp*, 2 Price, 20.

A bond to secure the damages to be recovered upon a new trial, and the costs of the action, in the event of the result of a second action proving similar to that of the first action, was properly stamped with a 35*s.* stamp. *Lopes v. De Tastet*, 8 Taunt. 712.

A bond for securing certain conditions to be performed by the vendor of a house required a 20*s.* stamp only. *Hughes v. King*, 1 Stark. 118—Ellenborough.

A bond conditioned for the payment, by quarterly payments, of an annual rent, was within the 48 Geo. 3, c. 149, sched. part 1, which imposed a duty on bonds given as a security for the payment of any definite and certain sum of money, and required a stamp accordingly. *Attree v. Ancomb*, 2 M. & S. 88. *And see Mounsey v. Stephenson*, 7 B. & C. 403.

A bond conditioned for the production of a box, containing the subscriptions of a friendly society, was within the exemption in 33 Geo. 3, c. 54, s. 4, and need not be stamped. *Carter v. Bond*, 4 Esp. 253—Ellenborough.

A bond conditioned for the payment of money and interest, and also for the performance of collateral acts, requires only the ad valorem stamp appropriated to the principal sum, where that stamp exceeds the 1*l.* 15*s.* which the collateral matter would require if it stood alone. *Dearden v. Binns*, 1 M. & R. 130.

A bond was conditioned for the payment, on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 5*l.* per cent.:—Held, that a stamp covering the amount of the principal was sufficient. *Dixon v. Robinson*, 1 M. & R. 115; 5 C. & P. 96.

A bond, conditioned to pay 1000*l.* on a day five years from the date, and to pay interest, half-yearly, in the meantime, only requires a stamp for the amount of the principal sum of 1000*l.* *Foreman v. Jeyes*, 5 C. & P. 419—Parke.

A bond was given for 2000*l.*, the condition of which, after reciting that A. B. had opened an account with D. E. F. and G., as bankers, and that the bankers had agreed to discount bills, and pay in advance for A. B. any sum not exceeding 1000*l.* in the whole, was that A. B. and C. should satisfy and pay the bankers all such sums as they

should advance on account of the discount or paying any bills, &c. together with such lawful charges and allowances for advancing and paying such bills as are usually charged by bankers in such cases, and interest:—Held, that this being a bond to secure not only 1000*l.*, but a further sum for the bankers' charges for commission, &c., the stamp of 5*l.* required by the 55 Geo. 3, c. 184, sched. part 1, tit. "Bond given to secure a sum exceeding 500*l.* but not exceeding 1000*l.*," was not sufficient. *Dickson v. Case*, 1 B. & Adol. 343.

A bond was given, conditioned to secure a London banker from the balance arising from paying bills, &c. for a country banker; a stipulation was inserted in the condition, that the whole amount of moneys to be ultimately recoverable should not exceed the sum of 1000*l.*:—Held, that the bond did not require a 25*l.* stamp. *Lloyd v. Heathcote*, 1 C. & M. 336.

A bond conditioned to secure plaintiffs to the extent of 5000*l.*, which was held to guarantee a running account which plaintiffs had with a third person, and not to be discharged by the first payment of 5000*l.*, only requires a 9*l.* stamp and not a 25*l.*, as a security of an unlimited extent, under stat. 55 Geo. 3, c. 184. *Williams v. Rawlinson*, 3 Bing. 71; R. & M. 233. *And see Thompson v. Cooke*, 8 Moore, 588.

An agreement stamp is not necessary to an arbitration bond, containing, besides the usual covenants, an agreement as to the payment of costs. *Waneborough v. Dyer*, 2 Chit. 40.

Where, by a bond, A., as principal, and B., as surety, were jointly and severally bound to pay to the creditors of C., 14*s.* in the pound on the amount of their debts; and by the same bond A. was bound to indemnify B. against all loss by reason of his becoming surety:—Held, that a stamp of 1*l.* 15*s.* was sufficient in amount for this instrument, and that it did not require a second stamp on account of its obligation to indemnify B., the whole being one transaction. *Annamdale v. Pattison*, 9 B. & C. 919.

A bond and a mortgage executed on the same day, for securing the same sum of money, but bearing different dates, require an ad valorem stamp on each instrument. *Wood v. Norton*, 4 M. & R. 673; 9 B. & C. 885.

### III. LIABILITY OF OBLIGOR.

#### 1. Collector's Bonds.

*Taxes.*—Where a collector of revenue has given a bond to the crown, the penalty is a security against all the expenses of process and execution against him. *Rex v. Dean*, 2 Anst. 369.

A bond with one surety only, taken by commissioners of taxes, under the 43 Geo. 3, c. 99, s. 13, is not therefore void. *Peppin v. Cooper*, 2 B. & A. 431.

The office of collector under that act of parliament is an annual office; and therefore, where a bond, after reciting the appointment of H. W. to be collector under the act, was conditioned for

the due collection by H. W. of the rates and duties at all times thereafter:—It was held that the due collection of the rates for one year was a compliance with the condition of the bond. And although it appeared from the condition of the bond that H. W. and G. P. were both appointed collectors, it was held that such bond, being for the due collection by H. W. only, might be put in suit against the surety without first selling the goods of G. P. *Id.*

A bond, whereby the obligor became bound as collector of certain duties assessed under stat. 43 Geo. 3, c. 122, may be put in force against one of the sureties, though he were not apprised of the default of the principal collector in not paying over duties collected by him, nor called upon for an indemnity by the commissioners till after the dismissal from office of such collector. *Nares v. Rowles*, 14 East, 510.

If in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary on the part of the plaintiff to prove exactly what money he received; for if it be proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps to exonerate himself from the residue, the plaintiff will be entitled to recover. *Loeland v. Knight*, 1 M. & R. 597; 3 C. & P. 106.

A bond made by defendant's testator as surety for E., with a condition reciting that E. had been and still was collector of the land tax, and all other taxes and duties imposed by several acts of parliament on the inhabitants of the parish of C., by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by E., from time to time, and at all times thereafter, to the receiver-general of taxes, &c., of all and every sum which he (E.) should from time to time collect and receive from the inhabitants of the parish, for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of parliament, was held to be confined to the current year for which E. was collector at the date of the bond, although it did not appear on the condition that he was only appointed for a year, it being shown by the defendant's plea, that the said office of collector was an annual office, and held as such by E. at the date of the bond, although by the replication it appeared that E. held the office not only for that year, but from thence to the time of exhibiting plaintiff's bill. *Hassell v. Long*, 2 M. & S. 363. *And see Curling v. Chalkden*, 3 M. & S. 502.

The 43 Geo. 3, c. 99, s. 13, enacts, that the collectors shall give security to the commissioners for duly paying such monies as shall come to their hands, and for duly demanding the sums assessed, and for duly enforcing the act against defaulters; and by the land tax act, 38 Geo. 3, c. 5, s. 21, the collectors are required to give security to the commissioners for duly paying to the receiver-general the sums collected by them. The defendant was sued on a bond which con-

tained those conditions, and also a condition for accounting and paying to the commissioners:—Held, that this latter condition might be rejected as surplusage, and did not avoid the bond. *Collins v. Gwynne*, 7 Bing. 423; 5 M. & P. 276.

By s. 13, the district collectors of assessed taxes are required to give security to the commissioners in a sum "equal to the amount of the whole duty assessed and to be collected in each district;" and by the general stamp act, 55 Geo. 3, c. 184, sched. part 1, title "Bond," bonds given by collectors of assessed taxes and their sureties, for the due payment of monies collected by them, are exempted from stamp duties:—Held, that the direction of the 43 Geo. 3, c. 99, s. 13, was virtually complied with by a security given in such sum as was large enough to include, though it exceeded, the exact amount of duties to be collected for the district; and therefore that such bond was within the above exemption in the stamp act;—Held, also, that such bond was properly given "to the commissioners;" and need not be "to his majesty, his heirs, and successors." *Collins v. Gwynne*, 2 M. & Scott, 640; 9 Bing. 544.

The 30th section of the 43 Geo. 3, c. 99, empowers and requires the commissioners of assessed taxes to call before them the collector, and to examine him upon oath, and assure themselves of the sums paid to him as such collector, and to make such order therein for the payment of the same to the receiver-general, as they shall judge necessary:—Held, that an omission on the part of the commissioners to comply with this direction of the statute, affords no answer to an action against a surety on the collector's bond. *Id.*

The 13th section of the 43 Geo. 3, c. 99, contains a proviso, "that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector or collectors, in pursuance and by virtue of the directions and powers given to the respective commissioners by the act:—Held, that the sale of the collector's lands and goods can only form a condition precedent to the right to put the bond in suit against a surety, where the existence of such property of the collector is known to the commissioners at the time of commencing the action. *Id.*

Payment by the collector to the receiver-general of monies received by him to the account of a different year from that, for the service of which they were collected, in order to make up deficiencies in a preceding year's account, is a breach of the condition of the bond for duly paying over the sums collected. *Id.*

To a declaration upon a bond given by a collector of assessed taxes and his sureties, the defendant, a surety, pleaded pleas, showing that the commissioners and receiver-general had not taken steps to enforce payment from the collector, as directed by the acts relating to the assessed taxes:—Held, on general demurrer, that these pleas were bad. *Wilks v. Heeley*, 1 C. & M. 249.

A plea that the commissioners have not seized the lands, &c. of the collector, must show that

**Rates.**—The condition of a bond given to commissioners of sewers by a collector of rates, was, that the collector should at all times render a faithful account to the commissioners for the time being of all such sums of money as had already been collected or received, or which thereafter should be collected or received by him, by virtue of any rates for and on account of such commissioners, and should pay to the commissioners for the time being all monies already received, or which should thereafter be received by him:—Held, that the collector was bound to account for and pay to the commissioners for the time being, sums of money collected and received by him, by virtue of a rate made by commissioners acting under a commission, which expired before the execution of the bond. *Saunders v. Taylor*, 9 B. & C. 35.

Where a bond was conditioned that a collector of church and poor's rates should produce a faithful account to the obligees or their successors, for monies which might be received by him, or come to his hands, pursuant to, and in execution of, his said office of collector:—Held, that the obligor was not answerable for monies received by him on account of any year subsequently to that in which the obligees were in office. *Leadley v. Evans*, 2 Bing. 32; 9 Moore, 102.

A, B, and C. entered into a bond as sureties for D. and E., the condition of which bond recited that D. was on such a day appointed collector of the church rate of the parish of St. S. S., by virtue of which office he was empowered to collect and receive all such monies as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for D.'s duly accounting for all monies collected or received by him on account of the above rate, as also on all and every other rate or rates thereafter to be made and collected by him the said D.:—Held, that the sureties were only answerable for D. in that single appointment, and not on his appointment in the ensuing year. *St. Saviour's, Southwark v. Bostock*, 2 N. R. 175.

Debt on bond made by C. and his sureties, with a condition reciting statute 27 Geo. 2, c. 38, and that C. (four years before the date of the bond) was appointed by the churchwardens and parishioners of D., in pursuance of the statute, collector of the poor rates to be levied and raised in the parish, and conditioned that C. should account as often as required, for all monies so collected and received by him, by virtue of the act, &c. Breach, for not accounting for monies collected and received since the making of the bond, &c.: plea, that C. accounted for all the monies collected and received by him before the making of the bond; secondly, that the office of collector is an annual office, and that C. accounted for all the monies collected and received by him within the current year of office in which the bond

pointment is prospective, to collect future rates and not retrospective only, and the condition is in the words of the statute without any restraining words; and it is not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appears by the statute not to be an annual office, though concerning rates which are raised in the course of a year. *Curling v. Chalkden*, 3 M. & S. 502.

The bond given by the county treasurer to the clerk of the peace, under the 12 Geo. 2, c. 29, extends to duties imposed on county treasurers by subsequent statutes. *Farr v. Hollis*, 4 M. & R. 230.

A breach of the bond given by county treasurers to the clerk of the peace, may be assigned that the defendant, as treasurer, received a certain sum of money, and omitted to account for it upon being required by the justices at sessions so to do, without adding that he was required to account by an order of justices. *Id.*

## 2. Bonds respecting Marriage.

A bond, conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. And if the marriage be pleaded in bar to an action of debt on the bond against the heir of the obligor, a replication stating the purposes for which the bond was made will be good, for they are consistent with the bond and condition. *Milbourn v. Ewert*, 5 T. R. 381.

A bond given by a father on the marriage of his daughter, was conditioned for payment of interest of a certain sum to the husband or his executors, during the obligor's life; and also for payment of the principal to the husband or his executors, within a limited time after the obligor's death, if any of the issue of the marriage should be living at that time; there were children of the marriage who all died before the obligor, leaving grandchildren; the grandchildren were deemed to be issue of the marriage within the meaning of the condition, and consequently the husband's executors were entitled to recover on the bond. *Haydon v. Wilshere*, 3 T. R. 372.

If, in a bond made in contemplation of marriage, the obligor agree to settle all lands and hereditaments of which he should be seised during his life upon his intended wife and the issue of the marriage, in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for his intended wife in case she should survive him:—Held, that such obligor having survived his wife, by whom he had issue, and married another by whom he had also issue, would not commit a breach of the condition, if he did not make a settlement of property acquired during the second marriage upon the issue of the first. *Freble v. Baghurst*, 1 Moore, 258; 7 Taunt. 538.

A woman on her marriage with a copyholder

of a manor, where the widows of husbands dying seised are entitled to their free-bench, gave a bond that the son of her intended husband, by a former wife, should have possession of part of the copyhold estate after the death of the husband, on condition of his repairing the part of the house reserved for her:—Held, to be a valid bond. *Res v. Lopen*, 2 T. R. 580.

### 3. Bonds given by Members of Parliament.

Where a member of parliament had given a bond with two sureties, pursuant to 4 Geo. 3, c. 33, and before trial became bankrupt, the court of King's Bench would not order such bond to be cancelled. *Hunter v. Campbell*, 3 B. & A. 273; 1 Chit. 731.

Where a bond was given under 4 Geo. 3, c. 33, s. 1, by a member of parliament, being a trader; and after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given:—Held, that the bankruptcy and certificate were no discharge to the bond. *Campbell v. Jameson* (in error), 8 Moore, 281; 1 Bing. 390; 5 B. & A. 250; 12 Price, 341.

Such a bond must be taken as being intended to stand instead of, and be considered as analogous with, the ordinary bail-bond to the action in common cases of arrest for debt. *Id.*

### 4. Indemnity Bond.

In case of an ordinary money bond, there is no distinction, upon the face of it, between principal and surety. Secus, in the case of an indemnity bond, where the surety expressly stipulates for the act of his principal. *Antrobus v. Davidson*, 3 Mer. 578.

The obligee of an indemnity bond, upon being damaged, has an immediate right to be reimbursed. *Challoner v. Walker*, 1 Burr. 574.

For, one who agrees to indemnify and save others harmless against a certain engagement, is bound to secure them from incurring any expense, as it runs on at the time, which falls upon them by virtue of that engagement. *Sparkes v. Martindale*, 8 East, 593.

Under a bond of indemnity given by A., that B., who was appointed the general agent of C., the receiver of his rents, and the manager of his estates, should pay over to C. all rents which he should receive, as also the increase and improvements thereof upon any new contracts or renewals of leases; A. is answerable for all fines received by B. on renewing the leases, which were not paid over by him. *Irish Society v. Needham*, 1 T. R. 482.

The condition of a bond, which recited a purchase from W. by the plaintiffs of lands, was to save them and the lands harmless from all manner of mortgages, judgments, extents, executions, and other incumbrances, had and obtained, or thereafter to be had and obtained, by T. T., or any other person; and it was held to bind the obligor against the wrongful entry of T. T., being particular against the acts of a particular person. *Nash v. Palmer*, 5 M. & S. 374.

X. became bound as a surety with Y. to A. on

the 10th August 1778, in a bond conditioned for payment in six months: on the 1st March, 1780, he became bound with Y. to B. conditioned for payment in six months: on the 4th March, 1780, Y. became bound to X. conditioned for payment of the two former bonds, and also to indemnify X. against those two bonds: the money secured by the second bond not being paid on the day when it became due: it was held that the last bond was thereby forfeited, though X. was not called on to pay the money in the second bond until afterwards. *Hodgson v. Bell*, 7 T. R. 97.

A. binds himself under a penalty to indemnify B. against his obligation to C., if the money be not paid before a certain day. B., in an action on the bond for not indemnifying, is entitled to recover the amount of the penalty of the bond. *Wood v. Wade*, 2 Stark. 167—Ellenborough.

A. engages to indemnify B. against a debt due from A. and B. to C. of 50*l.*; they, in fact, owe 74*l.*, for which B. is arrested. A. is liable to B. on his engagement to indemnify him. *Hancock v. Clay*, 2 Stark. 100—Ellenborough.

A bond conditioned to save A. harmless from all actions, legal proceedings, and costs, &c., which might be the consequence of A.'s delivering over to the defendant a bill of exchange, part of the proceeds of which a third person was entitled to, is forfeited by a payment over by A. to such third person of his share of the proceeds upon his demanding the same, without his bringing any action: although A. gave no notice of the payment to the defendant. *Ker v. Mitchell*, 2 Chit. 487.

Where there are several names composing a firm, but part are nominal only and not interested in the profits, and in a declaration on a bond of indemnity to secure money advanced to a third person, the breach states the money to be paid by the partners only who are interested in the profits, it is good, though the money was paid on bills drawn on the firm composed of all the partners. *Harrison v. Fitzhenry*, 3 Esp. 238—Lo Blanc.

Several owners of different ships having entered into a bond to a trustee, binding themselves and their assigns to indemnify each other to a certain amount, if any of their ships should be lost; and one of them having sold his ship, and she being afterwards lost, the others are not liable under the bond, unless the vendor has sold (together with the ship) his interest in the agreement of indemnity. *Ayres v. Wilson*, 1 Dougl. 385.

B. being hired as a clerk to A. & Co., but not for any definite period, C. and D. joined in a bond to secure his duly accounting for his assets. C. died, and his executrix gave a written notice to A. & Co., that she would no longer remain surety; A. & Co. communicated this notice to B., and required and obtained from him the notice of another surety; D. died, and also the new surety, and, four years and a half after the death of C., B. died, when deficiencies were found in his accounts, subsequent to the notice:—Held, that the executrix of C. had no equity to restrain A. & Co. from proceeding at law on the bond. *Gor-*

to C., A. gave B. a bond conditioned to pay the annuity to C., and to indemnify B. from any claims of C.:—Held, that this was not a mere indemnity bond, and that B. therefore might put it in suit, as soon as A. made default in payment of the annuity, without proving that he had actually been damaged. *Perring v. Foy*, 2 M. & R. 181.

Two ladies entrusted much of the management of their affairs to A., who was not a professional person. In the course of business A. became bound with them in a bond for 10,000*l.* given on their account; on the same day they executed a bond to A. for 12,000*l.* The survivor of the two ladies afterwards, by her will, left a legacy of 2000*l.* to A. The bond for 12,000*l.* was on the face of it a simple money bond:—Held, that it must be taken to be a simple money bond, unless impeached by evidence which showed that it was partly for indemnity; and that the burden of proving it to be an indemnity bond lay upon the party impeaching the bond. *Nicol v. Vaughan*, 1 Clark & Fin. 49.

#### 5. Bonds to the Crown.

The statute 33 Hen. 8, c. 39, says that all obligations and specialties made to the king, or his heirs, shall be made payable by these words: *Solvend. eidem domino Regi hæc. vel executoribus.* But a bond taken to the king, his heirs and successors, was held to be good; these words in the statute being only directory. *Yale v. Rex* (in error) 6 Bro. P. C. 30.

The bonds given by masters of vessels, under 26 Geo. 3, c. 40, are continuing bonds, and remain in force as long as the same person is master of the same ship, but not when he becomes master of any other vessel. *Rex v. M'Leod*, 3 Price, 203.

It is not necessary, therefore, that a fresh bond should be given on every voyage made by the vessel. *Id.*

A bond to the crown, though not forfeited, is sufficient to entitle the obligor to an extent in aid. *Rex v. Mainwaring*, 1 Price, 202.

If an auctioneer's bond to the crown under 19 Geo. 3, c. 56, s. 7, be forfeited, the penalty is due, and is not merely a security to compel an account. *Rex v. Christie*, 2 Anst. 586.

Plea to scire facias for breach of the condition of the usual bond given not to reland, where the merchant claims drawbacks on goods intended for exportation, that defendant was prevented from shipping and exporting accordingly, in consequence of a seizure of part of the goods by revenue officers: replication, that the glass had not been regularly so shipped, nor intended so to be, nor agreed in quantity with the notice given; imputing also a charge of fraud in attempting to obtain allowance of the drawbacks for a larger quantity than was actually shipped, and alleging that the glass was lawfully seized for having a certain quantity of earthenware

#### 6. On Change or Death of Parties.

A surety bond for the faithful service of J. B. to a sole trader, does not extend to a subsequent partnership. *Wright v. Russell*, 2 W. Black. 934; 3 Wils. 530.

A bond with condition that a clerk shall serve faithfully and account for all money, &c. to the obligee and his executors, does not make the obligor liable for money received by the clerk in the service of the executors of such obligee, who continue the business and retain him in the same employment. *Barker v. Parker*, 1 T. R. 287.

If A. become bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, and C. afterwards with B.'s knowledge, takes D. as his partner; the guarantee does not extend to sums of money received by C. for B.'s use, after the formation of the partnership. *Bellairs v. Elsworth*, 3 Camp. 53—Ellenborough.

A bond given to trustees to secure the faithful services of a clerk to the Globe Insurance Company, who were no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf v. Bruin*, 12 East, 406; 2 Camp. 422.

A surety who is bound for a clerk in the employment of the obligors, is not discharged from the obligation of his bond, by the obligor's having taken into the firm a new partner. *Bercley v. Lucas*, 1 T. R. 292, n.; 3 Dougl. 321.

Where a bond by A., reciting that B. intended to open a banking account with C., D., and E. as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the banking house of C., D., and E.:—Held, that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the old debt incurred in C.'s life, A. was wholly discharged from his obligation. *Strong v. Lee*, 3 East, 484.

Where C. became surety for such sums as should be advanced to meet bills drawn by A. and B. as partners, or either of them:—Held, that it did not extend to bills drawn by B. after the death of A. *Simpson v. Cooke*, 8 Moore, 586; 1 Bing. 452.

Therefore, where the defendant, as surety, entered into a bond, which, after reciting that his principals, A. B. and C. D., were bankers at Sunderland, was conditioned for securing such sum or sums as should be advanced to meet bills of exchange drawn by A. B. and C. D., or either of them, on the plaintiffs, (the obligees, who were bankers in London :) it was held, that the bond did not extend beyond the continuance of the partnership between A. B. and C. D.; and consequently that the surety was not liable for the amount of bills drawn by C. D. after the death of A. B.; and also that remittances, made by the survivor after the death, must be appropriated, in the first place, in liquidation of the partnership balance then due, there being no balance struck, or rest made, in the accounts in the books of the obligees, and such remittances having been made on the general account, without any specific mode of application. *Id.*

An action may be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed. *Moller v. Lambert*, 2 Camp. 548—Mansfield.

A bond, conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity of bankers, will not extend to sums advanced, after the decease of one of the five, by the four survivors, the four then acting as bankers. *Weston v. Barton*, 4 Taunt. 673.

A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor: one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm: advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account, and the balance due at the time of the partner's death is considerably reduced; and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond:—Held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid. *Bodenham v. Purchas*, 2 B. & A. 39.

Quere, whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as payment. *Id.*

A bond was given to A., B., C., &c. payable to

them and their successors, as the governors of the society of musicians, conditioned to secure J. H.'s faithfully accounting with them and their successors, governors, &c. as their collector; afterwards the society was incorporated by letters-patent, at which time J. H. had duly accounted for all monies collected by him; but after the incorporation received money for which he did not account:—Held, that the obligor of the bond was not liable for such default of J. H. in an action on the bond. *Dance v. Girdler*, 1 N. R. 34.

The condition of a bond, after reciting that A., B. & C. had filed a bill in equity against D. and E., was, that the obligee would pay all such costs as the court of Chancery should award to the defendants on the hearing of the cause:—Held, that the death of E., before any costs were awarded, could not be pleaded in discharge of the bond. *Kipling v. Turner*, 5 B. & A. 261.

### 7. Discharge by Payment.

Where the obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond, as solvit post diem is a good plea. *Dixon v. Parkes*, 1 Esp. 110—Kenyon. *S. P. sed quare*, *Hellicr v. Franklin*, 1 Stark. 291—Ellenborough.

A payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot, without some circumstances to show that it was intended to be made in discharge of the bond, be so applied in favour of a surety of the obligor, in an action upon the bond, under the plea of payment. *Plemer v. Long*, 1 Stark. 153—Ellenborough.

A. gave B. a bond to secure an annuity, and before any payment became due, A. lent B. a sum of money, on which it was agreed that B. should retain the payments of the annuity as they became due, till that sum was discharged: the agreement to retain was held a good plea to an action on the bond, such agreement and retainer being equivalent to a plea of solvit ad diem. *Sturdy v. Arnaud*, 3 T. R. 599.

A specialty security is not waived by a promissory note, taken for the balance of the account of interest. *Curtis v. Rush*, 2 Ves. & B. 416.

### 8. Limitation and Presumption of Payment.

By 3 & 4 Will. 4, c. 42, s. 3, all actions on bonds are to be brought within ten years after the end of the session of 1833, or within twenty years after the cause of action accrued: provided, that infants, married women, lunatics, and persons beyond the seas, may bring actions beyond that time, so that they proceed within the same time after the disability is removed.

By s. 7, no part of the United Kingdom is to be considered as beyond seas.

By s. 5, an acknowledgment in writing, signed by the party liable or his agent, a part payment or satisfaction on account of principal or interest, extends the term for a further period of like limitation.

Before the statute, twenty years without any demand was of itself a presumption that a bond

But there must be a lapse of the full period of twenty years from its becoming forfeited, unless there be some additional circumstance, as an intermediate settlement of accounts between the parties. *Colsell v. Budd*, 1 Camp. 27—Ellenb.

Payment of money secured by a bond is not to be presumed, although more than twenty years have elapsed since an acknowledgment that any sum was due upon it, if the obligee ever since that acknowledgment has resided abroad. *Newman v. Newman*, 1 Stark. 101—Ellenborough.

Indorsements on a bond, acknowledging the receipt of interest or payment of part of the principal, are not evidence against the obligor, to prove that the bond was on foot, without showing that they were on the bond recently after their dates, and at a time when their purport was contrary to the interest of the obligee. *Rose v. Bryant*, 2 Camp. 321—Ellenborough.

In the case of an annuity bond, a payment after a considerable time had elapsed, was held to be evidence for a jury to presume payment of the consideration money, although the attesting witness could not speak to the fact, and there was no receipt indorsed. *Haslam v. Diggles*, 1 C. & P. 398—Bost.

The producing a receipt for interest within twenty years, indorsed on a bond by the obligee, is sufficient to take off the presumption of payment, though no proof be given when such receipt was written and signed. *Barrington (Lord) v. Searle (in error)*, 3 Bro. P. C. 593.

A receipt for the payment of interest within twenty years, accruing due before twenty years, indorsed on a bond, is an acknowledgment that the principal was then due, sufficient to negative a plea of solvit post diem. *Saunders v. Meredith*, 3 M. & R. 116.

Payment of a bond is not to be presumed after more than twenty years, if the money was lent to enable the obligee to go abroad, where he died shortly after, and there is evidence that his administrator never received any assets. *Elliott v. Elliott*, 1 M. & Rob. 44—Tenterden.

Where in debt on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payment of interest by the obligor to A. B., equal in amount to the interest that would become due on the bond:—Held, that an indorsement on the bond in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligor in trust for A. B., was admissible in evidence to connect the payment of interest with the bond. *Gleadow v. Atkin*, 1 C. & M. 410.

To a bond of upwards of twenty years standing was pleaded—inter alia—payment and a release. To rebut the presumption of payment, an affidavit made by defendant before a master in Chancery was produced, in which he (being the son-

of the obligor) swore that he had never called upon him for it. Although the presumption of payment was thereby rebutted, it was nevertheless evidence also of the bond having been cancelled or otherwise legally discharged. *Washington v. Brymer*, Peake's Add. Cas. 201—Grose.

The presumption of payment of a bond after twenty years may be repelled by evidence that the obligor had no opportunity or means of paying. *Fladong v. Winter*, 19 Ves. jun. 196.

Upon objections to the presumption of payment of a bond, the fluctuation of credit and the fact of the security remaining with the obligee, are circumstances of great weight. *Id.*

## VI. PROCEEDINGS ON BONDS.

### 1. What within 8 & 9 Will. 3, c. 11.

By 8 & 9 Will. 3, c. 11, s. 8, in all actions in courts of record upon bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff may assign as many breaches as he may think fit, and the jury upon the trial may assess not only the usual damages and costs, but also damages for such of the breaches assigned as shall be proved to have been broken, and the ordinary judgment on verdict is to be entered; and if judgment shall be given for the plaintiff, on demurrer, by confession, or nil dicit, he may suggest breaches on the roll, and, upon a writ of inquiry, prove the breaches, and recover damages; upon the defendant's paying, either upon execution or into court, the damages assessed with costs, further execution upon the judgment is to be stayed, but the judgment is to remain as a security to answer further breaches, which may again be suggested on scire facias; and similar proceedings are to take place.

A bond given to the Lord Chancellor in bankruptcy under statute 5 Geo. 2, c. 30, s. 23, was, it seems, not within the stat. 8 & 9 Will. 3, c. 11, s. 8, by which a jury is to assess damages; because by the stat. 5 Geo. 2, the damages were to be ascertained by the Lord Chancellor, although he might assist his conscience by directing an inquiry before a master, or an issue at law. *Smiley v. Edmonson*, 3 East, 22.

In debt for a penalty in articles, the jury ought to assess damages upon the breach, according to the stat. 8 & 9 Will. 3, c. 11, and shall not find the debt; or a venire facias de novo shall be awarded. *Drage v. Brand*, 2 Wils. 377.

Leave was given to the plaintiff in debt on bond conditioned to perform an award, after judgment for him upon a plea of judgment recovered, to execute a writ of inquiry upon the stat. 8 & 9 Will. 3, c. 11, s. 8, after a writ of error allowed, and to sign a new judgment, on the terms of paying costs, and putting the defendant in statu quo, &c. *Hanbury v. Guest*, 14 East, 401.

Bail bonds are not within the statute. *Sally v. Lewee*, 1 Tidd's Prac. 633.

award, the plaintiff must assign a breach under the statute, and cannot have judgment for the penalty, and take out execution for the single sum awarded, though the measure of damages be ascertained by the award. *Welch v. Ireland*, 6 East, 613; 2 Smith, 666.

To debt on bond, the defendant cravedoyer; and, after reciting a mortgage deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of the proviso contained in the indenture, and for the performance of the covenants contained therein, pleaded, that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisos in the indenture on his part to be performed. The plaintiff, in his replication, took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes, that it should have concluded with a verification, and that no breach of the condition was assigned according to the statute:—Held, that such replication was good, as the only point in issue was the payment of the money, and as the plaintiff had therein denied the whole substance of the defendant's plea. *Darbishire v. Butler*, 5 Moore, 198.

To a declaration on a judgment in debt on bond, the defendant cannot plead that the bond was conditioned for the performance of covenants, and that no breaches of covenant were suggested or assigned in the original action as the statute requires. *Anon. M. & M.* 496, n.

Breaches need not be assigned under the 8 & 9 Will. 3, c. 11, on non-payment of an annuity secured by a warrant to confess judgment on a mutuuus. *Shaw v. Worcester (Marquis)*, 6 Bing. 385; 4 M. & P. 21.

A post-obit bond, upon which a forfeiture has taken place, is not within the statute, and therefore it is not necessary to suggest breaches; but it seems that such an instrument is within 4 & 5 Anne, c. 15. *Murray v. Stair (Earl)*, 3 D. & R. 278; 2 B. & C. 82.

But a bond conditioned for the payment of a certain sum by instalments, is within the statute 8 & 9 Will. 3, c. 11, s. 8; and after judgment obtained upon default of payment of one of the instalments, if a subsequent instalment be in arrear, the plaintiff cannot sue out execution for it, though within a year after such judgment, without first suing out a scire facias to revive it. *Willoughby v. Swinton*, 6 East, 550; 2 Smith, 663.

A bond upon the face of it appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or

might have been entered up by virtue of this deed, the obligees issued execution without assigning breaches or executing a writ of inquiry:—Held, first, that this was a bond substantially conditioned for the performance of an agreement within the statute, and that the obligees ought to have assigned breaches. *Hurst v. Jennings*, 5 B. & C. 560.

The 8 & 9 Will. 3, c. 11, s. 8, enabling and requiring the plaintiff in actions on bonds to assign breaches, extends to a liability created by the breach of an indemnity bond, whereby the obligee is so far damnified as that he may be required to pay money in consequence of a forfeiture, although the matter of the liability should be in some sort collateral to the direct breach, and actual damnification has not ensued. Thus, where a party indemnified by bond is sued for damages in respect of the matter of the indemnity, and the plaintiff recovers, if the defendant in that action recover over against the indemnifier, he must assign as a breach, not only the damages and costs recovered against him, but also his own costs sustained in defending the suit, although he have as yet in fact paid nothing in respect or on account of such costs, or if he do not assign, he will be estopped by the statute from recovering by scire facias on the judgment obtained on the bond what he may afterwards be compelled to pay on that account. *Harrop v. Armitage*, 12 Price, 441.

Demurrer to a plea in sci. fa. that the plaintiff might have suggested and assigned the damages as further breach of a bond already recovered on under the judgment obtained in the action on which the sci. fa. was founded, overruled. *Id.*

## 2. When lost.

Though a court of law will permit a plaintiff to declare upon a lost bond, that does not oust the jurisdiction of the court of Chancery. *Atkinson v. Leonard*, 3 Bro. C. C. 218.

The jurisdiction of Equity upon lost bonds is very ancient, and is founded upon the want of a remedy at law without profert, till that jurisdiction was lately assumed. *East India Comp. v. Boddam*, 9 Ves. jun. 466.

Relief was given upon a lost bond against sureties, the principal being out of the jurisdiction, upon giving an indemnity against the demands of the plaintiffs or persons claiming under them by virtue of the bond, and such costs, damages, and expenses as they may be put to by the loss of the bond. *Id.* 464.

## 3. Pleadings.

*Declaration.*—If a person enter into a bond by a wrong Christian name, and be sued on such bond, he should be sued by such name. A declaration against him by his right name, stating that he by the wrong name executed the bond, is bad. *Gould v. Barnes*, 3 Taunt. 504.

In debt upon bond for the penalty, where there are alternative parts of the condition, the plaintiff must confine himself to a particular breach. *Cornwallis v. Savery*, 2 Burr. 772; 2 Ld. Ken. 492.



by 71, and that the plaintiff had no recovery thereof, upon due proof of his having so failed, the obligation to be void: plea, that J. T. was still alive, and that the estate had not been recovered by him according to the tenor of the condition: replication, that the plaintiff had not at any time due proof made to him that J. T. had failed in the recovery: demurrer, that an immaterial fact was put in issue:—Held, that the obligee was entitled to judgment. *Price v. Heapy*, 1 D. & R. 451.

To debt on bond conditioned for the payment of a sum of money, which the condition stated to have been taken up, borrowed, and received by the defendants of the plaintiffs at respondentia interest, secured by a cargo of goods shipped from Calcutta to Ostend, it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the East Indies, and illegally prepared by the plaintiffs for shipment from thence to the Cape of Good Hope, without the license of the East India Company: without proceeding to state formally, that the condition was colourable to conceal the illegality of the transaction, and to negative that the bond was given for money taken up, borrowed, and received, &c.: for the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond: but if it were inconsistent with it, the plea would still be good in this form. *Paxton v. Popham*, 9 East, 408. And see *Downing (Lady) v. Chapman*, 9 East, 414, n.

If the condition of the bond is, "that A. shall not embezzle any money that shall come to his hands on account of his master, it is necessary, in an action against the obligor, to state in the breach, what particular sum of money was embezzled, and how or from whom it was received. *Jones v. Williams*, 1 Dougl. 214.

Where the obligor of a post-obit bond craved oyer, and set out the condition:—Held, that it was not necessary for the obligee to aver the death of the person, at whose decease the money secured by the bond was to become payable. *Murray v. Stair (Earl)*, 3 D. & R. 278; 2 B. & C. 82.

The breach of the condition of a bond, otherwise well assigned, is not vitiated by the super-addition of immaterial allegations. *Stahert v. Goodfellow*, 1 Nev. & M. 202.

*Pleas.*—The defendant cannot take advantage of a void condition in a bond, without praying oyer and pleading it. *Colton v. Goodridge*, 2 W. Black. 1108.

A plea of payment before the day is bad to debt on bond. *Anon.* 2 Wils. 150.

But where to debt on a bond, conditioned to pay money on or before a certain day, the defendant pleaded that he did pay it before the day, to wit, on such a day, it was held good. *Anon.* 2 Wils. 173.

on bond, conditioned for the payment of a sum of money at a certain day, though it appeared by the condition that the bond was given by way of indemnity. *Holmes v. Rhodes*, 1 B. & P. 638.

So, a plea, that it was given as an indemnity to the plaintiff's testator against another bond, and not dammified, was held bad. *Mease v. Mease*, Cowp. 47.

Solvit ante diem is not an immaterial plea in debt on bond. *Fletcher v. Hennington*, 1 W. Black. 210; 2 Burr. 944; *S. P. Giddings v. Giddings*, 1 Ld. Ken. 335.

To debt brought by husband and wife on a bond conditioned for the payment of a certain sum at a certain day, defendant pleaded, that by articles of agreement between the wife, her sister and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but as the plea did not allege the payment of the interest accordingly, it was holden bad. *Baldee v. Elers*, 5 T. R. 250.

The condition of a bond, after reciting that the defendant and J. S. had delivered and indorsed to the plaintiff a bill of exchange, drawn by J. S. and accepted by A. B., was, that the defendant and J. S., or either of them, their heirs, &c. should pay, or cause to be paid to the plaintiff, his executors, &c. the sum secured by the bill within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due:—Held, in an action on a bond, that it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and J. S., or either of them. *Murray v. King*, 5 B. & A. 165.

A tender and refusal of principal and interest due on a bond after the day mentioned in the condition, and before action brought, cannot be pleaded. *Underhill v. Matthews*, Bull. N. P. 171.

To an action on a bond, conditioned for the performance of several matters, it is requisite to set forth in the plea, with particularity, the manner in which the terms of the condition were complied with. *Reynald v. Reynald*, 1 Ld. Ken. 357.

So, to debt on bond, a special demurrer was held good to a plea, because performance of articles of agreement mentioned in the condition was pleaded generally to the agreement, which appeared to be only partially set forth, and that for ought appearing the agreement might contain negative or disjunctive covenants, to which general performance could not be pleaded. *Kerry (Earl) v. Baxter*, 4 East, 340. And see *Plamer v. Raine*, 4 East, 344, n.

Debt on bond, conditioned for the performance by R. G. of all the covenants on his part mentioned in a certain indenture, bearing even date with the bond, made or expressed to be

made between the plaintiff and the said R. G.:—Plea, that before the execution of the bond it was agreed that the plaintiff should grant to R. G. a lease under certain covenants, and that the defendant should enter into a bond as surety for the performance of those covenants; that the defendant did accordingly enter into the bond on which the action was brought, and that the indenture mentioned in the condition thereof was the lease so agreed upon, and no other, but that the said lease never was executed:—Held, on demurrer, that the defendant was estopped by the condition of the bond from pleading this plea. *Hosier v. Searle*, 2 B. & P. 299.

In a declaration on an indemnity bond to "save harmless and keep indemnified W., his heirs, &c., and also certain closes, &c. from and against all actions, suits, claims, and demands whatsoever, both in law and equity, which should or might be had, made, commenced, or prosecuted by any person or persons claiming any right, title, or demand, in, to, or upon the said closes, &c., as heir-at-law of H. P. and others, and of and from all costs, charges, and expenses which the said W., &c., should sustain or be put to, for or by reason or means of such actions, suits, claims, and demands, or otherwise howsoever:" to which the breaches assigned were—first, that on, &c. H. W. P. "made claim and demand, and claimed to have a right and title of, in, to, and upon the said closes, &c., and entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use;" and secondly, that he "caused and procured, and suffered and permitted one H. B., who then held and enjoyed the said closes, to attorn to him, and to withhold the payment of the rents, issues, and profits;" and thirdly, "that certain title-deeds relating to the said closes, &c. were kept, detained, and withholden, by one A. W., at the instance and through the means, and by and through the claim and demand of T. B. W. P.," &c.:—Held, after the defendant had pleaded over, that those breaches were well assigned on the covenant declared upon. *Fowl v. Welch*, 2 D. & R. 133: S. C. not S. P. 1 B. & C. 29. And see *Nash v. Palmer*, 5 M. & S. 374.

Where, to debt on bond to save harmless from expenses by reason of naming one to a curacy, or from suits by reason thereof, the defendant pleaded non damnificatus, and the plaintiff replied, and assigned for breach, that he was obliged to pay such a sum by reason of such nomination, but did not say how he was obliged:—Held, well enough. *Simmons v. Langhorne*, 2 Wils. 11.

Debt on a common money bond, by executor of obligee against executor of an obligor: plea, that the money mentioned in the condition was part of the personal estate of A. B. deceased, by whom it had been bequeathed to the testator of the plaintiff and the testator of the defendant, and the survivor of them, and the executors and administrators of such survivor, upon trust to put and place the same out at interest, upon such real or other sufficient security as they might approve of, and to pay the interest, &c.; that the testator of plaintiff died, leaving the testator of the defendant surviving;

whereupon the said estate of A. B. vested in the defendant's testator, to be by him applied according to the trusts of the will of A. B.:—Held, on general demurrer, that the plea was bad. *Gleadow v. Atkin*, 2 C. & J. 548.

In an action on a bond given by defendant as surety for W. and W., with a condition reciting that obligees were bankers, and W. and W. manufacturers, who had overdrawn their account, and that obligees had agreed to allow W. and W. to overdraw such further sum as they should require, so as that the same, together with the amount already overdrawn, should not exceed in the whole 5000*l.*, conditioned for the payment of the amount already overdrawn, and such further advances as might be made not exceeding 5000*l.*:—Plea, that after the making of the bond the partnership of the obligees was dissolved, and a new partnership formed, by the retiring of one of the old partners and admitting a new partner, with which new partnership W. and W., with the privacy of the retired partner, kept an account; and that, at the time of the dissolution of partnership, a balance of 5000*l.* was due from W. and W. to the partnership for such overdrawn, but the partnership did not at any time demand payment of it; but, on the contrary, at and after the dissolution, discharged W. and W. from making such payment, and consented that the balance should be, and it was transferred to the account between W. and W. and the new partnership, and became incorporated in their account:—Held, that the plea was ill, for an assignment of a chose in action is no discharge of an obligation. *Parker v. Wise*, 6 M. & S. 239.

*Subsequent Pleadings.*—A replication to a plea of duress, "that the defendant was at liberty, and made the bond of his own free will, and not for fear of imprisonment," which concluded to the country, although informal, was held good after verdict. *Tomlin v. Burlace*, 1 Wils. 6.

If to a plea of performance generally to an action on a sheriff's bond, the plaintiff reply a particular warrant, and that the defendant ought to have made due return, &c., but neglected, &c., he ought to conclude with a verification. *Seyre v. Minns*, Cowp. 575.

A plea to a declaration on a bond, conditioned amongst other things for the payment of 3000*l.*, that all the sums of money which became due on the bond were paid, may be replied to generally by a general denial of the words of the plea, without assigning any specific breach. *Turner v. M'Namara*, 2 Chit. 697.

Declaration upon a bond, conditioned for the payment of all monies which J. S. should receive on account of the revenue; the defendant pleaded general performance; the attorney-general replied that J. S. or some other person or persons by his order received, &c.:—Held, that the averment of the receipt was only the introduction to the breach, the real assignment of the breach being the non-payment of the money; but however this would have been on demurrer, it was cured by the defendant's rejoining that he had paid the money, which was an admission of his

ance of covenants, if the defendant craves oyer, and pleads performance of each covenant specially, and also general performance, the plaintiff must assign specific breaches in his replication, if he has not done it in his declaration; and if he merely takes issue on the general performance, and enters a separate assignment of breaches on the record, no damages can be assessed on them, and the court of C. P. will award a repleader. *Plomer v. Ross*, 5 Taunt. 386; 1 Marsh. 95.

Debt on a bond to prosecute error in the hustings, and to pay damages and costs if judgment be affirmed: plea, that the writ was prosecuted with effect, and that the judgment was not yet affirmed: replication that the writ was nonprossed in the hustings: demurrer, and objected, first, that it did not appear before whom the hustings were holden; and secondly that it was not shown that the writ was returnable: but overruled, and judgment given for the plaintiff. *Loufield v. Satchwell*, 1 Wils. 123.

To debt on bond, conditioned that one B. R. should account for and pay over to the plaintiffs as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity: the defendants pleaded general performance: the plaintiffs replied that B. R. had received divers sums amounting to a large sum, viz. 100*l.* from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over, &c.:—Held, on special demurrer, that the replication was sufficiently certain. *Barton v. Webb*, 8 T. R. 459.

To debt on bond, the condition of which was, that A. B. should deliver a true account of all monies received by him in pursuance of his office, the defendant pleaded performance generally. The plaintiff, in his replication, assigned for breach, that A. B. was requested to deliver a true account of all monies received by him in pursuance of his office, but refused so to do:—Held, on special demurrer, that this assignment of the breach was bad, in not alleging that A. B. had received any monies by virtue of his office. *Serra v. Fyffe*, 1 Marsh. 441; S. C. nom. *Serra v. Wright*, 6 Taunt. 45.

To an action of debt on bond, against one of two obligors, the defendant pleaded that the plaintiff, by a deed of release under seal, released his co-obligor. The plaintiff replied, that the release was executed by him with the consent and at the request of the defendant, and on an express promise and undertaking by him that the release should not operate to discharge the defendant from, or in any way prejudice the plaintiff's rights or remedies against the defendant in respect of the bond:—Held, that the replication was bad, as the plaintiff could not by parol averment vary the terms of an instrument under seal:—Held, also, that the plaintiff, having admitted in his replication, that he executed the release to the co-obligor, thereby admitted that the

Debt on bond; plea, after craving oyer of the bond and condition, which was that A. B. should faithfully account for all monies received by him as collecting clerk, that A. B. did account, replication, that A. B. received divers sums amounting to 2000*l.*, for which he did not account; rejoinder, that the sums mentioned in the replication were three sums of 1000*l.*, 500*l.*, and 500*l.*, received by A. B., of C. D. and F. and G., and that A. B. accounted for those sums; sur-rejoinder, that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by A. B., and concluding to the country:—Held, upon special demurrer, that the sur-rejoinder was good. *Calvert v. Gordon*, 7 B. & C. 809; 1 M. & R. 497. And see S. C. nom. *Gordon v. Calvert*, 4 Russ. 581; 1 Sim. 253.

Debt on bond conditioned for J. S. rendering account to the plaintiffs of all monies which he should receive as their agent. Defendant pleads performance in the words of the condition; plaintiffs reply, that J. S. received divers sums of money amounting to 2000*l.*, belonging to, and relating to the plaintiffs' business, as their agent, and hath not rendered to the plaintiffs an account of the said 2000*l.* or any part thereof; this replication being specially demurred to for generality, was held sufficient. *Shum v. Farington*, 1 B. & P. 640.

In debt upon an obligation without any condition, satisfaction must be pleaded to have been by deed. *Preston v. Christmas*, 2 Wils. 86.

Where to debt on bond, which contained a condition, that the defendant should not open a shop within a certain distance of premises demised in a lease, the defendant pleaded that he opened a shop by the license of the plaintiff:—Held that such plea was bad, on general demurrer, on the ground that a license, after breach, was not good, unless by deed. *Sellers v. Bickford*, 1 Moore, 460.

Debt on bond, conditioned for the payment of 5000*l.* at certain times, and performance of covenants in an indenture; plea, stating the payment of the money at the times, and performance of the covenants; replication, that the defendant did not pay the money modo et formâ, and concluded to the country; special demurrer, on the ground that the replication ought to have concluded with a verification:—Held, that the conclusion to the country was good. *Bush v. Leake*, 3 Dougl. 255.

Declaration on a bond to indemnify plaintiff for what beer, &c., he should deliver to I. S.; plea that the plaintiff delivered no beer to I. S. after the making of the bond; and replication, that he did deliver to such an amount: upon general demurrer that the replication did not show that the beer was delivered before the filing of the bill, it was held good, as the objection was only matter of form. *Thrale v. Vaughan*, 1 Wils. 5.

The stat. 8 & 9 Will. 3, c. 11, s. 8, which enacts, "that in actions on any penal sum for non-performance of covenants, &c., the plaintiff may assign as many breaches, &c.; and if judgment shall be given for the plaintiff on nil dicit, the plaintiff may suggest on the roll as many breaches, &c., as he shall think fit, upon which shall issue a writ to the sheriff to summon a jury before the justice of assize, &c., to inquire, &c., and to assess the damages, &c.," is compulsory on the plaintiff, and he cannot enter up judgment for the whole penalty on a judgment by default, as he might have done at common law. *Roles v. Rosewell*, 5 T. R. 538: *S. P. Hardy v. Bern*, 5 T. R. 636.

Assignment of breaches in debt on bond to perform an award, in the words of the award generally, held sufficient; although the plaintiff did not show that the defendant had become enabled to carry it into effect, by the circumstances having taken place on which it was to have been performed, the award having assumed that they had; and the fact of such circumstances not having taken place, as it lay properly within the defendant's knowledge, should be pleaded and set out by him. *Wilcocks v. Nicholls*, 1 Price, 109.

The plaintiff may suggest breaches under the statute, at the conclusion of his replication. *Humphrey v. Rigby*, 2 Chit. 298; 5 M. & S. 60.

After a plea of non est factum, and that the bond was obtained by fraud and covin, where breaches are not assigned in the declaration, the plaintiff may suggest them under stat. 8 & 9 Will. 3, c. 11, in making up the issue. *Id.*

A suggestion of breaches cannot be introduced on the record, except in the three cases of judgment upon demurrer, by confession, or nil dicit. *De la Rue v. Stewart*, 2 N. R. 362.

In action of debt on bond, with a penalty for performance of covenants, breaches may be assigned in the replication, under the statute; and on demurrer, an interlocutory judgment may be given, and final judgment stayed till after award and execution of the writ of inquiry. *Johnes v. Johnes*, 3 Dow, 1.

And where the interlocutory judgment was in Easter term, and then, as the inquisition could not be taken pursuant to the statute till after Trinity term, a day was given in Michaelmas term, passing over Trinity term, without continuance:—Held, that as, in the due execution of the object of the statute, the giving a day in Trinity term would have been nugatory, the reason for the continuance failed, and the omission was no error. *Id.*

After judgment for the plaintiff on demurrer in debt on bond conditioned to pay an annuity, the plaintiff cannot take out an execution for the arrears due, but must assign breaches on the record under the statute. *Walcot v. Goulding*, 8 T. R. 126.

A plea, (to a declaration on bond, conditioned, amongst other things, for the payment of 3000*l.*.)

on the bond were paid, may be replied to generally, by a general denial of the words of the plea, without assigning any particular breach. *Turner v. M'Numara*, 2 Chit. 697.

In debt on bond, conditioned not to assault, molest, or injure the person of the plaintiff, the replication alleging that the defendant assaulted, molested and injured the person of the plaintiff by then and there beating and otherwise ill-treating him, was held a sufficient assignment of a breach of the condition for which the jury were to assess damages on the statute, although such breach was not alleged in formal terms, according to the statute. *Tombs v. Painter*, 13 East, 1.

Where one gives a counter-security to another, containing a covenant to pay an annuity and indemnify him, and also a warrant of attorney by way of collateral security, and it is agreed, that, in default of any one payment of the annuity, judgment shall be entered up, and execution issue for the whole sum specifically, being the price of the annuity, it is not necessary to assign breaches under the statute, but execution may issue for the whole sum. *Howell v. Stratton*, 2 Smith, 65.

An action of debt was commenced in Michaelmas term, against executors on a bond of their testator, conditioned for making it void on payment of a certain sum at a future day, or within one month after his decease, whichever should first happen, and a rule to plead was given as of that term. The defendants, in the following vacation, obtained a judge's order for time to plead, which they neglected to do, and final judgment was signed for want of a plea, which was set aside in the next Hilary term, on the defendants' undertaking to plead within a week, when they pleaded a judgment recovered against them as executors; which not being signed by a serjeant, the plaintiff again signed final judgment:—Held, that it was unnecessary to suggest breaches under the statute. *Cardozo v. Hardy*, 2 Moore, 220.

Where non est factum is pleaded to a declaration on a bond in which breaches are assigned, the jury who try the issue may assess the damages under the common venire. *Parkins v. Hawkshaw*, 2 Stark. 381—Abbott.

After oyer of the condition, and non est factum pleaded to debt on bond, on which issue is joined and notice of trial given, the plaintiff may enter a suggestion on the roll, and assign breaches pursuant to the 8 & 9 Will. 3, c. 11. But it is irregular to deliver such second issue without a summons and a judge's order. *Ethersey v. Jackson*, 8 T. R. 255.

In a judgment on bond for the payment of an annuity, if a *fi. fa.* be sued out, and marked for only part of the penalty, a new *fi. fa.* for subsequent arrears cannot be taken out, without a *sci. fa.* under stat. 8 & 9 Will. 3. *Howell v. Hanforth*, 2 W. Black. 843.

Judgment being entered on a bond to secure the quarterly payment of an annuity, and a *fi. fa.*

year, a second *id.* may be taken out for the past quarter, without reviving the judgment. *Scott v. Whalley*, 1 H. Black. 297.

In debt for a penalty, for non-performance of covenants, a judgment on demurrer may be entered up for the penalty, in like manner as before the stat. 8 & 9 Will. 3, c. 11; but it can stand only as a security for the damages sustained. *Goodwin v. Crowle*, Cowp. 357.

By 3 & 4 Will. 4, c. 42, s. 16, all writs of inquiry under the 8 & 9 Will. 3, c. 11, are now, unless the court or a judge shall otherwise order, to be tried before the sheriff instead of the judge of assize or nisi prius.

### 5. Evidence.

If issue be joined on non est factum, the only proof required on the part of the plaintiff is proof of the execution of the bond by the defendant. *Hutchinson v. Kearns*, 1 Selw. N. P. 589—Mansf.

A bond was executed by a person who could not write:—Held, that if there was no other plea besides non est factum, the defendant's counsel could not ask whether the bond was read over to the defendant before he signed it, nor what was the transaction respecting which it was given. *Cranbrook v. Dadd*, 5 C. & P. 402—Bolland.

The defendant cannot, under the plea of non est factum to a declaration upon a bond, go into evidence to show that the consideration was an illegal one at common law. *Harmer v. Wright*, 2 Stark. 35—Ellenborough.

A defendant cannot give in evidence illegality in the consideration of a bond, unless he pleads specially. *Harmer v. Rowe*, 2 Chit. 334; 6 M. & S. 146.

Where to debt on bond conditioned for the payment of a sum of money on demand, there is an issue on the demand, the plaintiff must prove an express demand before action brought. *Carter v. Ring*, 3 Camp. 459—Ellenborough.

A person who has given a bond which is the subject of an action, is not a competent witness to impeach its validity, though he is not interested in the event of the suit. *Walton v. Shelley*, 1 T. R. 296. But see *Jordaine v. Lashbrooke*, 2 T. R. 601.

In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of money. *Whitnash v. George*, 8 B. & C. 556.

Where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of non est factum, show that he was misled as to the legal effect of the bond. *Edwards v. Brown*, 1 C. & J. 307; 1 Tyr. 182; 3 Y. & J. 423.

A., with B. and C. his sureties, entered into a bond to D., the condition of which, after reciting that A. was seised in tail of an estate of which he had covenanted to suffer a recovery at

was, that the bond should be void if the recovery should be suffered, "so and in such manner as that, under and by virtue thereof, the estate should be vested in D. for ever:" the recovery was duly suffered; but A. being seised for life only, D. brought an action upon the bond, to which one of the sureties pleaded, that if A. had been seised in tail, the recovery was suffered so as to vest the estate in D. in fee:—Held, that this plea was bad, because the recital in the condition did not stop D. from disputing that A. was seised in tail, nor release the surety from his obligation, it being the intention of the parties that D. should have an estate in fee. *Id.*

### 6. Practice.

If default be made in payment of the interest on a bond, the principal whereof is not yet due, the court of C. P. will not stay proceedings, on payment of the interest and costs. *Tytle v. Crafter*, 2 Taunt. 387.

But that court will stay proceedings in an action on a bastardy bond, on payment of the penalty and costs. *Shutt v. Procter*, 2 Marsh. 226.

Proceedings were stayed in an action on a bond for performance of mortgage covenants, on payment of principal and interest, and costs to be computed and taxed by the master on the statute 5 & 6 Anne. *Skinner v. Stacey*, 1 Wils. 80.

If the obligor of a bond, after notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the court of C. P. will set the plea aside. *Legh v. Legh*, 1 B. & P. 447. And see *Payler v. Homersham*, 4 M. & S. 423.

And they would not, under the circumstances, allow the obligor to plead payment of the bond. *Id.*

BOOKS, PUBLIC—See EVIDENCE

BOTTOMRY—See INSURANCE

### BOUNDARIES.

A bill will not lie for one parish against another to ascertain boundaries. *St. Luke's v. St. Leonard's*, 1 Bro. C. C. 40.

Nor for the mere purpose of settling the boundaries of two manors. *Wake v. Conyers*, 2 Cox, 360; 1 Eden, 331.

A bill to ascertain the boundaries of two manors was dismissed, there being no dispute as to the soil. *Id.*

Expired leases and counterparts of expired leases, though cancelled, are admissible in evidence upon a question of boundary. *Plaxton v. Dare*, 5 M. & R. 1.

Old assessments to church rates are evidence upon a question of boundary, though the parish officers do not charge themselves with the receipt

of the rate, otherwise than by crosses set against the names of the parties rated. *Id.*

BRAWLING—See ECCLESIASTICAL LAW.

BREACHES, ASSIGNMENT OF—See BOND.

BREAD.

[See stat. 3 Geo. 4, c. 106, respecting the sale of bread in London, &c.; and stat. 1 & 2 Geo. 4, c. 50, repealing 59 Geo. 3, c. 36, regulating the assize of bread.]

It was an offence within the statute 40 Geo. 3, to sell, by wholesale, bread before it has been baked twenty-four hours, even though the seller give directions to the person to whom he sells, not to sell it by retail until the expiration of the twenty-four hours. *Rez v. Smith*, 6 T. R. 588.

BREWER.

A retail brewer of strong beer, under the stat. 5 Geo. 4, c. 54, whose brewery was situated in a city or market town, could retail from his brewery such strong beer only as was brewed by him upon his brewery premises. *Att. Gen. v. Overington*, 3 Y. & J. 440.

A retail brewer of strong beer, whose brewery was situate out of a city or market town, and who obtained a license to retail strong beer in a city or market town next adjoining his brewery premises, under the stat. 5 Geo. 4, c. 54, s. 7, could retail at that place only the strong beer brewed by him at his country brewery. *Id.*

Where a brewer of strong beer, who had two breweries, the one situate out of a city or market town, and the other situate in a city, obtained a license to retail the beer brewed at the former in the next adjoining city, and another license to retail that brewed at the latter at the place where it was brewed, he could not retail at both places the beer brewed at his country brewery. *Id.*

By stat. 5 Geo. 4, c. 54, s. 6, a retail brewer of strong beer, whose brewery premises were situate in a city or market town, could only retail there the strong beer there brewed by him: where, therefore, the license of a retail brewer empowered him to retail at C. strong beer which he should have brewed, and be charged with duty thereon:—Held, that the license should be construed with reference to the act of parliament, and did not empower him to retail at C. strong beer brewed by him elsewhere. *Id.*

Where the plaintiff, a druggist, after the 42 Geo. 3, c. 38, but before the 51 Geo. 3, c. 87, sold and delivered drugs to the defendant, a brewer, knowing that they were to be used in the brewery; the court held, that in an action of assumption he could not recover the price of them. *Langton v. Hughes*, 1 M. & S. 593.

Where a brewer delivers beer to be used in a  
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particular public-house, he can not make any person except the licensed keeper of the house primarily liable, so as to maintain an action for goods sold, as it would be a fraud upon the licensing system. *Meuz v. Humphries, M. & M.* 132; 3 C. & P. 79—Tenterden.

BRIBERY—See PARLIAMENT.

BRIDGE—See WAY.

BROKER—See AGENT and PRINCIPAL.

BUILDING ACT.

1. *Statute*, 545.
2. *Who is Owner of the improved Rent*, 545.
3. *Accounts, Demand, and Notice*, 546.
4. *Other Things*, 547.

1. *Statute*.

The 14 Geo. 3, c. 78, is intitled, "An Act for the further and better regulation of Buildings and Party-walls, and for the more effectually preventing mischiefs by Fire within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places within the weekly bills of mortality, the parishes of St. Mary-le-bone, Paddington, St. Pancras, and St. Luke, at Chelsea, in the county of Middlesex, and for indemnifying, under certain conditions, builders and other persons against the penalties to which they are or may be liable, for erecting buildings within the limits thereof, contrary to law.

By s. 41, the persons at whose expense any party-wall or party-arch shall be built, shall be reimbursed, by the owners entitled to the improved rent of the adjoining building or ground, who shall at any time make use of it, a part of the expense of building the same, in the proportion of one moiety of the actual expense, where the class of buildings is the same, or of one moiety of the estimated expense, according to the quantity of wall made use of, where the class of the building last erected is inferior to the former.

The rate of expense is to be estimated at 7l. 15s. per rod of new brick work.

Ten days after a party-wall is finished, an account is to be left with the owner of the adjoining building of what he is liable to pay; and if the plaintiff, before action, gives three months' notice, and recovers, he is to have double costs.

By s. 43, party fence walls may be raised by the owner of one side, or be taken down and rebuilt.

The directions of the act are extremely minute and numerous: it must therefore be referred to for further information on the subject.

2. *Who is Owner of the improved Rent*.

The owner of the improved rent, not of the

A lessee for twenty-one years, at a pepper-corn rent for the first half year, and a rack rent for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land tax, and all other taxes, rates, assessments, and impositions, having assigned his term for a small sum in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of the statute, or by the covenant; but that charge must in such case be borne by the original landlord. *Southall v. Ledbetter*, 3 T. R. 458.

The statute was intended to throw that burden on persons to whom long leases had been granted, with a view to an improvement of the estate, and who afterwards underlet at a considerable increase of rent. *Id.*

Semble, a lessee of such a term, who afterwards sold the lease for a sum in gross, would also be liable within the act. *Id.*

The lessor of a house at rack rent (there being no other person entitled to any kind of rent,) is liable to contribute to the expenses of a party-wall, under the statute, though the lessee has improved the house demised. *Beardmore v. Fox*, 8 T. R. 214.

The assignee of the lessee of premises, at a fixed rent, which he considerably improved, and thereby rendered of greater annual value, is not the owner of the improved rent within the statute. *Lambe v. Hemans*, 2 B. & A. 467.

If the lessee of a house at a rack rent underlet it at an advanced rent, he is liable to contribute to the expenses of a party-wall built under the statute; nor is the operation of the statute at all varied by any covenants to repair, entered into between the landlord and his tenant. *Sangster v. Birkehead*, 1 B. & P. 303.

A tenant who rebuilds a house in London, without a lease or agreement for a lease, and therein makes use of the party-wall of the adjoining house, cannot be sued for half the cost as owner of the improved rent, though he afterwards obtains, in consideration of the rebuilding a beneficial lease at a low ground-rent, habendum from a day before the rebuilding. *Taylor v. Reed*, 6 Taunt. 243.

Defendant, who had a lease of land from N., entered into an agreement with G., who was to build houses and pay defendant 20*l.* a year, and G. then employed the defendant to build the houses:—Held, that he was liable to contribute to a party-wall to which the houses were attached. *Collins v. Wilson*, 4 Bing. 551; 1 M. & P. 454.

Where there is no adjoining house when the party-wall is built, the owner is not confined to ten days to give his notice; he has a reasonable time after the adjoining houses are attached. *Id.*

The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting, repairing, and amending all party-walls, &c., and to pay all taxes, duties assessments, and impositions, parliamentary and parochial, "it being the intention of the parties that the land-

During the lease, the proprietor of the adjoining house built a party-wall between that house and the house demised, under the statute:—Held, that the tenant (not the landlord) was bound to pay the moiety of the expense of the party-wall. *Barrett v. Bedford*, (*Duke*), 8 T. R. 602.

A., a builder, proposed to B., the occupier of the adjoining house, to build a party-wall, and stated the expense; B. answered, "Very well, I expect to pay what is right and fair," and the wall was built:—Held, that A. was entitled to recover from B. his share of the expense, without reference to the statute. Semble, that B. having asked 300*l.* for his lease, he was to be considered as owner of the improved rent, within that act. *Stuart v. Smith*, 2 Marsh. 435; 7 Taunt. 158; Holt, 321.

A tenant under covenant to repair cannot maintain an action on the statute, against his landlord, for a moiety of the expense of rebuilding a party-wall, which, being out of repair, the tenant pulled down and rebuilt at the joint expense of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority. *Pizey v. Rogers*, B. & M. 357—Abbott.

A tenant of premises, having built a party-wall thereon, let a portion of them upon a building agreement for 50*l.* a year. The sub-tenant built a house on his part of the ground, and in so doing made use of the party-wall: the agreement contained no stipulation in case of this being done. The sub-tenant underlet the house, when finished, at a rent exceeding 50*l.*:—Held, that the original tenant was not entitled to compensation from his lessee, under the statute, for the use of the party wall, since he himself, and not the sub-tenant, was the owner of the improved rent, within that clause. *Williams v. Pocklington*, 2 B. & Adol. 886.

Semble, that the clause does not apply, where the land adjacent to the party-wall is held under an agreement with the builder of it. *Id.*

### 3. Accounts, Demand, and Notice.

Before an action can be brought to recover a proportion of the expenses of building a party-wall, the accounts prescribed by the 41st section must be delivered, whether the house be occupied by the owner or by a tenant, and a formal demand of the money must be made twenty-one days before action brought. *Philp v. Dennis*, 3 Taunt. 62.

Where the account delivered contained a correct statement of the quantity of work done, and the materials allowed for it, it was held a sufficient account, though it also contained a statement of the prices paid for the brick work, which exceeded the prices fixed by the statute. *Reedling v. Barnard*, M. & M. 71—Tenterden.

And the demand for payment referring to that account, and consequently of a greater sum than was recoverable, is a good demand. *Id.*

And where the party-wall was built more on the defendant's ground than on plaintiff's, contrary to s. 14:—Held, that the plaintiff might recover the expenses of building, the jury finding there was no intention of encroaching, and the defendant having made no objection while the work was in progress. *Id.*

The three months' notice required by s. 38 is only necessary, where the person who at the time when it is necessary to build, &c. is liable to pay, cannot agree with the owner of the adjoining house. *Peck v. Wood*, 5 T. R. 130.

#### 4. Other Things.

The stat. 11 Geo. 1, c. 28, does not extend to party-walls between stables. *Rez v. Pratt*, 4 Burr. 2298.

An offence against the Building Act, 12 Geo. 3, is committed as soon as the wall, or at least the shell, contrary to the act, is pitched, and nothing done to the inside can make any alteration. *Payne v. Hill*, Loft, 330.

The stat. 14 Geo. 3, c. 78, s. 96, (Building Act,) does not enable the district surveyor who lodges a complaint before two justices, on account of a projection made in front of a house, contrary to the provisions of that act, to appeal to the quarter sessions against the admission of the complaint by the two justices. *Rez v. Middlesex (Justices)*, 16 East, 310.

The builder of a house on a new foundation may not erect half his flank or side wall on his neighbour's vacant ground. *Barlow v. Norman*, 2 W. Black. 959.

If two persons have a party-wall, one half of the thickness of which stands on the land of each, they are not therefore tenants in common of the wall, or of the land on which it stands, although the wall was erected at the joint expense of the two proprietors. *Matts v. Hawkins*, 5 Taunt. 20.

The stat. 14 Geo. 3, c. 78, does not make party-walls common property; and if one proprietor adds to the height of such a party-wall, and the other pulls down the addition, the first may maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil: the property in a wall, erected at a joint expense, follows the property of the land whereon it stands. *Id.*

If a person, bonâ fide intending to pursue the authority given by the Building Act, 14 Geo. 3, c. 78, erects a party-wall, without, in fact, pursuing the directions of the statute, and thereby injures his neighbour, he is liable to an action; but the action must be brought after twenty-one day's notice, and within three months after the injury done. *Pratt v. Hillman*, 6 D. & R. 360; 4 B. & C. 269.

Where, in trespass for an act done in pursuance of the act 14 Geo. 3, c. 78, a verdict was found for the plaintiff, subject to a reference, and the arbitrator awarded a verdict for the defendant:—Held, that the defendant was entitled to treble costs under s. 100 of the statute, the same as if the plaintiff had been nonsuited, or a verdict

had been found for the defendant at the trial *Pratt v. Hillman*, 6 D. & R. 481; 4 B. & C. 269.

So, also, he is entitled to notice of action. *Id.*

In trespass against the owner of a house, adjoining to the plaintiff's in the metropolis, for taking down his party-wall and building on it, the defendant showing at the trial that he was authorized in doing the thing complained of, under 14 Geo. 3, c. 78, is entitled to treble costs under the 100th section, upon a nonsuit. *Collins v. Poney*, 9 East, 322.

The Building Act has not destroyed the right to lateral windows, which existed before that act. *Titterton v. Conyers*, 5 Taunt. 465; 1 Marsh. 140.

The owner of windows in an edifice, carried up above a party-wall, contrary to the provisions of the Building Act, may nevertheless recover against the owner of the adjoining land who contributed to the wall, for darkening the lights. *Id.*

An edifice built not conformably to the Building Act, in respect whereof no conviction is had within three months under s. 60, is nevertheless not rendered legal by the lapse of that time, but may afterwards be proceeded against under the act. *Id.*

The penalty given by the stat. 14 Geo. 3, c. 78, s. 67, is recoverable against the master builder within the regulations of the statute, and not against the proprietor of the premises. *Meymot v. Southgate*, 3 Esp. 223—Kenyon.

To a declaration with special counts for a contribution to the repairs of a party-wall, (the defendant being owner of the improved rent of an adjoining house,) and common money counts: plea to the whole declaration, that E. N. in his lifetime was the owner of the improved rent, and that the defendant is only entitled as his executor; that there were bonds outstanding, and plene administravit præter a sum insufficient to pay the demand in the first count:—Held bad on demurrer. *Wilcox v. Newman*, 1 Chit. 132.

If the plaintiff declare on a general covenant to repair a messuage, and assign a breach, per quod he was put to expense, it is sufficient for a tenant to plead performance of all, except as to the repairs of a party-wall, and that those repairs were rendered necessary, and were done under the stat. 14 Geo. 3, c. 78, and did not become necessary by the defendant's default, and that the defendant was not the owner of the improved rent; and if the plaintiff is possessed of any facts to charge the defendant with a proportion of the repairs, he ought to reply them. *Moore v. Clark*, 5 Taunt. 90.

Where notice of pulling down and rebuilding a party-wall was given under the Building Act, 14 Geo. 3, c. 78, and the tenant of the adjoining house, who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house, giving notice in the manner prescribed by the act, and afterwards paying the same to



for the same:—Held, that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the act in respect to any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner, for such works as are authorized to be done by such other owner in respect of such adjoining house. *Robinson v. Lewis*, 10 East, 227.

Limitations of action on the Building Act. See *Pratt v. Hillman*, 4 B. & C. 269; 6 D. & R. 481.

The Building Act, s. 100, limits actions to be brought within three months. A. had begun to build a party-wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time:—Held, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three months, he must bring ejectment. *Trotter v. Simpson*, 5 C. & P. 51.—Parke.

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**'BURGLARY—See CRIMINAL LAW.**

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**BURIAL.**

**I. RIGHTS RESPECTING—See ECCLESIASTICAL LAW.**

**II. OFFENCES AS TO—See CRIMINAL LAW.**

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**BUSTS AND SCULPTURES—See COPYRIGHT.**

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**I. WHEN PARTNERS.**

*By I. Will*, 4, c. 69, s. 5, any one or more of mail contractors, stage-coach proprietors, or common carriers, may be sued by his, her, or their name or names only; and no action or suit for damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner.

Before the statute, it was held, in an action on the case against the proprietor of a coach as a common carrier, for not safely conveying a passenger, that he could not plead in abatement the non-joinder of a co-proprietor. *Ansell v. Waterhouse*, 2 Chit. 1; 6 M. & S. 385. *And see Beale v. Bird*, 2 D. & R. 419; contra, *S. P. Buddle v. Willson*, 6 T. R. 369.

To an action on the case in the form of tort against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant might plead in abatement, that the goods were delivered to him and his partners jointly, and that his partners were not sued. *Powell v. Layton*, 2 N. R. 365.

To an action on the case against several partners for negligence in their servant, whereby the plaintiff's goods were lost, it could not be pleaded in abatement that there were other partners not named. *Mitchell v. Tarbutt*, 5 T. R. 649.

A. and B. are partners in the business of public carriers; by contract between them, A. finds horses and drivers for certain stages, and B. supplies them for the remaining stages. They are, notwithstanding this division of the concern between them, responsible for the misconduct and negligence of their drivers and servants throughout the whole distance, and it is no defence to B. that the servant by whom an injury is committed was the special servant of A., and hired and paid by A. alone. *Weyland v. Elkins*, Holt, 227; *S. C. nom. Waland v. Elkins*, 1 Stark. 272—Gibbs.

If several persons horse, with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing

the coach along his part of the road. *Barton v. Hanson*, 2 Taunt. 49; 2 Camp. 97.

Where two persons contracted to assist the defendant with their respective horses, but to give in their accounts separately:—Held to be separate contracts. *Smith v. Taylor*, 2 Chit. 142.

Where the plaintiff and defendant ran a stage-coach from Bath to London, the former providing horses for one part of the road, and the latter for another, and the profits of each party were calculated according to the number of miles his horses went: and the plaintiff received the fares of the passengers, and gave a weekly account thereof to the defendant:—Held, that the plaintiff and defendant were partners. *Fromont v. Coupland*, 9 Moore, 319; 2 Bing. 170; 1 C. & P. 275.

A special contract made by one of several joint coach proprietors for the carriage of parcels, is binding upon them all, though some of them became proprietors after the contract was made. *Helsby v. Meers*, 8 D. & R. 289; 5 B. & C. 504.

Where A., the keeper of a coach office, and a part owner in several coaches, made a contract with B. for the carriage of parcels which he was in the habit of sending from that office to various places:—Held, that this bound the owners of all the coaches in which A. was a part owner, and as well those who became partners after the making of the contract, as those who were so before. *Id.*

A., B., &c. were common carriers from L. to F., a separate portion of the road being allotted to each, and it having been stipulated also that no partnership should exist between them. A., for himself and the other parties, agrees with the Mint to carry coin from L. to F., and afterwards makes another agreement with the Mint to carry other coin to places on the road:—Held, that the parties were entitled to share in the profits of this agreement. *Russell v. Anstwick*, 1 Sim. 54.

If a party recover damages in case against one of two joint proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened. *Wooley v. Batte*, 2 C. & P. 417—Park. But see *Merryweather v. Nixon*, 8 T. R. 186.

Two persons having agreed to work a coach from Bristol to London, one providing horses for a part of the road, and the other for the remainder, and in consequence of the horses of one having been taken in execution, the other having provided horses for that part which had been undertaken by the first, claimed the whole profits of the journey: the court refused an injunction against continuing to provide horses. *Smith v. Fromont*, 2 Swanst. 330.

## II. LIABILITY FOR SERVANTS.

A promise made by the book-keeper of a carrier, at the office, to make compensation for the loss of a parcel, is not binding upon the carrier,

unless the book-keeper be shown to be his general agent. *Olive v. Eames*, 2 Stark. 181—Ellenb.

A parcel delivered to the guard of a mail-coach, and by him to the porter of the inn where the mail stops, whose business is to carry out the parcels brought by the coach, receiving for such duty a portion of the sum demanded for carriage, does not make such porter personally responsible for its loss. *Cavenagh v. Such*, 1 Price, 328.

Where a parcel is delivered to a driver of a stage coach to be carried, the master, and not the servant, is responsible. *Williams v. Cranston*, 2 Stark. 82—Ellenborough.

If a parcel be given to a wagoner for hire to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. *Butler v. Basing*, 2 C. & P. 613—Garrow.

Semble, that in an action against stage-coach proprietors for an injury done by mismanagement of the coach, whereby a person was struck by the luggage on the coach, the proprietors and the coachman may be sued jointly. *Whitmore v. Waterhouse*, 4 C. & P. 383—Parke.

## III. CONVEYANCE OF PERSONS.

The 2 & 3 Will. 4. c. 120, is the act by which the duties, licenses, number of passengers, luggage, &c. as regard stage carriages, are now regulated.

Every stage-coach proprietor impliedly undertakes that his coach shall be sufficiently secure to perform the journeys it undertakes; and he ought to examine its sufficiency previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietor for negligence, though the coach had been examined previous to the second journey before the accident, and though it had been repaired at the coachmaker's only three or four days before. *Bremner v. Williams*, 1 C. & P. 414—Best.

And if an accident happen from a defect in the original construction, the proprietor is liable, although the defect be ought of sight, and not discoverable upon ordinary examination. *Sharp v. Gray*, 9 Bing. 457; 2 M. & Scott, 621.

In an action by a passenger in a coach, against the owner, for an injury done to him by the coach overturning, if the declaration states that the servants of the defendants negligently "drove, conducted, and managed the coach," the plaintiff cannot recover, if the negligence was in sending out an insufficient coach. *Mayor v. Humphries*, 1 C. & P. 251—Littledale.

In an action against the proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt, to prove negligence, it is *prima facie* enough to give evidence of the coach having broke down; from which negligence will be presumed. *Christie v. Griggs*, 2 Camp. 79—Mansfield.

But proof that at the time of the accident there were more passengers than the statute al-

The proprietors of a mail coach are answerable for any injury happening to a passenger through the misconduct of their driver. *White v. Boulton, Peake, 81—Kenyon. And see Brucker v. Fromont, 6 T. R. 659.*

Coach owners are not liable for injuries happening to passengers from accident or misfortune, wheret here has been no negligence or default in the driver. *Aston v. Heaven, 2 Esp. 533—Eyre: S. P. Christie v. Griggs, 2 Camp. 79; Crofts v. Waterhouse, 11 Moore, 133; 3 Bing. 319.*

Where there is no other carriage on the road the driver may keep in the middle of the road, and is not bound to keep on the left hand side of the road, even though the accident might have proceeded from the coach not being on the proper side. *Id.*

The proprietor of a stage coach is answerable for the negligence of the driver, from the usual place of taking passengers, not only till the coach arrives at its destination, but till the passengers are safely set down. *Dudley v. Smith, 1 Camp. 163—Ellenborough.*

And the driver of a stage coach before passing through any place that is dangerous, is bound to inform the passengers of the full extent of the danger; and if he proceeds without giving them this information, the proprietor is liable for any injury they may thereby suffer, which they might have escaped by alighting. *Id.*

If, through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach whereby his leg is broken the proprietor will be responsible in damages, although the coach was not actually overturned. *Jones v. Boyce, 1 Stark. 493—Ellenborough.*

If, when dangers occur the driver of a stage coach does not take the safest course, the owner is responsible for the mischief which ensues. *Jackson v. Tollett, 2 Stark. 37—Ellenborough.*

So, under similar circumstances, the driver would be liable, and he cannot in such case insist upon the fact that he kept to his own side of the road. *Mayhew v. Boyce, 1 Stark. 423—Ellenborough.*

If the declaration, in an action on the case, against coach proprietors, for an injury received by the overturning of a coach, state that it was their duty to carry the plaintiff safely, for a certain hire, it does not mean to carry safely at all events, but will be sufficiently supported by proof of the want of due care. *Harris v. Costar, 1 C. P. 636—Best.*

The driver of a stage coach gathered a bank, and upset the coach. He had passed the spot where the accident happened twelve hours before, but in the interval a landmark had been removed. In an action for an injury sustained by this accident, the judge told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and

and a verdict having been returned accordingly, the court granted a new trial on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence. *Crofts v. Waterhouse, 3 Bing. 319; 11 Moore, 133.*

In an action against a coach proprietor for negligence, it appeared that the coach travelled from the county of O. to the county of W.; that plaintiff became an outside passenger for hire; that there was luggage on the roof of the coach, and no iron railing between the luggage and the passengers; and that the plaintiff, being seated with her back to the luggage, was by a sudden jolt thrown from the coach, and her leg was thereby broken in the county of O., where she remained some time to be cured; but before she was fully recovered she removed to the county of W., where further medical attendance became necessary, and expense was consequently incurred. The learned judge directed the jury to find for the plaintiff, if they were of opinion that the injury sustained was occasioned by the negligence of the defendant. The jury found for the plaintiff, and stated that they so found on account of the improper construction of the coach, and of the luggage being on the seat:—Held, that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence in the defendant:—Held, also, that the inconvenience suffered and expense incurred by the plaintiff in the county of W. was material evidence of a matter in issue arising there, within the meaning of the undertaking given by the plaintiff, in answer to a motion to change the venue. *Curtis v. Drinkwater, 2 B. & Adol. 169.*

If the declaration state, that the defendant, being the owner of a stage coach, undertook to carry "the plaintiff, her children, and servants, together, in and by a certain stage-coach," evidence that the whole inside of the coach was taken for the plaintiff and her three daughters, and two outside places for her servants, will support the declaration: and the defendant having sent a double-bodied coach, and refusing to take them, unless one of them would travel in one body and the others in the other body is a breach of this agreement. The stat. 50 Geo. 3. c. 48, enacting, that double-bodied coaches shall only carry eight outside passengers, it is also a breach of the agreement that there were eight other outside passengers permitted to go by the coach, if the plaintiff's servants refused to go by it on that account. *Long v. Horne, 1 C. & P. 610—Abbott.*

A person paying the whole fare of a stage coach may take his place at any stage of the journey: aliter if he pays only a deposit. *Ker v. Mountain, 1 Esp. 27—Kenyon.*

Though a postmaster cannot be compelled to let a chaise, if he do so, and the passenger takes his seat in it, the postmaster must proceed if his fare is tendered. *Massiter v. Cooper, 4 Esp. 269.—Ellenborough.*

By 1 Will. 4, c. 68, s. 1, no mail contractor, stage coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article of property of the following description, viz. gold and silver coin of the realm or of any foreign state; gold or silver in a manufactured or unmanufactured state; precious stones, jewellery, watches, clocks, or time pieces of any description; trinkets, bills, notes of any bank in England, Scotland, or Ireland; orders, notes, or securities for payment of money; English or foreign stamps; maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate, or plated articles; glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not with other materials; furs, lace, or any of them; contained in any packages delivered either to be carried for hire, or to accompany the person of any passenger, if the value exceed 10*l.*, unless, at the time of delivery, the value and nature be declared, and an increased charge or engagement to pay the same be accepted.

By s. 2, the rate of such increased charge is to be notified by a public notice affixed in some conspicuous part of the office, warehouse, or receiving house, which shall bind the parties sending without further proof of its having come to their knowledge.

By s. 3, carriers are to give (if required) receipts for packages, acknowledging the same to be insured; and if not given when required, or the notice be not affixed, they are not to have the benefit of the act.

By s. 6, nothing in the act is to extend or be construed to annul or in anywise affect any special contract between parties for the conveyance of goods.

By s. 8, nothing is to be deemed to protect carriers from liability to answer for loss or injury arising from the felonious acts of servants; nor to protect servants from liability for loss or injury occasioned by their own personal neglect or misconduct.

Before the statute a carrier was held to be an insurer of the goods which he carried; he was obliged for a reasonable reward to carry any goods to the place to which he professed to carry goods, which were offered him, if his carriage would hold them, and he was informed of their quality and value; he was not obliged to take a package, the owner of which would not inform him what were its contents, and of what value they were; if he did not ask for this information, or if, when he asked, and was not answered, he took the goods, he was answerable for their amount, whatsoever that might be; he might limit his responsibility as an insurer by notice, but that notice would not protect him against the consequences of a loss by gross negligence. *Macklin v. Waterhouse*, 2 M. & P. 319; 5 Bing. 212: *S. P. Riley v. Horne*, 5 Bing. 217, 224; 2 M. & P. 331.

A greyhound was delivered to a carrier, who gave a receipt for it, the greyhound being afterwards lost:—Held, that the carrier could not set up as a defence that the dog was not properly

hand, he sent by a carrier and lost, the judge will recommend the jury to give the fair value of it in damages, although what particular articles the box contained cannot be proved. *Butler v. Basing*, 2 C. & P. 613—Garrow.

A common travelling trunk of a large size, containing apparel and jewels, having been lost by the defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely:—Held, that he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office limiting his responsibility to five pounds, in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing. *Brooke v. Pickwick*, 4 Bing. 218; 12 Moore, 447.

And, under the above circumstances, the jury were properly directed to consider generally, whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed. *Id.*

A common carrier must make good a loss though not in fault, as if he be robbed. *Gibbon v. Paynton*, 4 Burr. 2298.

A carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies; even though the jury expressly find that they were destroyed without any actual negligence in the defendant. *Forward v. Pittard*, 1 T. R. 27: *S. P. Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389; 1 Esp. 36.

A carrier is in the nature of an insurer. *Id.*

A hoyman who undertakes to carry goods must deliver them safe at all events, except damaged by the act of God or by the King's enemies. *Dale v. Hall*, 1 Wils. 281.

Where a declaration stated an undertaking to carry safely certain goods by water with an exception of all accidents arising from the act of God, the king's enemies, fire, pirates, and all other dangers and accidents of seas, rivers, and navigation of what nature and kind soever:—Held, that this exception being beyond the common law exception must be specially proved. *Richardson v. Sewell*, 2 Smith, 205.

How far a carrier is liable for an unavoidable accident, not coming within the description of accidents happening from the act of God or the king's enemies. See *Trent Navigation v. Wood*, 3 Esp. 127; *Abb. Ship*. 256. 4 Dougl. 287.

The carrier of goods by water is liable for damage occasioned by running against an anchor to which no buoy appeared to be fastened. *Id.*

Where there is an exception in a charter party of "perils of the sea," a loss from the ship's running foul of another by misfortune, is within the exception, and is a loss by perils of the sea. *Buller v. Fisher*, 3 Esp. 67—Kenyon.

Where a carrier received a parcel of bank notes, to be carried from London to Dover, under a con-

posited by one of the defendants in a desk at their office in London, was missing a short time after he left the office:—Held, not to be a loss within the exception in the contract, as it could not be considered to be a loss by robbery. *Latham v. Stanbury*, 3 Stark. 143—Abbott.

The plaintiffs declared against the defendants on their common law liability as carriers, for the loss of a parcel, which the declaration stated that the defendants for certain hire and reward, undertook to carry from London, and deliver safely at Dover: and it appearing that the course of dealing between the parties was, for the plaintiffs to pay the defendants an annual sum for the carriage of parcels between London and Dover, and, on the receipt of each parcel, the defendants were in the habit of delivering to the plaintiffs a written acknowledgment, stating that they undertook to carry and deliver the same safely, ("fire and robbery excepted;") and the jury having found that this was the contract between the parties, though the loss was occasioned by negligence only:—Held, a fatal variance. *Latham v. Rutley*, 3 D. & R. 211; 2 B. & C. 20; S. C. not S. P. R. & M. 13; 3 Stark. 143.

On a declaration against a lighterman in the common form for negligence, the plaintiff cannot recover if it appear that the loss was not occasioned by a neglect of the common and ordinary duty of the defendant. *Whalley v. Wray*, 3 Esp. 74—Eldon.

A stage coachman is responsible for the loss of a parcel which he insures to carry without reward, if it is lost through gross negligence on his part. *Beauchamp v. Pouley*, 1 M. & Rob. 38—Tenterden.

When an order is given to a carrier, antecedently to the delivery of goods, who assents to deal with them when delivered in a particular manner, a duty is imposed on him on the receipt of the goods to deal with them according to the order previously given; and the law implies a promise by him to perform such duty. *Streeter v. Horlock*, 7 Moore, 283; 1 Bing. 34.

If A. send goods by B., who says, "I will warrant they shall go safe;" B. is liable for any damage sustained by the goods, notwithstanding A. send one of his own servants in B.'s cart to look after them. *Robinson v. Dunmore*, 2 B. & P. 416.

The liability of a wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighters, is similar to that of a carrier. *Maving v. Todd*, 1 Stark. 72—Ellenborough.

## 2. What is gross Negligence.

**Carriers by Land.**—A carrier was liable for gross negligence, although the goods were above the value mentioned in his public notice, and although they were not specially entered and insured. *Burkett v. Willan*, 2 B. & A. 356; S. C. not S. P. 1 Chit. 633; S. P. *Beck v. Evans*, 16 East, 244; 3 Camp. 267.

Gross negligence is a question for the jury. *Duff v. Budd*, 6 Moore, 469; 2 B. & B. 177; S. P. *Batson v. Donovan*, 4 B. & A. 21.

There was no gross negligence on the driver's part, and that the book-keeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it or look into the coach for it:—Held, to be a loss arising from gross negligence, and that the proprietors were liable for the value, notwithstanding they had put up the usual notice. *Bodenham v. Bennett*, 4 Price, 31.

To render a carrier liable for the loss of a valuable parcel of plate, in a case where the defendant relied on the usual defence of notice, it was necessary to establish a case of gross negligence. *Love v. Booth*, 13 Price, 329.

A parcel was sent by the defendant's coach from Worcester to London, directed to be delivered at the latter place: it arrived in London, and was taken from the coach office of the defendants in a cart, under the direction of one person only, for the purpose of delivery, and lost:—Held, that the defendants were liable for such loss, as it amounted to gross negligence, and defeated the usual notice. *Smith v. Horne*, 2 Moore, 18; 8 Taunt. 144; Holt, 623.

A parcel, containing property exceeding 5*l.* in value, was delivered to A. and B. to be carried by their mail coach, and was accepted by them to be so carried, and was put into the mail, and carried therein a short distance; and was then taken out of the mail by a servant of the carriers, and left to be forwarded by another coach, of which A. was one of the proprietors, but B. was not, and the parcel was lost:—Held, that notwithstanding a notice by A. and B., they were responsible for the loss of the parcel in question, in consequence of their servant having delivered it to be carried by another coach, of which one of them only was a proprietor. *Garnett v. Willan*, 5 B. & A. 53.

Where one delivered goods of above 5*l.* value to common carriers to carry by the mail, paying no extra price; and, by a public notice which had before reached the owner, the carriers had declared they would not be accountable for any package above the value of 5*l.*, unless insured and paid for accordingly:—Held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the 5*l.*, as by the terms of the notice the carriers stipulated not to be answerable at all for goods above 5*l.* value, unless paid for accordingly. *Nicholson v. Willan*, 5 East, 507; 2 Smith, 107.

But where a paper parcel, containing notes of country bankers to the amount of 1300*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to a carrier without any notice of its value, and booked to be carried by the mail; and was accepted by him to be so carried, but was sent by a different coach, and stolen or lost; and the carrier had previously given notice that he would not be answerable for

B. & A. 342. And see *Wright v. Snell*, 5 B. & A. 350.

Quere, whether the entrusting valuable property to a servant, of whose character the carrier gave no account at the trial, was sufficient to authorize the jury to find that the carrier had been guilty of that degree of negligence which would deprive him of the protection of a proper notice? *Macklin v. Waterhouse*, 2 M. & P. 319; 5 Bing. 212.

The plaintiffs sent goods packed in a box by the defendant's wagon. The box was placed with its lid outwards at the tail of the wagon, which was left during several hours in the night standing in the road opposite an inn where the wagoner stopped, without any person to watch it. The box was forced open, and its contents abstracted. A notice was proved limiting the carrier's responsibility to 5*l*.—Held, that the carrier was guilty of gross negligence in leaving the wagon so exposed, and consequently liable for the loss. *Langley v. Brown*, 1 M. & P. 583.

In an action against a carrier for the loss of a painting, it appeared that the stage wagon in which it was sent had seven horses, but that there was only one wagoner. The L. C. J. left it to the jury to say, whether the sending but one wagoner was gross negligence; and they found that it was so. *Beckford v. Crutwell*, 5 C. & P. 242; 1 M. & Rob. 187—Tenterden.

Plaintiff received a parcel from G. to book for London at the office of the defendants, common carriers. Plaintiff instead of obeying his instruction, put the parcel into his bag, intending to take it to London himself. The defendants having lost the bag:—Held, that the plaintiff could not recover damages from them in respect of the parcel. *Miles v. Cattle*, 6 Bing. 743; 4 M. & P. 630.

Where, in an action against a carrier for the loss of a parcel, it had been properly left to the jury, whether, under the circumstances, the carrier had been guilty of gross negligence; and they having found that he had, the court of C. P. refused to grant a new trial, which was moved for on the grounds, first, that the plaintiffs had corresponded by letters with the defendant, after the loss, requesting him to apprehend the person to whom the parcel had been delivered as a swindler; secondly, that the intimation of the value of the parcel was not given to the defendant at the time it was delivered at his office, according to a notice which was there affixed, limiting his responsibility to 5*l*., except the value of the parcel was specified when delivered; and lastly, that the property in the goods contained in such parcel had passed from the plaintiffs to the consignee. *Duff v. Budd*, 6 Moore, 469; 3 B. & B. 177.

*Carriers by Water.*—The owner of a ship was not liable beyond the value of the ship and freight, under 7 Geo. 2, c. 15, s. 1, in the case of a robbery, in which one of the mariners was concerned, by giving intelligence and afterwards  
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of a steam boiler, in consequence of the pipe having been cracked by frost:—Held, that this was not an act of God, but negligence in the captain in filling his boiler before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning. *Siordet v. Hall*, 4 Bing. 607; 1 M. & P. 561.

The owners of vessels on the navigation between A. and C., having given public notice that they would not be answerable for losses in any case except the loss were occasioned by the want of care in the master, nor even in such case beyond 10*l*. per cent., unless extra freight were paid, the master of one of the ships took on board the plaintiff's goods to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B.: the vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C., without any want of care in the master:—Held, that the owner of the vessel was responsible to the plaintiff for the whole loss in an action on the contract. *Ellis v. Tanner*, 8 T. R. 531.

Where a man undertook to carry goods from London to Amsterdam, and they were accidentally damaged in their being let down into the hold of the ship, it was held that he was liable for such damage. *Goff v. Clinkard*, 1 Wils. 282.

The defendant received on board his barge certain lime to be conveyed for the plaintiff from Bewly Cliff to London. The master deviated from the usual and customary voyage, without any justifiable cause, and whilst the barge was so out of her course she encountered a storm, and the sea communicating with the lime caused it to ignite, whereby the barge and cargo were lost. In an action on the case for the loss of the lime, the declaration alleged that "it was the duty of the defendant to have carried and conveyed the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay, or hindrance in the same," and averred the loss to be by reason of the deviation and departure, and delay and deviation out of such usual and customary course and passage:—Held, first, that the damage sustained by the plaintiff was sufficiently proximate to the wrongful act of the defendant, to form the subject of an action; secondly, that the declaration was sufficient to support a judgment for the plaintiff. *Davis v. Garrett*, 4 M. & P. 540.

### 3. Delivery of Goods.

A carrier is bound to deliver the goods, if it be the general course of his trade so to do. *Golden v. Manning*, 2 W. Black. 916; 3 Wils. 429.

So, he is bound to deliver a parcel at the place to which it is directed. Where, therefore, a parcel of goods was directed to "Mr. James Parker, High Street, Oxford," who, on being applied to, said that he expected no such parcel, and it was

afterwards delivered to a person who called at the defendant's office, claiming it as his, and who paid the carriage for it:—Held, that the carrier was responsible. *Duff v. Budd*, 6 Moore, 469; 3 B. & B. 177.

A carrier is bound to deliver goods entrusted to him, at the place to which they are addressed; and if he deliver them elsewhere, trover lies against him. *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476.

Goods are sent by a carrier who cannot hear of the consignee at the place where they are directed, but receives letters ordering them to be sent elsewhere, which he does. The transaction turns out to be a fraud on the consignor by some person unknown:—Held, that the consignor might recover against the carrier, he having been guilty of negligence in so delivering the goods. *Id.*

On a motion for a new trial it was held rightly left to the jury to say whether the defendant had delivered the parcel according to the due course of business, and that it was not requisite to be left to the jury, whether it was delivered to the person to whom it was consigned. *Id.*

Common carriers receive goods of S., at L., on an undertaking to carry them to W., and deliver them there to S. for his use, on payment of the hire. The goods are carried to W., and sent from the warehouse, nearly half a mile, to the house of S., but, the hire not being ready to be paid, are taken back to the warehouse. Applications to send the goods again to the house are refused, not on the ground that the contract had been performed by the proffer, but until satisfaction of a lien set up on one side, and resisted on the other, and which proved to have been unfounded in fact:—Held, under these circumstances, that the carriers had waived the benefit which would probably have resulted to them from insisting on the proffer as an execution of their undertaking; that both parties had treated the contract as one continuing contract from the commencement of the transaction till an actual delivery should have taken place; and that the carriers, not having performed their part of the agreement, the consignee was entitled to recover the value of the goods in an action of assumpsit. It seems that common carriers are ordinarily bound to carry goods entrusted to their conveyance to the residence of the consignee. *Stoer v. Crowley*, M'Clel. & Y. 129.

Seemable, that a carrier is not discharged by delivering the goods to a wharfinger, whose wharf he uses, but continues to be liable until they are received by the party. *Wardell v. Mourillyan*, 2 Esp. 693—Kenyon.

A., B., C., and D., being in partnership as carriers, entered into an agreement with S. & Co. to carry goods for them from London to Frome, where they should be deposited in the warehouse of A., the resident partner, till S. & Co. should be ready to receive them into their own. The goods, having been forwarded, were, after they had been deposited in A.'s warehouse, destroyed there by fire:—Held, that the liability of A., B., C. and D., as carriers, ceased on the arrival of the goods at Frome, and that when they were de-

posited in A.'s warehouse, they could only be considered as warehousemen;—Held also, that A., having paid over the amount of the loss to S. & Co., could not recover a proportion from B., C. and D. *In re Webb*, 2 Moore, 500; 8 Taunt. 443.

A common carrier between A. and B. (employed to carry goods from A. to B. to be forwarded to C.) carried them to B., and there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them:—Held, that he was not answerable for the loss. *Garside v. Trent Navigation*, 4 T. R. 581.

If common carriers from A. to B. charge and receive for cartage of goods to the consignee's house at B. from a warehouse there, where they usually unload, but which does not belong to them, they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance was known to the consignee. *Hyde v. Trent and Mersey Navigation*, 5 T. R. 369; 1 Esp. 36.

Guardians of a female under age, who had eloped, are justified in detaining her clothes; and a carrier to whom they had been delivered for the purpose of conveyance is justified in delivering them over to the guardians. *Barker v. Taylor*, 1 C. & P. 101—Park.

If a carrier, by mistake, deliver to B. goods consigned and sold to C., and B. appropriate the goods, and the carrier on demand, without action, pays C. their value, the carrier may recover it against B. as money paid to B.'s use; but not as the price of goods sold and delivered to B. *Brown v. Hodgson*, 4 Taunt. 189.

Where, in an action for the loss of a parcel, the shopman of the consignee proved that he did not know of the delivery of the parcel, and believed that it could not have been delivered without his knowledge:—Held, to be *prima facie* evidence of non-delivery, or it is, at all events, sufficient to call on the plaintiff to prove a delivery to the carrier. *Griffiths v. Lee*, 1 C. & P. 110—Hullock.

#### 4. To whom liable.

An action lies against a carrier in the name of the consignor, who agreed with him and was to pay him. *Davis v. James*, 5 Burr. 2680.

Where the plaintiff's consigned goods, according to an order received, to a person they did not know, and who afterwards appeared to be a swindler, but who got possession of them by the carrier's negligence:—Held, that they might maintain an action against the carrier, as the property had not passed to the consignee. *Duff v. Budd*, 6 Moore, 469; 3 B. & B. 177. *And see Stephenson v. Hart*, 4 Bing. 476; 1 M. & P. 357.

If the consignor of goods deliver them to a particular carrier by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods; the action can only be brought by the consignee. *Dames v. Peck*, 8 T. R. 330; 3 Esp. 12.

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of large amount, without  
its contents, which was  
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*see Clay v. Willan, 1*

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common law of carriers, in respect of any articles to be conveyed by them, unless such as are mentioned in the act, and to which it extends.

*To what extent available before the statute.*—Before the statute, it was held that a carrier might not only limit, but exclude all responsibility by notice. *Maving v. Todd*, 1 Stark. 72; 4 Camp. 225—Ellenborough. And see *Hill v. Trent and Mersey Navigation*, 5 T. R. 389; 1 Esp. 36.

A keeper of a booking house could not set up a notice, that he would not be answerable for goods, if above a certain value, as a defence against the effect of negligence in himself or his servants. *Newborn v. Just*, 2 C. & P. 76—Best.

Where a carrier gave notice that he would not be liable for goods lost, beyond the value of 5*l.*, that extended to the property of passengers going by the coach or other carriage, and not to goods sent to be carried only. *Clarke v. Gray*, 6 East, 564; 2 Smith, 622; 4 Esp. 177.

A notice that the proprietor of a general coach office would not be responsible for the carriage of parcels of more than 5*l.* value, unless entered as such, would not avail the proprietor of a coach, who took a parcel from the office, unless it be otherwise shown that he was connected with the office. *Macklin v. Waterhouse*, 5 Bing. 212; 2 M. & P. 319.

A notice by carriers that they would not be accountable for the loss or damage of goods, unless the terms of the notice were complied with, protected them as well against a loss by robbery, as against an accidental loss. *Covington v. Willan*, Gow, 115—Dallas.

A carrier, who gave two notices limiting his responsibility, was bound by that which was least beneficial to himself. *Munn v. Baker*, 2 Stark. 255—Ellenborough.

A carrier placed a board in his office, giving notice that he would not be answerable for jewels, however small their value, unless entered as such; but circulated handbills, stating generally, that he would not be answerable for any article above the value of 5*l.* unless entered as such:—Held, that he was answerable for the loss of jewels not entered as such, if under the value of 5*l.* *Cobden v. Bolton*, 2 Camp. 108—Ellenb.

In an action against a carrier for not taking care of, and safely conveying goods according to his promise, it appeared that he had limited his responsibility as such, by means of a notice of which the plaintiff was cognizant:—Held, that he having declared against the defendant as a carrier in the usual form, could not insist that the goods were lost from the defendant's warehouse, before the actual carriage of the goods commenced. *Roskell v. Waterhouse*, 2 Stark. 461—Abbott.

Seemingly, that when carriers run a coach from A. to B. and back, notice that they limit their responsibility on the carriage of parcels from A. to B., was notice that they limited it likewise from B. to A. *Riley v. Horne*, 5 Bing. 217; 2 M. & P. 331.

A carrier by water contracting to carry goods

for hire, impliedly promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage; and this though he had given notice "that he would not be answerable for any damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10*l.* per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight:" for a loss happening by the personal default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law, for a reasonable reward to make good all losses not arising from the act of God, or the King's enemies. *Lyon v. Mells*, 5 East, 428; 1 Smith, 418.

In an action against a coach-owner for losing a trunk, the defendant was allowed to pay into court the amount of the sum to which he had by notice limited his responsibility. *Hutton v. Bolton*, 3 Dougl. 59.

*To whom to be given.*—A carrier's notice limiting his liability, was not available, if it appeared that it did not come to the knowledge of the customer. *Kerr v. Willan*, 6 M. & S. 150; 2 Stark. 53.

A notice given to the vendor, was equivalent to notice to the vendee who directed the goods to be sent. *Maving v. Todd*, 1 Stark. 72—Ellenb.

Notice to the principal is, in law, notice to all agents: therefore, if stage-coach proprietors have given the usual 5*l.* notice to principals in London, in the month of January, and their traveller, who proves that he was ignorant of such notice, sends them from Downham, a parcel, containing 8*l.* he has received for them in the month of February, by a coach belonging to these coach proprietors, and it is lost; the coach proprietors will not be responsible; the notice given to the principal being considered in law as notice to all their agents. *Mayhew v. Eames*, 4 D. & R. 484; 3 B. & C. 601; 1 C. & P. 550.

The carrier's agent telling the female servant of the owner of a parcel above the value of 5*l.* that it ought to be insured, is not a sufficient notice of the limitation of the carrier's responsibility. *Macklin v. Waterhouse*, 5 Bing. 212; 2 M. & P. 319.

Where it was agreed between the plaintiff and one of the defendants, proprietors of a stage coach, to carry certain parcels for the plaintiff free of expense, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.* unless entered and paid for, &c.:—Held, that the defendants were not liable for the loss of a parcel of above the value of 5*l.* sent by the plaintiff under this agreement, of the value of which no notice had been given to the defendants. *Bignold v. Waterhouse*, 1 M. & S. 255.

agent at W., to the defendant, to be carried to the plaintiff, who resided in London: it is sufficient for the defendant to prove that the plaintiff had received notice in London, that the defendant would not be responsible for goods exceeding 5*l.* in value, unless entered and paid for, without proving any notice to the agent in the country, especially if the terms of the notice extended to deliveries to agents in the country as well as in London; and the mere circumstance that the defendant's agent received the parcel, after notice that its value was considerable, does not amount to a waiver of such notice. *Alfred v. Horne*, 3 Stark. 136—Abbott.

**Sticking up in Office.**—A notice stuck up in the office, to be of any avail, must be in such large characters that a person delivering goods at the office cannot fail to read without gross negligence. *Clayton v. Hunt*, 3 Camp. 27—Ellenbor.

If a carrier receive goods at a distance from his office, he must prove that the special terms on which he deals were communicated to the owner of the goods through some other medium than a notice stuck up in the office. *Id.*

It is not sufficient notice to paste upon the door of the office a bill blazoning the advantages of his conveyances, and stating in small characters, at the bottom of it, that he will not be answerable for goods above the value of 5*l.* unless entered as such, and paid for accordingly. *Butler v. Heane*, 2 Camp. 415—Ellenborough.

It is not sufficient to show that a printed notice was exhibited in the carrier's office, where the goods were delivered by a porter, although the porter could read, and had seen the notice, if in fact he had never read it. *Kerr v. Willan*, 2 Stark. 53; 6 M. & S. 150: *S. P. Davis v. Willan*, 2 Stark. 279.

A notice of certain limitations on a general liability, suspended at the termini of the journey, will not attach upon the delivery of goods at intermediate places, where no such notice is given. *Gouger v. Jolly*, Holt, 317—Gibbs.

**By Advertisement.**—In an action against a carrier for negligence, the defendant cannot read in evidence the advertisement in a newspaper, by which he limits his responsibility, unless he first prove that the plaintiff was in the habit of reading that paper. *Leeson v. Holt*, 1 Stark. 186—Ellenborough.

But semble, that an advertisement in the Gazette may be read without such preparatory proof, but without it the evidence is weak. *Id.*

To fix a plaintiff with knowledge of a general notice by which a coach proprietor had limited his responsibility, it was proved that the plaintiff had taken in for three years a newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the court refused a new trial. *Rowley v. Horne*, 3 Bing. 2; 10 Moore, 247.

**Knowledge of Value.**—The usual notice given

the loss of goods above the value of 5*l.*, unless the appearance of the goods necessarily indicated that they were above that value. *Down v. Fremont*, 4 Camp. 40—Ellenborough.

A public notice given by carriers that they will not be answerable for certain specified articles, or any other goods of what nature or kind soever above the value of 5*l.*, if lost, stolen or damaged, unless a special agreement is made, and a premium paid, such value to be extended at the time of delivery, seems not to extend to goods which do not fall within any of the specified articles, and which from their bulk and quality communicated to the carriers at the time of delivery, must be known to them to exceed the value of 5*l.*: and therefore it seems they will be liable for any damage to the goods arising from the carriage, although no special agreement be made, nor any premium paid; but at all events they will be liable for damage arising from gross negligence notwithstanding such notice. *Beck v. Evans*, 16 East, 244: 3 Camp. 267.

A notice by carriers that they will not be answerable for any goods above the value of 5*l.* unless entered as such and paid for accordingly, applies to goods which from their bulk may be supposed to exceed the specified value. *Thoroughgood v. Marsh*, Gow, 105—Dallas.

Notwithstanding a notice by carriers that they will not be accountable for goods of a particular description above the value of 5*l.* "unless specified and paid for as such when delivered," it was held, that they were liable for damage, done to an article of this description, much above the value of 5*l.*, although not paid for as such when delivered, their book-keeper having been then informed of its value, and desired to charge for it what he pleased, which should be paid provided it was taken care of. *Wilson v. Freeman*, 3 Camp. 527—Ellenborough.

Notice is not defeated by proof that the book-keeper who received the goods was conscious of or might have inferred their value. *Levi v. Waterhouse*, 1 Price, 280.

If a carrier gives notice that he will not be accountable for goods above the value of 20*l.* unless entered, and an insurance paid, over and above the price charged for carriage, according to their value: a person who enters silk exceeding the value of 20*l.* and does not pay the insurance, cannot recover any part of the value of the goods, if lost. *Harris v. Packwood*, 3 Taunt. 264.

Although the price he agrees to pay for the carriage of the silk is, on account of its superior value, higher than the ordinary price charged even for the carriage of bulky articles. *Id.*

And although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer. *Id.*

Semble, a carrier is entitled to make a higher charge for the superior risk attending the carriage of valuable goods, but the charge must be reasonable. *Id.*

A common carrier gave public notice that he would not hold himself accountable for any parcel

cordingly, when delivered. A person who knew that the carrier had given this notice, delivered to him a parcel containing goods (much exceeding the value of 5*l.*) to be carried from L. to B., and the carrier accepted them for that purpose. The price of the carriage was not then paid. The carrier knew the parcel contained goods much exceeding 5*l.* The parcel was lost;—Held, that the carrier was not responsible. *Marsh v. Horne*, 5 B. & C. 322; 8 D. & R. 223.

#### V. LIEN AND REMUNERATION.

The lien of a common carrier for his general balance—however it may arise in point of law from an implied agreement—to be inferred from a general usage of trade, must be proved by clear and satisfactory instances, sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm; yet is not to be favoured, nor can it be supported by a few recent instances of detention of goods by four or five carriers for their general balance. But such a lien may be inferred from evidence of the particular mode of dealing between the respective parties. *Rushforth v. Hadfield*, 6 East, 519; 2 Smith, 624. And see *Whitehead v. Vaughan*, 6 East, 523, n. *Holderness v. Collison*, 7 B. & C. 212.

And a jury having negatived such a general usage, though proved to have been frequently exercised by the defendant and various other common carriers throughout the north for ten or twelve years before, and in one instance so far back as thirty years, though not opposed by other evidence, the court refused to grant a new trial. *Rushforth v. Hadfield*, 7 East, 224; 3 Smith, 221.

A carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them, against the consignee, for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcott*, 2 N. R. 64.

Where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular articles, but also for any general balance due from their respective owners; and goods were sent by the carrier addressed to the order of J. S. who was merely a factor:—Held, that the carrier had not any lien as against the real owner, for a balance due from J. S. *Wright v. Snell*, 5 B. & A. 350.

Quære, whether if he had given notice that all good to whomsoever belonging, should be subject to a lien for any general balance that might be due from the persons to whom they were addressed, he would have any right to retain goods for a balance due from J. S.? *Id.*

Where goods are taken by the owner from the wagon, the carrier or warehouseman has no claim for booking or warehouse room, there being in such case no lien. *Lambert v. Robinson*, 1 Esp. 119—Eyre.

If a person go to a coach office, and direct that

the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but if the party merely leave the portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all. *Higgins v. Bretherton*, 5 C. & P. 2—Tent.

If a carrier receive goods to be carried, he cannot retain the goods, and put the consignor of the goods upon proof of his title to them. *Ann. cited* 3 Esp. 115—Gould.

If, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk, who is transacting the business there, 2*s.* 6*d.* per cwt., and on the faith of this he sends the goods, the carrier cannot charge more, although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates, in which 3*s.* 6*d.* per cwt. was set down for goods of the sort in question. *Winkfield v. Packington*, 2 C. & P. 599—Tenterden.

#### VI. BOOKING-OFFICE KEEPERS.

A booking-office keeper, who also keeps a wine vault, is guilty of negligence, if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of two large a size to be conveniently taken into the bar behind the counter. *Dover v. Mills*, 5 C. & P. 175—Park.

Evidence, that, at the door of a booking-office, there is a board on which is painted "conveyances to all parts of the world," and a list of names of places, is not sufficient proof that the owner of the office is a common carrier, so as to charge him for the loss of a box that was booked there. *Upston v. Slark*, 2 C. & P. 598—Tent.

If a common carrier demand a certain sum for booking, and refuse to take charge of goods unless such sum be paid, he is not liable to an action if they be left without being paid for and are lost. — *v. Jackson*, Peake's Add. Cas. 185—Kenyon.

If a carrier direct goods to be sent to a particular booking office, he is answerable for the negligence of the booking-office keeper. *Colepepper v. Good*, 5 C. & P. 380—Gaselee.

#### VII. ACTIONS.

By 1 Will. 4, c. 69, s. 7, where any parcel or package which has been delivered, and, the value being declared, the increased rate of charges paid, has been lost or damaged, the party entitled to recover damages in respect of such loss or damage, shall also be entitled to recover back the increased charges so paid, in addition to the value.

By s. 9, carriers are not to be concluded by the declared value, but are only to be liable to such damages as are proved, not exceeding the declared value, together with the increased charges.

Proof of contract is not necessary to support an action against common carriers: they may be sued in an action on the case for the injury arising ex delicto, and such an action is not necessarily to be considered quasi ex contractu, or founded on contract. *Brotherton v. Wood* (in error,) 6 Moore, 141; 9 Price, 408; 3 B. & B. 54.

The inscription on a stage coach of the name of the party licensed to use it, is evidence against him of ownership, as well in an action as on summary proceedings. *Barford v. Nelson*, 1 B. & Adol. 571.

In an action against a carrier for the loss of a box, the person at the booking-office who delivered the goods to the carrier, is a competent witness to prove the state in which they were delivered. *Colepepper v. Good*, 5 C. & P. 380—Gaselee.

A declaration in assumpsit, stating that goods had been delivered to the defendants, as carriers, to be conveyed by them for a reasonable reward, and that they undertook to carry them safely and securely, and deliver them accordingly, and assigning for breach that they had lost the same, is sufficient to admit proof that they had been guilty of gross negligence. *Smith v. Horne*, 2 Moore, 18; 8 Taunt. 144; Holt, 643.

In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff averred that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff; proof that the hire was to be paid by the consignee, was held to be no variance, the consignor being by law liable. *Moore v. Wilson*, 1 T. R. 659.

An averment of an undertaking to carry goods to R., to be delivered to C. B., to be paid for on delivery, shows with sufficient certainty that the price of the goods was to be paid by C. B., the consignee, to the carrier. *Jacobs v. Nelson*, 3 Taunt. 423.

Assumpsit may be maintained in the common form of declaring, against a carrier for the loss of goods which were of above 5*l.* value, and were not in fact paid for accordingly, although it were part of the contract proved by a general notice, fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, that the "carrier would not be accountable for more than 5*l.* for goods, unless entered as such and paid for accordingly." *Clarke v. Gray*, 6 East, 564; 2 Smith, 622; 4 Esp. 177.

A misdescription of the termini is fatal in assumpsit against a carrier for the loss of goods. *Tucker v. Cracklin*, 2 Stark. 385—Abbott.

In an action of case against a carrier for the loss of a trunk:—Held, that the terminus a quo was immaterial, as the gist of the action was the non-delivery at the place it ought to have gone to. *Woodward v. Booth*, 7 B. & C. 303.

A declaration in case stated, that plaintiff delivered a trunk to defendant, to be put in a coach at Chester, in the county of Chester, to wit, at

riance, there being no other place of the same name. *Id.*

Where a count in a declaration against a carrier by water, alleged, that in consideration that the plaintiff, at the request of the defendant, had caused to be shipped on board the defendant's vessel a quantity of wheat, to be carried to a certain place for freight, to be therefore paid to the defendant, he undertook to carry the wheat safely, and deliver it for the plaintiff on a given day; but it appeared that the defendant's undertaking to carry was made before the whole of the wheat had been shipped on board of the vessel:—Held, that the count might be supported, although it was objected that the consideration for the promise was executory. *Streeter v. Horlock*, 7 Moore, 283; 1 Bing. 34.

In an action on the case against the proprietor of a stage coach, for an injury sustained by a passenger, the declaration alleged that the defendant was the owner of a stage coach for the conveyance of passengers from London to Blackheath, and that the plaintiff had agreed to become a passenger, and the defendant to receive him as such passenger, to be carried from London to Blackheath; and the evidence was that the words "London and Blackheath" were painted on the coach door; that the coach was licensed to run from Charing Cross only, and that the plaintiff was taken up at the Elephant and Castle, in St. George's Fields:—Held, that as Charing Cross and St. George's Fields are both, in common parlance, styled "London," the variance was immaterial, and the allegation sufficiently proved. *Ditcham v. Chavis*, 1 M. & P. 735; 4 Bing. 706.

An averment of a contract to carry goods from London to Bath, is supported by evidence of a contract to carry from Westminster to Bath; London must be taken in the enlarged and popular sense of a collective name, and not in a limited sense, applicable to the city only. *Beckford v. Crutwell*, 1 M. & Rob. 187; 5 C. & P. 242—Tenterden.

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### I. MALICIOUS ARREST.

#### 1. Malice.

Malice must be proved in an action for a malicious arrest. *George v. Radford*, 3 C. & P. 464—Tenterden.

An action will not lie against a party suing out a writ, if he neglect to countermand it after payment of the debt, at least, unless malice be averred. *Scheibel v. Fairbairn*, 1 B. & P. 388.

And if the costs were paid as well as the debt. *Page v. Wiple*, 3 East, 314.

And in an action for maliciously holding to bail, it is not sufficient to prove that the writ was sued out after payment of the debt, if the cir-

such case evidence of actual malice must be given. *Gibson v. Chaters*, 2 B. & P. 139. And see *Silversides v. Bowley*, 1 Moore, 92.

A. arrested B., for money paid to his use, on the 10th of December, and was ruled to declare on the 17th; filed a declaration on the 24th; and discontinued the action, upon payment of costs, on the 31st:—Held, in case for a malicious arrest, that this was a sufficient *prima facie* evidence of malice, and want of probable cause. *Nicholson v. Coghill*, 6 D. & R. 12; 4 B. & C. 21.

A plaintiff, who, acting under what he conceives sound advice, takes the defendant in execution, after he has taken the defendant's bail in execution, is not liable to an action for maliciously arresting the defendant, although previous to the arrest, he had notice from the defendant that his proceedings were illegal. *Snow v. Allen*, 1 Stark. 502—Ellenborough.

Where A. arrested B. upon the advice of his special pleader that he had a good cause of action, but afterwards, upon being ruled to declare, discontinued proceedings, and B. brought an action for a malicious arrest without any reasonable or probable cause:—Held, that the reasonableness or probability of the cause was a mixed question of law and fact for the jury to decide; and that they were rightly told by the judge at *Nisi Prius*, that if they believed the defendant to have acted *bona fide* upon the advice he had received, he was entitled to a verdict; but if otherwise, they ought to find for the plaintiff. *Ravenga v. Macintosh*, 4 D. & R. 107; 2 B. & C. 693; 1 C. & P. 204.

In an action for maliciously holding the plaintiff to bail, which was founded on the single fact of her having been arrested on *meane process*, at the suit of the defendant, for money due from her as administratrix of her husband, to the defendant as indorsee of two notes made by the husband; no proof having been offered on the trial of malice express or implied, the jury gave a verdict for the plaintiff, with 5s. damages: on a motion to set aside the verdict, and enter a nonsuit on the assumed defect in the plaintiff's case of the absence of evidence of malice, the court were inclined to hold that such a case of implied malice had been made out, as would support the verdict against that objection: the damages being very small, however, they held it to be a case in which they ought not to interfere, and refused a rule to show cause. *Fletcher v. Webb*, 11 Price, 381.

A. having by his laches lost all right of action on a note indorsed by B., arrests B., and afterwards discontinues the action; these circumstances do not of themselves so exclude all probable cause as to afford a presumption of malice. *Bristow v. Heywood*, 1 Stark. 48; 4 Camp. 213—Ellenborough.

The first action being non-prossed, is not of itself evidence of malice. *Sinclair v. Eldred*, 4 Taunt. 7.

An action for maliciously holding to bail, when less than 10l. was due, cannot be sustained, unless it is in proof that the plaintiff knew the fact

to be so. It is not sufficient that, in the action, less than 10*l.* was paid into court, which the plaintiff took out, and proceeded no further in the action. *Jackson v. Burleigh*, 3 Esp. 34—Kenyon.

If the declaration avers that B. the defendant had no cause of action against A. the plaintiff, to the amount of 10*l.*, and it appears that A. was indebted to him above that sum, although not nearly to the amount sworn to in the affidavit to hold to bail, the action cannot be supported, as A. should have declared against B. for maliciously holding him to bail for a greater sum than was really due; but if, in fact, B. was largely indebted to A. on a balance of accounts, and had only a cross demand upon him, for a different cause from that mentioned in the affidavit to hold to bail, then the above averment is not falsified, as in that case A. did not owe B. 10*l.*, and B. had no cause of action for which he could lawfully hold A. to bail. *Wetherden v. Embden*, 1 Camp. 295—Mansfield.

Where the declaration averred that defendant had no cause of action against the plaintiff for which the latter was liable to be held to bail, and at the trial it was proved that the plaintiff owed the defendant at the time of the arrest 12*l.*: after verdict for plaintiff, the court of K. B. set it aside, on the ground that plaintiff had not proved the injury complained of in his declaration. *Wilkinson v. Mawbey*, 1 Camp. 297—Gould.

An action cannot be maintained for a malicious arrest by A. against B., if A. owed B. the sum for which he was held to bail, although B. was indebted to A. to a larger amount. *Brown v. Pigeon*, 2 Camp. 594—Ellenborough.

Where A. arrested B. for 20*l.*, knowing that upon the balance of their mutual dealings there was but 5*l.* due to him:—Held, that the arrest was malicious, and without any probable cause. *Austin v. Debnam*, 4 D. & R. 653; 3 B. & C. 139.

The plaintiff was arrested by the indorsee of a bill purporting to be drawn on, and accepted by him, but the acceptance was not his:—Held, that this was not sufficient in an action for a malicious arrest, the defendant having acted under mistake, and without malice. *Spencer v. Jacob, M. & M.* 180—Tenterden.

Where a cause (in which the defendant has been arrested) is referred to arbitration, and the award is given in favour of the defendant, he cannot on that ground maintain an action against the plaintiff for a malicious arrest. *Habershon v. Troby*, Peake, Add. Cases, 181; 3 Esp. 33—Kenyon. And see *Thomson v. Atkinson*, 6 B. & C. 193.

In an action for maliciously arresting the plaintiff, and taking him in execution at the defendant's suit, it seems that the latter is liable, although the plaintiff was taken in execution at the instance of defendant's attorney, and without the knowledge or assent of the defendant. *Jones v. Nicholls*, 3 M. & P. 12.

By a cognovit, A. confessed the action, and that B. had sustained damage to the amount of 3000*l.*; and agreed, that, in case A. should make default

in payment of 259*l.* on the 7th of May, B. should be at liberty to enter up judgment for 3000*l.*, and sue out execution for 259*l.* and costs, which would have left a principal sum of 1650*l.* due to B. A. not having paid the 259*l.* on the 7th of May, B. entered up judgment, and sued out execution for 3011*l.*, indorsed with a direction to the sheriff, requiring him to levy 1967*l.* and A. was arrested and detained in prison for that sum;—Held, that A. might maintain an action against B. for having caused him to be arrested for a larger sum than he ought. *Wentworth v. Bullen*, 9 B. & C. 840.

## 2. Process and Arrest.

In an action for a malicious arrest, it is necessary to state the writ. *Gadd v. Bennett*, 5 Price, 540.

The declaration in an action for maliciously causing a writ to be sued out, whereon the plaintiff was imprisoned, stating the process with the *ac etiam* clause as sued out for 50*l.* (instead of 30*l.* according to the fact) and an indorsement of 15*l.*, the warrant being for 30*l.*, is a fatal variance. *Id.*

In an action for a malicious arrest, the plaintiff must prove the sheriff's warrant on the writ against him. *Lloyd v. Harris*, Peake, 174—Kenyon.

A bailable writ is not necessarily a special writ within the 51 Geo. 3, c. 124, and, therefore, a plea stating that plaintiff commenced his action by a bailable writ indorsed for bail for 60*l.*, by virtue of which defendant was arrested; and that plaintiff's then cause of action did not amount to 15*l.*, or to any sum for which defendant was liable to be arrested, was held bad on general demurrer for not showing the writ to be a special writ. *Ball v. Swan*, 1 B. & A. 393.

An officer, who had a writ against a man, sent to him to say so, and asked him to appoint a time to come to his office and execute a bail bond, which he did:—Held, not to constitute an arrest, so as to support an action for a malicious arrest, although the original plaintiff had no cause of action. *Berry v. Adamson*, 6 B. & C. 528; 9 D. & R. 558; 2 C. & P. 503.

An allegation that the defendant maliciously caused the plaintiff to be arrested, and to be detained in prison, until, in order to procure his release, he was forced to procure bail, is not a divisible allegation; and if there was a giving of bail proved, but no evidence of any arrest, it is not sufficient. *Id.*

In one case at nisi prius, it was held that an action lies for maliciously holding a party to bail, although he is never arrested, but is told that there is a writ out against him, and he goes to the sheriff's officer and gives bail. *Small v. Gray*, 2 C. & P. 605—Tenterden.

A. by mistake sues out a bailable writ against B., and gives it to C. an officer, to be executed; C. says to B. he has a writ against him; but B. denying that he owed the money, C. does not take him into actual custody. On inquiry, the mistake is discovered, and B. is told he need give himself no further trouble in the matter;

arrest. *Deen v. Barnage*, 3 Camp. 165—Ellenborough.

An averment in an action for a malicious arrest, that the defendant detained the plaintiff until he found bail; if some detention be proved, it is sufficient to support the action, although no bail be put in. *Bristow v. Heywood*, 1 Stark. 48; 4 Camp. 213—Ellenborough.

An allegation that the plaintiff gave bail to the sheriff for his appearance at the return of the writ, is not supported by evidence that he paid the debt and 10*l.* for costs into the hands of the sheriff; but he may still maintain the action, although he cannot recover for the consequential damage. *Id.*

### 3. Termination of Suit.

An action for a malicious arrest cannot be maintained where the former cause was terminated by a *stet* process, by the consent of the parties. *Wilkinson v. Howel*, M. & M. 495—Tenterden.

Rule to set aside nonsuit afterwards refused. *Id.*

An action may be brought to recover damages for a malicious arrest, where the suit is terminated by a rule of court; and that rule is evidence of the termination of the suit. *Brook v. Carpenter*, 3 Bing. 297; 11 Moore, 59.

Although it was objected that it was obtained merely on the oath of the plaintiff, who would, by its admission, be in effect giving evidence in her own cause. *Id.*

A judge's order to stay proceedings in the first suit, on payment of costs, and proof of such payment, is not sufficient evidence that the first suit is at an end. *Kirk v. French*, 1 Esp. 80—Kenyon. *And see Harvey v. Morgan*, 2 Stark. 19.

Proof that no declaration was filed or delivered within a year after the return of the writ, is sufficient to show a termination of that suit. *Pierce v. Street*, 3 B. & Adol. 397.

An averment that the suit is wholly ended and determined, is evidenced by proof of the rule to discontinue upon payment of costs, and that the costs were taxed and paid. *Bristow v. Heywood*, 1 Stark. 48; 4 Camp. 213—Ellenborough.

The allegation that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy, &c." is not supported by a proof of a rule to discontinue on payment of costs, and proof of payment of such costs:—Held, also that the court could not reject the allegation of the judgment of nonpros, as, without that, it would not be shown how the suit was terminated. *Webb v. Hill*, 3 C. & P. 485; M. & M. 253—Tenterden.

The plaintiff, on the 6th of February, took out a rule to discontinue his action upon payment of costs, to be taxed by the master; and on the 7th an appointment was made by the master, but the costs were not taxed and paid until the 11th of

that the latter action was brought before the first was discontinued:—Held, that it was not; and that when the judgment of discontinuance was entered, it had relation back to the day when the original rule to discontinue was taken out. *Brandt v. Peacocke*, 3 D. & R. 2; 1 B. & C. 649.

Where the declaration in setting out a judgment by default in the former action, stated that "it was thereupon considered that the then plaintiffs should take nothing by their said writ, but that they and their pledges to prosecute should be in mercy, &c.;" it is no material variance, if the record produced in evidence have not the words "and their pledges to prosecute," but only have an "&c.;" for these words may be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. *Judge v. Morgan*, 13 East, 547. *And see Reed v. Taylor*, 4 Taunt. 616.

### 4. In Inferior Courts.

An action was held to lie for holding to bail in an inferior court, when no more than 30*s.* was due. *Smith v. Cattel*, 2 Wils. 376.

So when the inferior court had no jurisdiction over the cause. *Goslin v. Wilcock*, 2 Wils. 302.

In an action for maliciously arresting and imprisoning the plaintiff upon a plaint for debt in the Sheriff's Court in London, without reasonable or probable cause, it is sufficient to allege and prove that the plaint was made "at the Sheriff's Court in London, before J. A., one of the sheriffs," &c. *Arundell v. White*, 14 East, 216.

The usual course of that court, upon the abandonment of a suit by the plaintiff, being to make an entry in the minute book of "withdrawn" by the plaintiff's order, opposite to the entry of the plaint:—Held, that proof of such entry in the minute-book was sufficient to prove an allegation that the former suit was "wholly ended and determined." *Id.*

And a general allegation that the plaintiff was arrested "under and by virtue of the plaint," is proved by showing the plaint entered, and the subsequent arrest; though it also appeared that the officer making the arrest first received a paper in the nature of a warrant, (but which was no warrant, but only the parol direction of the sheriff, which is good by the custom, reduced into writing to avoid mistake,) directing him to make the arrest; and though the stat. 12 Geo. 1, c. 29, requires a previous affidavit of the debt, which had not been made in this case. *Id.*

### 5. Evidence and Damages.

In an action for arresting a party and holding him to bail, without a reasonable or probable cause, whatever was admissible in evidence to defeat the action on which the arrest took place, is also admissible, on the question of the right of the party arrested to recover for the injury sustained. *Hadden v. Mills*, 4 C. & P. 486—Tindal.

to be indorsed for bail, by virtue of an affidavit for that purpose filed:—Held, that a copy of the affidavit was admissible in support of this allegation. *Crook v. Dowling*, 3 Dougl. 75.

In case against a judgment creditor for maliciously suing out an alias fi. fa., after a sufficient execution levied upon the plaintiff's goods under the first fi. fa.:—Held, that the sheriff's returns indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *prima facie* evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gifford v. Woodgate*, 11 East, 297; 2 Camp. 117.

In the calculation of damages, in an action for maliciously holding to bail, the plaintiff is entitled to recover not merely the taxed costs, but the costs as between attorney and client. *Sand-buck v. Thomas*, 1 Stark. 306—Ellenborough.

The plaintiff can recover no damages for extra costs, nor any damages, unless malice be proved. *Sinclair v. Eldred*, 4 Taunt. 7: *S. P. Webber v. Nicolas*, R. & M. 419.

## II. MALICIOUS CRIMINAL PROCEEDINGS.

### 1. Malice and Want of probable Cause.

An action for a malicious prosecution cannot be maintained, though the accusation turns out to be unfounded, if the prosecutor can show probable cause for the prosecution. *Arbuckle v. Taylor*, 3 Dow, 160.

Malice and the want of probable cause must both concur. *Farmer v. Darling*, 4 Burr. 171.

The question of a probable cause is a mixed proposition of law and fact: whether the circumstances alleged are true or not, is a question of fact for the jury; whether they amount to probable cause, is a question of law. *Johnstone v. Sutton*, 1 T. R. 545. And see *Caudell v. London*, 1 T. R. 520, n.

In an action for maliciously indicting A. for perjury, it appeared that the defendant B., in 1824, preferred the indictment, and gave evidence before the grand jury; that the bill was found, removed into K. B., and tried in 1827; and that B., who was then in custody, was brought into court under a habeas corpus obtained by his attorney, on the ground that he was a material witness; but he did not give evidence, and A. was acquitted. The judge, in his direction, told the jury, that if the defendant did not appear at the trial as a witness, from a consciousness that he had no evidence to give which would support the indictment, then there was a want of probable cause, and they should find for the plaintiff; but if his non-appearance did not proceed on that ground, then there was no proof of want

and the jury found for the plaintiff:—Held, upon error, and a bill of exceptions, whereby the objection stated to the summing up was, that the judge himself ought to have determined, upon the facts, whether there was probable cause, without leaving any question to the jury; that, under the circumstances, the motive which induced the defendant not to appear as a witness, was a question of fact for the jury, and they might be directed to conclude that there was no probable cause, and to find for or against the defendant, according to their opinion of the motive. *Taylor v. Williams*, 2 B. & Adol. 845: *S. C. nom. Willans v. Taylor*, 6 Bing. 183; 3 M. & P. 350.

The plaintiff is to give *prima facie* evidence of want of probable cause, which the defendant may rebut, if he can, by showing the existence of probable cause. Defendant presented two bills for perjury against the plaintiff, but did not appear himself before the grand jury, and the bills were ignored. He presented a third, and on his own testimony the bill was found. This prosecution he kept suspended for three years, till the plaintiff taking the record down to trial, the defendant declining to appear as a witness, although in court, and called on, plaintiff was acquitted:—Held sufficient *prima facie* evidence of want of probable cause. *Id.*

A. being taken before a justice of peace to be bailed, the defendant's attorney objected that the justice had no power to bail him. A letter, proved to have been written by a judge's clerk, purporting to be by authority of the judge, but without proof of such authority, was given in evidence for the purpose of showing that the justice was induced, by such letter to bail A.:—Held, that the letter was admissible for that purpose. *Id.*

An affidavit made by an attorney's clerk was put in, as showing, that those who conducted the prosecution had taken means to prevent a person becoming bail for A. This was held to be admissible, without calling the clerk to prove an authority from his master to make the affidavit. *Id.*

Upon the trial of an action for maliciously indicting the plaintiff, the plaintiff proved a case, which in the opinion of the judge showed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and that being proved, the judge was of opinion that there was:—Held, that there being no contradictory testimony as to that fact, and there being nothing in the demeanour of the witness who proved it to impeach his credit, the judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff. *Davis v. Hardy*, 6 B. & C. 225; 9 D. & R. 380.

In an action by an attorney for maliciously, and without probable cause, indicting him for sending a threatening letter, it appeared that his clients having inquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the de-



sible for the price of the goods, but believed that the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the plaintiff, by direction of his clients, wrote a letter to defendants, demanding payment of them for the price of the goods obtained from his client through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount; and that he had instructions to adopt proceedings, if the matter were not arranged in the course of the morrow; and that, as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendants were then summoned before a magistrate to answer a charge of obtaining goods under false pretences. The plaintiff served the summons, and attended for his clients, and the complaint was dismissed. The defendants afterwards indicted the plaintiff for sending a threatening letter, contrary to the 7 & 8 Geo. 4, c. 29, s. 8, and he was acquitted. On the trial in this action, the judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment:—Held, that the decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants *bonâ fide* believed that they had a reasonable cause for indicting; but a pure question of law for the judges, whether the defendants had such reasonable cause. *Blachford v. Dod*, 2 B. & Adol. 179.

In an action for a malicious prosecution, it is no answer that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect, or the opinion ill founded. *Hewlett v. Cruchley*, 5 Taunt. 277.

It lies on the plaintiff to give evidence of malice in the defendants, either express, or to be collected from circumstances, showing plainly the want of probable cause; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called. *Purcell v. Macnamara*, 9 East, 361; 1 Camp. 199. And see *Sykes v. Dunbar*, 1 Camp. 202, n. *Wallis v. Alpine*, 1 Camp. 204, n.; and *Parrot v. Fishwick*, 9 East, 362, n.

In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent of the offence of which he was convicted; but he must also prove, from what passed before the magistrate, that there was a want of probable cause. *Burley v. Bethune*, 1 Marsh. 220; 5 Taunt. 580.

An action, however, lies for a malicious prosecution, though the plaintiff be acquitted on a defect in the indictment. *Wicks v. Fentham*, 4 T. R. 247.

So, for the malicious prosecution of a bad indictment for perjury; therefore, where, in such action, the perjury was assigned upon evidence given before the sheriff's secondary on an inquiry

directed to be returned into C. P. instead of K. B.:—Held, to be no objection in arrest of judgment. *Pippet v. Hearn*, 1 D. & R. 266; 5 B. & A. 634.

Where the bill has not been found, an action cannot be supported without evidence of express malice, as well as of the want of probable cause. *Byne v. Moore*, 1 Marsh. 12; 5 Taunt. 187.

The plaintiff must produce some evidence of want of probable cause, (although slight evidence would be sufficient,) as well as proof of express malice. *Incedon v. Berry*, 2 Selw. N. P. 4051, n.; 1 Camp. 203, n.—*Le Blanc*.

If a party is indicted for a felony, though he is acquitted without calling witnesses, he cannot maintain an action for a malicious prosecution, if his acquittal was the result of deliberation, and the evidence was sufficient to cause the jury to pause. *Smith v. Macdonald*, 3 Esp. 7—Kenyon.

If a plaintiff declares that the defendant maliciously and without probable cause preferred an indictment, setting it forth, the averment is proved, if some charges in the indictment were maliciously and without probable cause preferred, although there was good ground for others of the charges preferred. *Reed v. Taylor*, 4 Taunt. 616.

If A. strike B., and B. return the blow, on which A. indicts B. for an assault, the bare fact of A. having struck the first blow is not sufficient to support an action for a malicious prosecution. *Fish v. Scott*, Peake, 135—Kenyon.

Though it may be trespass in the magistrate to grant an illegal warrant, yet an action on the case may be supported against the person who causes and procures such warrant to issue, if it is done maliciously, and without reasonable or probable cause. *Elsee v. Smith (in error)*, 1 D. & R. 97; 2 Chit. 304.

Where a person having lost a bill of exchange which he supposes to have been stolen, goes before a magistrate, and relates the circumstances of the loss, and the magistrate grants his warrant to apprehend A. B. on a charge of having "feloniously stolen, taken, and carried away" the bill of exchange, (language which the complainant did not use when he laid his information,) and upon subsequent investigation of the case, it turns out to be no felony:—Held, that case would not lie for maliciously procuring the magistrate to grant his warrant; to sustain the averment of malice, the charge must be wilfully false. *Cohen v. Morgan*, 6 D. & R. 8.

A declaration which alleges that the defendant charged the plaintiff with felony, is supported by evidence that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them. *Davis v. Noake*, 6 M. & S. 29; 1 Stark. 317—*Diss. Bayley*.

A., the servant of B., stated before a magistrate that C. came into the yard of his employer, and took from a stable there two geldings, the property of B. and rode them away, though he was

tion did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having feloniously stolen and ridden away with two geldings. *Milton v. Elmore*, 4 C. & P. 456—Tindal.

If C. be intrusted to receive money for A., with a written direction for its application, and C. write a letter to A., stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C., under the statute 7 & 8 Geo. 4, c. 29, s. 49, not malicious. *Eager v. Dyott*, 5 C. & P. 4—Tenterden.

Rule to set aside the nonsuit refused. *Id.*

## 2. Parties.

In an action for malicious prosecution against A. and B., if it appear that both A. and B. entered into a joint cognizance to prosecute and give evidence; but that A. only employed the attorney, and that B. attended before the magistrate and the grand jury at the request of the attorney, the judge will direct the acquittal of B. *Eager v. Dyott*, 5 C. & P. 4—Tenterden.

Rule to set aside the nonsuit refused. *Id.*

A rule for a criminal information obtained by the plaintiff in an action for the malicious prosecution of an indictment, and made absolute, is no bar to such action, although the indictment was against the plaintiff and another person. *Caddy v. Barlow*, 1 M. & R. 275. *And see Rez v. Sparrow*, 2 T. R. 198.

In an action by A., for the malicious prosecution by C. of an indictment against A. & B., evidence of the misconduct of C. towards B., after his apprehension, tending to show the bad motives of C. is admissible. *Id.*

In an action on the case against parish officers; for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of an act of vagrancy, and imprisoned and kept to hard labour, the conviction being afterwards quashed, it is not necessary that the convicting magistrate should be made a defendant under the 24th Geo. 2, c. 44. *Simpkin v. French*, 12 Price, 394.

## 3. Proceedings.

It is necessary to state in the declaration every allegation proper to support the action, namely, that the defendant falsely, maliciously, and without any reasonable or probable cause, caused the defendant to be indicted, and to state the trial and acquittal. *Carman v. Trueman* (in error,) 1 Bro. P. C. 101.

A declaration for maliciously indicting at the general quarter sessions, instead of general sessions, was held good; the word "quarter" being only surplusage. *Bushby v. Watson*, 2 W. Black. 1050.

After verdict, in an action for a malicious prosecution for perjury, it is no objection to the description of the court in which the indictment

whom the session of oyer and terminer was held, are not set out; and it seems sufficient to allege, that at such a session the defendant maliciously indicted the plaintiff for wilful and corrupt perjury, without describing more particularly the circumstances under which the alleged perjury was supposed to have been committed. *Pippet v. Hearn*, 4 D. & R. 266; 5 B. & A. 634.

In an action on the case against parish officers, for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of an act of vagrancy, and imprisoned and kept to hard labour, the conviction being afterwards quashed, it was averred in the declaration in such a case, that the conviction was quashed on the 22d day of April, at the general quarter sessions of the peace held on that day; and the proof by the order for quashing the conviction showed that it was not a general but an adjourned sessions: the variance was held not to be such as to furnish ground for setting aside the verdict in this case—Dubit. Baron Hullock, regarding the point as matter of pleading. *Simpkin v. French*, 12 Price, 394.

An averment, in a declaration, of the day of a former trial, must exactly agree with the record to be produced in evidence to support it, though it be laid under a videlicet. *Pope v. Foster*, 4 T. & R. 590.

But it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought; and, therefore, a variance in that respect, between the day laid, and the day stated in the record which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell v. Macnamara*, 9 East, 157; 1 Camp. 199.

Where, in an action for a malicious prosecution there is an allegation in the declaration, that the person prosecuted was "acquitted by a jury in the court of our lord the king, before the king himself, at Westminster, before the chief justice;" it is not supported by a record, from which it appears that the trial took place before the chief justice at Nisi Prius. *Woodford v. Ashley*, 11 East, 508; 2 Camp. 193.

The declaration averred that the defendant charged the plaintiff with violently assaulting him, and procured a warrant to apprehend him for the said offence; the charge made was for assaulting and striking: the warrant produced recited the charge to be for assaulting and beating:—Held, that this was no material variance. *Byne v. Moore*, 5 Taunt. 187; 1 Marsh. 12.

Where, in an action for a malicious prosecution, the record, in setting out the indictment, stated the words to be, "then and there did make an assault;" and in the indictment they were stated as "did then and there make an assault;" Held, to be no variance, and even if it was, that it might be altered before trial. *Freeman v. Arkill*, 3 D. & R. 669; 2 B. & C. 494; 1 C. & P. 137.

In an action for a malicious prosecution, in

reason of which he was imprisoned; and on production of the information before the justice, there is no charge of felony, though the warrant was to arrest the plaintiff for felony; the evidence does not support the declaration, and the plaintiff shall be nonsuited. *Leigh v. Webb*, 3 Esp. 165—Eldon.

And it seems that no action lies against the complainant before the justice of the peace. *Id.*

#### 4. Termination of Prosecution.

An action for malicious prosecution cannot be maintained till the prosecution is terminated, which must appear upon the declaration. *Fisher v. Bristol*, 1 Dougl. 215.

The declaration in an action for a malicious prosecution for felony, must state that the prosecution is at an end; and alleging that the plaintiff was discharged from his "imprisonment," is not sufficient. *Morgan v. Hughes*, 2 T. R. 225.

If it allege that the plaintiff was discharged by the grand jury's not finding the bill, it will show a legal end to the prosecution. *Id.*

#### 5. Evidence and Damages.

A count for maliciously indicting the plaintiff for an assault, cannot be supported without proof of some consequential injury sustained by him. *Freeman v. Arkell*, 3 D. & R. 669: 2 B. & C. 494; 1 C. & P. 137.

And in such an action the plaintiff may call one of the grand jury to prove that the defendant was the prosecutor on the indictment. *Id.*

¶ In an action for a malicious prosecution, where the defendant gives evidence of probable cause, a witness may be asked whether the plaintiff was not a man of notoriously bad character. *Rodriguez v. Tudmire*, 2 Esp. 721—Kenyon.

In an action for maliciously procuring the plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to show that the plaintiff's character was suspicious, and that his house had been searched on former occasions. *Newsum v. Carr*, 2 Stark. 69—Wood.

### III. OTHER MALICIOUS PROCEDURE.

**Bankruptcy.**—An action lies for maliciously suing out a commission of bankruptcy, notwithstanding the specific remedy given by stat. 5 Geo. 2, c. 30, s. 23. *Brown v. Chapman*, 3 Burr. 1418; 1 W. Black. 427.

Although the commission was afterwards superseded. *Chapman v. Pickersgill*, 2 Wils. 145.

It must be averred and proved that the commission was superseded before the commencement of the action; and if this fact be not proved the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the

2 B. & Adol. 695.

It is not sufficient to prove merely that the commission was superseded, as a supersedeas may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause. *Hay v. Weakley*, 5 C. & P. 361—Tindal.

Evidence of facts upon which the act of bankruptcy was probably proved, but which facts do not amount to an act of bankruptcy, is sufficient to call upon the defendants to prove the affirmative of probable cause. *Cotton v. James*, 1 B. & Adol. 128.

The adjudication of the commissioners does not in itself negative the want of probable cause. *Id.*

Semble, that in an action for maliciously suing out a commission of bankruptcy, it is a fatal variance to allege that the defendant sued the commission out of the high court of Chancery. *Poynter v. Forrester*, 1 Rose, 222: S. C. nom. *Poynton v. Forster*, 3 Camp. 58.

In such action, the allegation that the commission was duly superseded, can only be sustained by the production of the writ of supersedeas, and not by the Chancellor's order directing it to issue. *Id.*

A commission recited that A. B. became bankrupt with intent to defraud C. and D., surviving partners of Edmund Darby, but the writ of supersedeas stated them to be surviving partners of Edward Darby:—Held, in an action for maliciously suing out the commission, that the variance was fatal. *Matthews v. Dickinson*, 1 Moore, 104; 7 Taunt. 399.

**Other Matters.**—An action on the case lies for maliciously obtaining or executing a warrant to search a house for smuggled goods though none are found. *Boot v. Cooper*, 1 T. R. 535.

So, for a conspiracy in issuing a commission of lunacy. *Turner v. Turner*, Gow, 50—Dallas.

To support such an action, malice and a want of probable cause must be proved; but on proof of a total want of probable cause, malice may be implied; and although express malice be proved, some slight evidence of a want of probable cause must be given. *Id.*

An action on the case to recover damages against the lessor of the plaintiff; in a vexatious ejectment, is not maintainable. *Purton v. Hanor*, 1 B. & P. 205.

Nor will an action lie for a malicious prosecution of a court-martial by a captain in the navy against his commander-in-chief. *Sutton v. Johnston* (in error), 1 Bro. P. C. 76; 1 T. R. 453, 784.

An action lies against the master of a vessel for purposely firing a cannon at negroes, and thereby preventing them from trading with the plaintiff: and it is no answer to such action, that the plaintiff had not conformed to the law of the

country in paying the duty due to the king for his license to trade. *Tarleton v. M'Gawley*, Peake, 205—Kenyon.

#### IV. NEGLIGENCE.

##### 1. In driving Carriages.

**Injury.**—An action on the case for negligence is only maintainable where the injury is consequential to an act before done by the defendant. *Leame v. Bray*, 3 East, 593; 5 Esp. 18.

A foot passenger, though he may be infirm from disease, has a right to walk in the carriage way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. *Boss v. Litton*, 5 C. & P. 407—Denman.

In case for negligent driving, the law or usage of the road is no criterion of negligence. Therefore, where the defendant's carriage was on the wrong side of the road, and in attempting to pass on the near, instead of the off side, the plaintiff sustained damage:—Held, that it was for the jury to decide the question of negligence without regard to the law of the road. *Wayde v. Carr*, 2 D. & R. 255.

It is no justification to an action for negligently driving, that the plaintiff was on the wrong side of the road, if there was room sufficient for the defendant to pass without inconvenience. *Clay v. Wood*, 5 Esp. 44—Ellenb.

Although a person driving a carriage is not bound to keep on the regular side of the road, yet if he does not, he must use more care, and keep a better look out, to avoid concussion, than would be necessary, if he were on the proper side of the road. *Pluckwell v. Wilson*, 5 C. & P. 375—Alderson.

Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it. *Chaplin v. Hawes*, 3 C. & P. 554—Bea.

It is matter of evidence whether sufficient room is left or not, in case any accident happens. *Wordsworth v. Willan*, 5 Esp. 273—Rook.

**Act of Servants.**—The act of the servant will not bind the master in actions of case to the same extent as in actions on contracts. *Harding v. Greening*, Holt, 531; 1 Moore, 477.

A master is liable for an accident in consequence of the chain-stay of a cart breaking, when the horse, being frightened, ran away, and damage was done, as he is guilty of negligence in not having the tackle good. *Welsch v. Lawrence*, 2 Chit. 262.

In an action on the case, for the negligent driving of the defendant's servant, if it appear that the defendant holds himself out to the

world as the owner of the cart, by suffering his name to remain painted on it, and over the door of the house of business to which he belongs, the action is maintainable against him, although it is proved that he had for some days ceased to be the owner of the cart and concerned in the business, having resigned both up to his former partner. *Stables v. Eley*, 1 C. & P. 614—Abbott.

A declaration which charges the defendant with having negligently driven his cart against plaintiff's horse, is supported by evidence that defendant's servant drove the cart. *Brucher v. Fromont*, 6 T. R. 659.

If one being the owner of a shop and goods, allow A. to be at this shop, and in his own name to sell and dispose of the goods as he pleases, and a portion of these goods be destroyed by the negligent driving of the coachman of B. while the servant of A. is carrying them: A. has such a qualified property in these goods as will entitle him to maintain an action on the case against B. *Whittingham v. Bloxham*, 4 C. & P. 597—Patterson.

**Other Parties.**—Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person:—Held, by Abbott, C. J., and Littledale, J., that the owner of the carriage was not liable to be sued for such injury—Bayley and Holroyd, Js. diss. *Laugher v. Forister*, 5 B. & C. 547.

Where the plaintiff had hired a chariot for the day, and appointed the coachman and furnished the horses:—Held, that he was properly described as the owner and proprietor thereof, in a declaration against the defendant for an accident which arose from his servant's negligence in driving against such chariot. *Croft v. Alison*, 4 B. & A. 590.

In an action against two for negligently driving a chaise, if the two defendants hired it jointly, and were jointly in the possession of it, both are liable for an accident. *Duvey v. Chamberlain*, 4 Esp. 229—Ellenborough.

But it is otherwise if it belonged to one only, and the other was merely a passenger. *Id.*

A porter removing goods is not liable for damage, unless he has been guilty of negligence: he is not obliged to put a person at the head of his horse while he removes goods from his cart. *Hayman v. Hewitt*, Peake's Add. Cas. 170—Kenyon.

If a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by, in striking the horse. *Illidge v. Goodwin*, 5 C. & P. 190—Tindal.

If the carriage of A. strike against the cart of B., and a person who sees it demands the address of the owner of the carriage, the address given by a person in the carriage is admissible in evidence; but a statement that any damage done

If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is for the latter vessel to go to leeward; and although such vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position. *Handyside v. Wilson*, 3 C. & P. 528—Best.

Therefore, when in an action on the case for running down the plaintiff's brig, it was proved that the defendant's vessel was sailing in the channel before the wind, having her studding-sails set at night, and that the plaintiff's brig was sailing by the wind, and the jury found a verdict for the defendant, the court granted a new trial, on payment of costs, for the purpose of further investigating the facts, as there was some doubt as to the propriety of carrying studding-sails at such a time and in such a place, and also as to whether the defendant's captain had kept a proper look-out. *Jameson v. Dunkald*, 12 Moore, 148.

In case for running down a ship, neither party can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree in fault in not endeavouring to prevent it. *Vennall v. Garzer*, 1 C. & M. 21.

The plaintiff cannot recover, unless the injury is attributable entirely to the fault of the defendants: if he were partly in fault, but the defendants might, with care, have prevented the accident, he cannot maintain his action. *Vanderplank v. Miller*, M. & M. 169—Tenterden.

If a vessel is damaged by another running foul of it, and the jury find a verdict for the plaintiff, the court will not send the case for a new trial, because there may be some ground to believe that the plaintiff was negligent in navigating his vessel, as well as the defendant. *Collinson v. Larkins*, 3 Taunt. 1.

If, in an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, it appears that the accident happened from circumstances which persons of competent skill could not guard against, the plaintiff will not be entitled to recover; nor will he, if his men had put his barge in such a place that persons using ordinary care would run against it; nor if the accident could have been avoided, but for the negligence of the plaintiff's own men, in not being aboard his barge at the time when it was lying in a dangerous place. *Luck v. Seward*, 4 C. & P. 106—Tenterden.

In an action against the captain of a steam-vessel, for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone; and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own

The captain of a sloop of war is not answerable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there. *Nicholson v. Mouncey*, 15 East, 384. And see *Huggett v. Montgomery*, 2 N. R. 446, and *Roe v. Miles*, 4 M. & S. 101.

If a ship be chartered to the commissioners of the navy as an armed vessel, and an injury be done to another vessel by the misconduct of the persons on board the former, while a commander of the navy and a king's pilot are on board, an action for the injury may be sustained against the owners of the chartered ship. *Fletcher v. Braddick*, 2 N. R. 182.

In an action for negligently steering a ship, whereby she was wrecked, and the plaintiff lost his passage in her, no evidence can be given of a specific act of negligence, which is not the foundation of the action; but evidence may be given that the captain had often expressed his conviction that the officer to whom he gave charge of the ship was incompetent for that situation; and experienced nautical men may be called as witnesses, and asked whether, in their judgment, particular facts which had been proved amounted to gross negligence. *Malton v. Nesbit*, 1 C. & P. 70—Abbott.

And where, in an action for negligently running foul of the plaintiff's vessel, the defence was, that the defendant's vessel, being at the time on the point of entering Plymouth harbour, was under the management of a pilot; notwithstanding evidence was adduced to show that, in fact, a pilot had, shortly before the accident happened, come on board the defendant's ship; yet it is a question of fact for the jury to determine, whether, at the time of the action, the defendant's vessel was under the direction of the pilot or not. *Catts v. Herbert*, 3 Stark. 12—Abbott.

The owner of a barge upon the Thames lends it to another, who navigates it with his own men, who are guilty of negligence, in consequence of which mischief is done; semble, that the owner is not liable. *Scott v. Scott*, 2 Stark. 433—Best.

Proof that defendant's boat ran down the plaintiff's in the Half-way Reach in the Thames, will support an allegation that the boat was run down in the Thames, "near the Half-way Reach," in an action on the case for negligence. *Dreary v. Twiss*, 4 T. R. 558.

In an action on the case for running foul of posts fixed in the river supporting the plaintiff's wharf, it is not necessary to prove the posts or wharf to be at the place at which they are, under a videlicet, alleged to be situate. *Hammer v. Raymond*, 5 Taunt. 789; 1 Marsh. 363.

Held, that an action would lie, by the owners

of goods in a ship, against the owners, for a loss, occasioned by the ship's striking against an anchor lying under water in the river Trent, without a buoy. *Trent and Mersey Navigation v. Wood*, Abb. Ship. 256; 3 Esp. 127; 4 Dougl. 287.

A declaration in case for negligently steering, managing, and directing a ship, by which another ship was injured, is not supported by evidence showing that it proceeded from unskilfully stowing the anchor, so that it caught hold of the other vessel, and broke into her side. *Halman v. Bennett*, 5 Esp. 226—Ellenborough.

### 3. In other Cases.

A., an engineer, being employed by B. to erect a steam boiler and other apparatus on premises adjoining to the manufactory of C.; and in consequence of the explosion of the boiler, from the insufficiency of the materials of which it was composed, the property of the latter was injured; and it being found as a fact by the jury, that A. was personally present, and that his servants had the management of the apparatus at the time of the accident:—Held, that C. might maintain an action on the case against A. for the injury he had sustained. *Witte v. Hague*, 2 D. & R. 33. And see *Wilson v. Peto*, 6 Moore, 47.

But it seems that if the jury had negatived the fact of A.'s management of the apparatus, though the accident arose from an imperfection in the materials of which it was composed, he would not have been primarily liable. *Id.*

In an action against the defendant for the negligence of his agent in pulling down the party-wall between the houses of the plaintiff and defendant, it is a good defence to show that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame. *Hill v. Warren*, 2 Stark. 377—Ellenborough.

Whenever a party seeks to recover for a breach of duty arising from an employment, such employment must be stated truly in the declaration, and proved as laid, whether the action be framed in assumpsit or tort: therefore, where a count in a declaration, *ex delicto*, stated that "the plaintiff, as owner of a ship, had retained and employed the defendant as his agent, to cause her to proceed to Gottenburgh, in order that she might afterwards proceed to St. Petersburg, and that the defendant accepted the retainer;" and it was proved at the trial, that a written arrangement had been entered into between the plaintiff's clerk or agent, and the defendant, that the ship should touch at Gottenburgh, to know the state of things in Russia, and receive instructions:—Held, that this was a fatal variance, as the defendant had not undertaken to proceed to St. Petersburg absolutely and at all events. *Lopes v. De Tastet*, 4 Moore, 266: 1 B. & B. 538.

### V. DECEIT.

#### 1. Misrepresentation of Solvency.

*By 9 Geo. 4, c. 14, s. 6*, no action shall be brought  
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after 1st January, 1829, whereby to charge any person, upon or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

*By s. 8*, such writing need not be stamped.

An action commenced before the 1st of January, 1829, for the false representation of the solvency of a party, made by parol before the statute, but tried after that day, is maintainable. *Felloses v. Williamson, M. & M.* 306—Tent.

*When maintainable.*—In an action on the case for falsely representing the character of another, by reason of which false representation he obtained credit of the plaintiff, it is necessary to prove against the defendant both fraud and falsehood, viz. that the representation which he made was false, and that the defendant knew it to be false at the time he made it: falsehood without fraud is not sufficient. *Ashlin v. White, Holt*, 387—Gibbs.

To support an action for a false assertion as to the circumstances of a third person, it must appear that the defendant intended to impose on the plaintiff, and that the plaintiff relied on his information. *Scott v. Lara, Peake*, 225—Ken.

To an inquiry concerning the credit of another who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from his own knowledge, and not from hearsay, will not sustain an action on the case for damages, on account of a loss sustained by the default of the party, who turned out to be a person of no credit, if it appear that such representation were made by the defendant *bonâ fide*, and with a belief of the truth of it; for the foundation of the action is fraud and deceit in the defendant, and damage to the plaintiff by means thereof. And taking the assertion of knowledge *secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief, founded on what appeared to the defendant to be reasonable and certain grounds. *Haycraft v. Cressy*, 2 East, 92.

If a person employ an agent to take orders, and a representation is made to him of the solvency of a person whom he advises his employers to trust for goods, if he at the time knew that such a person was not solvent, though he did not communicate it to his employers, they cannot maintain an action against the person who made such false representations. *Cowen v. Simpson*, 1 Esp. 290—Kenyon.

In an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, the court held that fraud was necessary to support the action; but set aside a verdict for the plaintiff on payment of costs, though there were some circumstances in the case from which fraud might be inferred, on

defendant with a view to entrapping him, and thereby obtain his guarantee for payment of the debt contracted by the insolvent. *Tapp v. Lee*, 3 B. & P. 367.

If A. fraudulently represent the circumstances of B. to be good, in order to induce C. to give him credit, and add, "if he does not pay for the goods, I will;" an action may be maintained against A. for the misrepresentation, notwithstanding the addition of the promise. *Hamar v. Alexander*, 2 N. R. 241.

A man by false representation induces another to supply goods on the credit of a third person, and enters into a collateral undertaking, not in writing, to pay for them, he is not liable for goods, sold, but must be sued in an action of deceit. *Thompson v. Bond*, 1 Camp. 4—Ellenborough.

If A. makes an inquiry of B. as to the circumstances of C., with respect to opening an account, with him as a general customer, and B. fraudulently misrepresents them, in consequence of which A. sells C. goods from time to time, and is afterwards a loser by him, an action lies for the deceit, although the buyer pays for the first parcels of goods, on the purchase of which the reference is made; but the defendant is liable only within a reasonable time, and to a reasonable amount. *Hutchinson v. Bell*, 1 Taunt. 558.

If one who has sold goods on the representation of another concerning the buyer's circumstances, afterwards tells the buyer he will sell him no greater amount without further references, and after that intrusts him to a greater amount, the author of the misrepresentation is not liable beyond the sum due at the date of the plaintiff's declaration. *Id.*

If A. inquires generally of B. concerning the circumstances of C., A. cannot maintain an action against B. for a deceitful representation upon this subject, if C. pays A. for the goods which it was in contemplation to sell when the representation was made, although C. becomes insolvent, and is indebted to A. for other goods subsequently sold. *De Graves v. Smith*, 2 Camp. 533—Ellenb.

An action on the case for a fraudulent representation of the circumstances of J. S. was referred to arbitrators, who found that the defendant had omitted to state to the plaintiff certain debts which J. S. owed to him: wherefore the defendant did not give a fair representation of what he knew concerning the credit of J. S., but that in what he said he did not mean to hold out any inducement for the plaintiff to trust J. S., and acquitted the defendant of all collusion with J. S., and of all premeditated fraud, with a view to benefit himself at the plaintiff's expense, and of any intention, at the time of making the representation, of withdrawing his credit from J. S., and awarded in favour of the plaintiff—Held, that such award was bad, as the arbitrator had, in substance, acquitted the defendant of any fraud or intention to deceive the plaintiff; without which such action could not be supported. *Ames v. Milward*, 2 Moore, 713; 8 Taunt. 367.

In case for a false representation of the solvency of A. B., whereby the plaintiffs trusted him

they trusted him with goods, in consequence of the representation, are admissible in evidence for them. *Fellowes v. Williamson*, M. & M. 306—Tenterden.

The defendant having had a credit lodged with him by a foreign house, in favour of one W. T., to a certain amount, upon an express stipulation that W. T. should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of W. T., answered that he knew nothing of W. T. himself but what he had learned from his correspondent; but that he had a credit lodged with him for so much, by a respectable house at H., which he held at W. T.'s disposal, (omitting the condition,) and that upon a view of all the circumstances which had come to his (the defendant's) knowledge, the plaintiffs might execute W. T.'s order with safety; (viz. an order for the sale and delivery of goods on credit.) In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted W. T. on this representation—Held, that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and though, at the time when it was made, he added, that he gave the advice without prejudice to himself. *Eyre v. Dunsford*, 1 East, 318.

If a person on being asked by a tradesman respecting the circumstances, character, and credit of another, informs him that he has been paid a debt due to himself from such a person, and that he was ready to give him credit for any thing he wanted: such representation would not be sufficient to support an action for a deceitful misrepresentation of such person's circumstances, whereby the tradesman was induced to give him credit, although such person had been before that time discharged under an insolvent act, and the defendant knew it, but did not mention it; and such a colloquium will not support an innuendo that the defendant meant thereby that such person was in good circumstances and fit to be trusted generally with goods on credit. *Geinsford v. Blackford*, 6 Price, 36; 7 Price, 544.

In an action on the case for giving a false character, it is not sufficient to charge the defendant with knowledge that the party recommended was in bad circumstances, that the defendant had himself arrested him; and the defendant may go into evidence to explain the circumstances. *Wood v. Wain*, 1 Esp. 442—Kenyon.

A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it. *Corbett v. Brown*, 8 Bing. 35; 1 M. & Scott, 85; 5 C. & P. 363; 1 M. & Rob. 108.

Plaintiffs being about to furnish defendant's son with goods on credit, inquired of the defen-

...and, as to the property, ...  
answered that he had; the fact being that the defendant had lent his son 300*l.* on his promissory note, payable with interest on demand, and had received interest on the note. The son having afterwards become insolvent:—Held, that this was a misrepresentation, for which the defendant was liable in damages to the plaintiffs; and a jury having found for the defendant, the court granted a new trial. *Id.*

In an action for a deceitful representation of the credit of a third person, that person is a competent witness for the plaintiff. *Richardson v. Smith*, 1 Camp. 277—Ellenborough. *S. P. Smith v. Harris*, 2 Stark. 47.

In an action of deceit, an insolvent, to whom the plaintiff has furnished goods on the representation of the defendant, is a competent witness to prove that the defendant represented him as a person fit to be trusted. *Brant v. Robinson*, R. & M. 48—Abbott.

In case for giving a false character, it is evidence against the defendant that he recommended the person trusted to another person who was called as a witness. *Beal v. Thatcher*, 3 Esp. 194—Kenyon.

## 2. Other Deceit.

A false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case, in the nature of deceit. *Pasley v. Freeman*, 3 T. R. 51.

In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is *Id.*

Where a defendant recommended an agent to the plaintiffs with a knowledge that his representation of the character of the agent was false: Held, in an action on the case, to recover damages arising from the misconduct of the agent, that it was not necessary for the plaintiffs to prove a malicious or interested motive by the defendant for the misrepresentation; if what the defendant said was false within his own knowledge, and occasioned an injury to the plaintiffs, it is a sufficient ground of action. *Foster v. Charles*, 4 M. & P. 61, 741; 6 Bing. 396; 7 Bing. 105.

Nor is it necessary to show that the recommendation was given from malice, or with a view to the pecuniary interest of the party recommending. *Id.*

Where the jury returned a verdict for the plaintiffs in an action of case for deceitful representation, accompanying it with this statement—“We consider that there was no fraudulent intention on the part of the defendant, though that which he has done legally constitutes a fraud,” the court refused to enter the verdict for the defendant on this finding. *Id.*

The making of a representation which a party knows to be untrue, and which is intended, or is

...may incur damage, is a fraud in law. *Polhill v. Walter*, 3 B. & Adol. 114.

Therefore, where a bill was presented for acceptance at the office of the drawee when he was absent; and A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance, as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the indorsee brought an action against the drawee, and on proof of the above facts was nonsuited. The indorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorized to accept by procuration; and on the trial the jury negatived all fraud in fact: Held, notwithstanding, that A. was liable, because he must be considered as having intended to make such representation to all who received the bill in the course of its circulation. *Id.*

In an action on the case for a deceit, the plaintiff declared that he had employed the defendant to obtain a lease for him; that the defendant fraudulently represented to him that a premium of 150*l.* was to be paid for it, whereas only 100*l.* were to be paid; by means of which fraudulent representation, the defendant obtained from him the sum of 50*l.* and converted it to his own use: Held, that these allegations were sufficient, without further stating that the 50*l.* so obtained was over and above the 100*l.* to be paid for the lease. *Peotress v. Austin*, 2 Marsh. 217; 6 Taunt. 522.

A sheriff, upon the representation of the plaintiff in a suit, having seized goods under a fieri facias as belonging to the defendant, and damages having been recovered against the sheriff by a third person claiming the goods, an action upon the case lies at the suit of the sheriff for the false representation. *Humphrys v. Pratt*, 5 Bligh, N. S. 154.

A declaration stating such a case without any averment of fraud in the representation, or knowledge of its falsehood, was held good upon motion in arrest of judgment. *Id.*

A declaration, stating that the defendant, on the sale of Teneriffe barilla, asserted that 7½ cwt. would produce a ton of soap, well knowing it would not do so, is not supported by evidence that he said he had made seven tons of soap out of 51 cwt. without giving proof of the scienter. *Horncastle v. Moat*, 1 C. & P. 166—Abbott.

In case in the nature of deceit, to reverse a recovery of lands in ancient demesne, all the parties to the recovery must be before the court. *Rex v. Hadlow*, 2 W. Black. 1170.

For the proceedings on a writ of deceit to set aside a fine and recovery of lands in ancient demesne, see *Rex v. Mead*, 2 Wils. 17.



person do not assume the name and character of the plaintiff. *Canham v. Jones*, 2 Ves. & B. 218.

If A., a manufacturer, use the mark of B. for the purpose of giving to articles manufactured by A. the appearance of being of the manufacture of B.; B. may maintain an action against A., although A.'s articles are not inferior in quality to B.'s, and although it is not shown that B. has sustained actual damage. *Blotfeld v. Payne*, 1 Nev. & M. 353; 4 B. & Adol. 410.

A declaration stated that the plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his; and that the defendants wrongfully made other hones, wrapped them in envelopes resembling the plaintiff's and sold them as his own, whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendants being inferior:—Held, that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that their hones were inferior, or that he had sustained any specific damage. *Id.*

Where plaintiff marked his goods, "Sykes, Patent," to show that they were his own manufacture, and the defendant copied the mark on his goods to show that they were the plaintiff's manufacture, and sold them so marked, as and for his manufacture:—Held, that case would lie for the injury, though neither party had a valid patent, and both were named "Sykes." *Sykes v. Sykes*, 5 D. & R. 292; 3 B. & C. 541.

The declaration alleged that defendants sold the goods as and for goods manufactured by the plaintiff; the evidence was, that the persons to whom the defendant sold them knew that they were not manufactured by plaintiff, but that defendants copied plaintiff's mark, and sold the goods so marked, in order that the purchasers might resell them, as and for goods manufactured by plaintiff, and which they did:—Held, not a fatal variance. *Id.*

The plaintiff's father prepared and sold a medicine called "Dr. J.'s Yellow Ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name and mark:—Held, that no action could be maintained against him by the plaintiff. *Singleton v. Bolton*, 3 Dougl. 293.

A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit. A label and seal, denoting that the medicine was manufactured by B. and sold by A., were affixed to each of the bottles in which it was sold. The defendants imitated the labels and seals. Demurrer allowed to a bill to restrain the imitation, and for an account of the sales of the spurious labels and seals, A. having no interest. *Delondre v. Shaw*, 2 Sim. 237.

By 7 & 8 Geo. 4, c. 18, s. 1, if any person shall set or place any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with intent that the same, or whereby the same may destroy, or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, it shall be a misdemeanour.

Provided (sects. 2 & 4.) that it shall not be illegal to set guns or traps, such as may have been usually set to destroy vermin, or spring-guns, man-traps, or other engines, from sunset to sunrise, in dwelling-houses, for the protection thereof.

Before this statute, it was held, that a trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on a latent wire communicating with a gun, and thereby letting it off. *Ilott v. Wilkes*, 3 B. & A. 304.

The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care; therefore, where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and damage accrued to the plaintiff's son, in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off:—Held, that the defendant was liable to damages in an action upon the case. *Dixon v. Bell*, 5 M. & S. 198; 1 Stark. 287.

If a man place dangerous traps baited with flesh in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbour's premises, must probably be attracted by their instinct into the trap, and in consequence of such act his neighbour's dogs be so attracted and thereby injured, an action on the case lies. *Twynshend v. Watken*, 9 East, 277.

Quære, whether a person is authorized in fixing dog-spears in his woods, or whether he is answerable in an action on the case for an injury done to a dog? *Deane v. Clayton*, (Bart.) 2 Marsh. 577; 1 Moore, 203; 7 Taunt. 489. And see *Sears v. Lyon*, 2 Stark. 317.

Where a defendant, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a garden completely walled round, and at a distance from his house, and the plaintiff, who had climbed over the wall in pursuit of a strayed fowl, was shot:—Held, that an action was maintainable, and the defendant liable in damages. *Bird v. Holbrook*, 4 Bing. 628; 1 M. & P. 607; *S. P. Jay, v. Whitfield*, 3 B. & A. 308, c; 4 Bing. 644, c.

## 2. Dangerous Animals.

In an action for an injury by a vicious bull,

the bull was attracted by a cow in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head to drive him away from the cow. *Blackman v. Simmons*, 3 C. & P. 138—Best.

Seem, that the owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode he has adopted to secure it proves to be insufficient. *Id.*

No action lies for an injury arising from the defendant letting loose a dog in his own premises for their protection at night. *Brock v. Copeland*, 1 Esp. 203—Kenyon.

A party, who is bitten by a dog in consequence of being himself on the owner's land on which he is not entitled to go, can maintain no action for the injury. *Sarch v. Blackburn*, M. & M. 505; 4 C. & P. 297—Tindal.

Nor, if the injury arises from his own carelessness, with knowledge of the danger. *Id.*

But if he has no means of knowing the danger, and is not otherwise in fault, he may recover, although the owner has attempted to give notice; therefore, it is no answer to such action, that a printed notice was put up, if it appears that the plaintiff could not read. *Id.*

If no suspicion be thrown upon the plaintiff by the defendant in such a case, it may be taken that he had good cause for being on the defendant's premises, provided the dog is put in a place forming one entrance to the house of the defendant, although there may be other entrances to the house of a more public description, by which the plaintiff might have proceeded. *Id.*

In an action for not sufficiently securing a fierce dog kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's own carelessness and want of caution. *Curtis v. Mills*, 5 C. & P. 489—Tindal.

In an action on the case for keeping a mischievous dog by which the plaintiff's child was bitten, a report that it had been before bitten by a mad dog was evidence that defendant knew him to be mischievous. *Jones v. Perry*, 2 Esp. 482—Kenyon.

It is not sufficient to show that the dog was of a savage disposition, and usually tied up, and the defendant promised to make a pecuniary satisfaction to the plaintiff after he had been bit by the dog. *Beck v. Dyson*, 4 Camp. 198—Ellenb.

In an action for negligently keeping a dog, proof that the defendant had warned a person to beware of the dog, lest he should be bitten, is evidence to go to the jury, of the allegation that the dog was accustomed to bite mankind. *Judge v. Cox*, 1 Stark. 285—Abbott.

In an action against a party for keeping a dog accustomed to bite mankind, it is not essential

or allows it to resort to his premises, that is sufficient. *M'Kone v. Wood*, 5 C. & P. 1—Tent.

An averment in a declaration that defendant's dogs were accustomed to worry and bite sheep and lambs, is not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men. *Hartley v. Harriman*, 1 B. & A. 620; S. C. nom. *Hartley v. Halliwell*, 2 Stark. 212; Holt, 617.

Seem, however, that an averment that the dogs were of a ferocious and mischievous disposition, would be sufficient in an action on the case brought for an injury to plaintiff's sheep without alleging specifically that they were accustomed to bite and worry sheep. *Id.*

The allegations in a plea to an action of trespass for shooting a dog, that he attacked the defendant, and was accustomed to attack and bite mankind, are both material, and must be proved. *Clark v. Webster*, 1 C. & P. 104—Park.

Where the defendants justified the shooting the plaintiff's dog, by pleading that he attacked them, and that "he was accustomed to attack and bite mankind," the plaintiff may call witness to prove the general quietness of the dog. *Id.*

A., a hawk, went to the house of B. to sell goods, and a dog of B. coming out of the house, A. knocked out one of its eyes, for which B.'s wife caused A. to be apprehended.—Held, that it was for the jury to say whether A., struck the dog for his own preservation and fairly to protect himself, or whether it was a wilful and malicious trespass on his part. *Hanway v. Boulbee*, 4 C. & P. 350; 1 M. & Rob. 15—Tindal.

If defendant justify shooting a dog, because the dog was worrying his fowl, and could not otherwise be prevented, he must prove that the dog was in the act of worrying the fowl at the very moment he shot him. *Janson v. Brown*, 1 Camp. 41—Ellenborough.

The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off.—Held, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in the protection of his property. *Wells v. Head*, 4 C. & P. 568—Alderson.

In an action of trespass for shooting the plaintiff's dog, the defence was, that the defendant had put up a notice that dogs trespassing on his land would be shot.—Held, that such notice did not warrant the defendant in shooting the dog. *Corner v. Champneys*, 2 Marsh. 584.

The servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing deer at the moment when it was shot, if the chasing of the deer and the shooting the dog were all one and the same transaction. *Protheroe v. Mathews*, 5 C. & P. 581—Taunton.

It is universally the duty of the occupier of a house, having an area fronting the public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him, for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened. *Coupland v. Hardingham*, 3 Camp. 398—Ellenb.

A tradesman who has a flap-door in the foot pavement of the street opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury by it. *Proctor v. Harris*, 4 C. & P. 337—Tindal.

He is also bound to take reasonable care that the flap is so placed and secured, as that under ordinary circumstances, it shall not fall down; but if the tradesman has so placed and secured it, and a wrongdoer throws it over, the tradesman will not be liable in damages for any injury occasioned by it. *Daniels v. Potter*, 4 C. & P. 262—Tindal.

In such an action, the declaration of one defendant, who has suffered judgment by default, cannot be used as evidence against the others. *Id.*

In an action for an injury resulting from falling down an unprotected area, the declaration stated that the defendant was possessed of the premises, and that they were adjoining "a certain public and common street and highway." It appeared that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them, but it did not appear that any conveyance had been made to him:—Held, that it was sufficient evidence to go to a jury of a possession in the defendant. *Jarvis v. Dean*, 11 Moore, 354.

If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger, from the want of repair. *Payne v. Rogers*, 2 H. Black. 349.

Case lies against the landlord of a house demised by lease, who, under his contract with his tenant, employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen. *Leslie v. Pounds*, 4 Taunt. 649.

## VIII. PRIVATE NUISANCES.

### 1. Building on adjoining Lands.

In 1803, the plaintiff's house was built against the pine end wall of the defendant's house, by permission. In 1829, the defendant made an excavation in a careless and unskillful manner, in his own land, near to his pine end wall, by

which he injured the house of the plaintiff:—Held, that an action on the case was maintainable for this injury. *Brown v. Windser*, 1 C. & J. 20.

The declaration alleged, that the plaintiff was possessed of a messuage, &c., belonging to, and supporting which there were certain foundations, which the plaintiff had enjoyed, &c., and ought, &c. to enjoy. On evidence it appeared that the plaintiff was only entitled to an easement in the foundations which belonged to the defendant:—Held, no variance. *Id.*

The possessor of a house which is not ancient, cannot maintain an action against the owner of adjoining lands, for digging away that land, so that the house falls in; and, therefore, where a declaration stated that A. was lawfully possessed of a dwelling-house, adjoining to a dwelling-house of B., and that B. dug into the soil and foundation of the last mentioned house so negligently, and near to the house of A., that the wall of the latter house gave way; on demurrer to so much of the declaration as alleged the digging so near &c., the defendant had judgment. *Wyatt v. Harrison*, 3 B. & Adol. 871.

But if it had appeared that the plaintiff's house was ancient; or if the complaint had been that the digging occasioned a falling in of soil of the plaintiff, to which no artificial weight had been added, *quære*, whether an action would not have lain? *Id.*

If by negligence of A. on building his house adjoining that of B., the house of B. is thrown down, A. is liable only to such sum in damages, as was the value of the old house, and not the whole expense of building a new one. *Lakin v. Godsall*, Peake's Add. Cas. 15—Kenyon.

In an action for an injury to the plaintiff's premises, in consequence of the pulling down of the defendant's house adjoining, the plaintiff may recover damages for any injury actually caused by the negligence of the defendant, although he has not himself used those precautions which it was his duty to adopt against such injury. *Walters v. Pfeil*, M. & M. 362—Tenterden.

Where notice was given to the occupier of adjoining premises, of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which, one of the walls of such adjoining premises rested:—It was held, that the party giving notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury although from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old. *Massey v. Goyder*, 4 C. & P. 161—Tindal.

Upon a declaration for negligence in pulling down a house adjoining the plaintiff's house without shoring up the latter, whereby it fell, the plaintiff cannot recover without evidence, from which a grant of right to the support of the adjoining house can be inferred. *Peyton v. St. Thomas's Hospital*, 4 M. & R. 625: S. C. *mem.* *Peyton v. London (Mayor, &c.)*, 9 B. & C. 725.

Quære, whether such a right ought not to have been stated? *Id.*

Nor upon such a declaration can the plaintiff insist that the defendant ought to have given notice of his intention to pull down. *Id.*

If A., by the direction of B., build a wall on the lands of C., C. cannot maintain an action on the case against B. for the continuance of the wall. And it seems that if A., in building a house on his own land, encroach on the adjoining land of C., and dispose of his interest in the house to B., C. cannot maintain an action on the case against B. for the continuance of the wall. *Cocentry v. Stone*, 2 Stark. 534—Abbott.

In an action on the case for negligently pulling down a party-wall adjoining a wall of the plaintiff's cellar, whereby the roof of the latter fell in, and a quantity of wine was destroyed, it appeared that the proximate cause of the damage was by placing a quantity of bricks on the roof of the cellar.—Held, that this was no variance, and need not be set out in the declaration in order to support the action. *King v. Williamson*, D. & R. N. P. C. 35; S. C. not S. P. 3 Stark. 162—Abb.

## 2. Injuries to Reversioners.

*Against Strangers.*—There must be some injury to the land, to enable a reversioner to support an action on the case. *Baxter v. Taylor*, 1 Nev. & M. 14; 4 B. & Adol. 72.

A reversioner cannot maintain an action against a stranger, for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way; such an act during the tenancy not being necessarily injurious to the reversion. *Id.*

But an action lies by a reversioner for any injury done to the value of the inheritance. *Jesser v. Gifford*, 4 Burr. 2141.

If the plaintiff declare as a reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion; otherwise the want of such allegation will be cause for arresting the judgment; therefore, where the plaintiff declared as reversioner of a yard and part of a wall, which W. F. occupied as tenant to him, and that the defendant, on &c., and on divers days, &c., wrongfully placed on the said part of the wall quantities of bricks and mortar, &c. and thereby raised it to a greater height than before, and placed pieces of timber, &c. on the said wall, overhanging the yard, per quod the plaintiff, during all the time, lost the use of the said part of the wall, and also by means of the timber, &c. overhanging the yard, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and the said part of the wall have been injured, to the damage of the plaintiff, &c.; without stating that his reversion was prejudiced: the court arrested the judgment. *Jackson v. Peaked*, 1 M. & S. 234.

A reversioner may maintain an action for a nuisance, which produces no present injury beyond that to his reversionary right, and which

may be removed before the reversion comes into possession. *Shadwell v. Hutchinson*, M. & M. 350; 4 C. & P. 333—Tenterden.

In case by a reversioner for an injury to the reversion, it is no answer that the injury complained of was caused by the wrongful act of the tenant, for which he might be liable to an action. *Egremont v. Pulman*, M. & M. 404—Tindal.

*Against Tenants.*—An action on the case for an injury to the inheritance, lies by the reversioner against the tenant pending the term, for inclosing and cultivating waste land included in the demise, and for continuing the grievance. *Queen's College (Oxford) v. Hallett*, 14 East, 489.

An action on the case in the nature of a writ of waste, lies at the suit of a landlord against his tenant, for acts done by the latter, while holding over after the expiration of a notice to quit. *Burckell v. Hornsby*, 1 Camp. 360—Ellenborough.

Where, in an action by the reversioner against the tenant of a house, for opening a door in a wall without the consent of the plaintiff, and thereby damaging the house, and prejudicing the plaintiff's reversionary interest; the opening of the door is proved, and all actual damage is disproved, the jury should be directed to inquire whether the reversionary interest of the plaintiff has or has not been injured. A nominal verdict entered for the plaintiff without such direction or inquiry, on the ground that the defendant had no right to make the alteration, was set aside. *Young v. Spencer*, 5 M. & R. 47; 10 B. & C. 145.

The reversionary interest of the plaintiff might be injured, although the house itself was not. *Id.*

*Proof of Tenancy.*—In an action of case, an averment that the plaintiff's close, at the time of the injury, was in the occupation of J. V. and H. V., is sufficiently proved, if at the time of the injury it was in their occupation, though the tenant be since changed, before action brought. *Vowles v. Miller*, 3 Taunt. 137.

In an action on the case for an injury done to the plaintiff's reversion, they proved that they were tenants in common under a demise; and a witness stated that he occupied part of the premises under both the plaintiffs, and that he had at first an agreement in writing which he signed; and another witness said, that he occupied under one of the plaintiffs only, and that he did not know the other.—Held, that there was sufficient evidence to go to the jury of a tenancy by both the occupiers under both the plaintiffs. *Strother v. Barr*, 2 M. & P. 207; 5 Bing. 136.

But, quære, whether it was not incumbent on the plaintiffs to produce the agreement, in order to show the nature of their reversion? *Id.*

First count, in case for injuring plaintiff's reversion in lands, by cutting and carrying away branches from trees growing on it. Second count, in trover, for the branches. Proof that plaintiff demised the lands to a tenant, by a written agreement not produced, and that defendant carried away some branches, the value of which was not shown:—Held, that plaintiff could not support

agreement; but that, on the second count, he was entitled to nominal damages. *Cotteril v. Hobby*, 6 D. & R. 551; 4 B. & C. 465.

In an action on the case for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of one S. P., as tenant thereof to the plaintiff. It was proved that the house had been let to S. P. by a cestui que trust, to whom she had paid rent, the plaintiff being his trustee:—Held, to be no variance, as the legal estate was in the plaintiff, and the cestui que trust was to be considered as his agent or bailiff. *Vallance v. Savage*, 5 M. & P. 576; 7 Bing. 595.

### 3. Noxious or offensive Trades.

The erection of a tobacco-mill, near to the house of another:—Held, to be a nuisance, and actionable. *Styan v. Hutchinson*, 2 Selw. N. P. 1105—Kenyon.

In case for a nuisance, notice to remove the nuisance left at the premises, is evidence against a subsequent occupier. *Johnson v. Bensley*, R. & M. 189—Abbott.

A bond given by the defendant, acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for a nuisance in carrying on the same business in another place. *Rez v. Neville*, Peake, 91—Kenyon.

In declaring for a nuisance, the immediate cause of the injury must be stated; and under an averment of the remote cause, and an allegation that by means of the premises the noxious matter annoyed the plaintiff's house, it is not competent to give evidence of the intermediate causes. *Fitzsimons v. Inglis*, 5 Taunt. 534.

The action upon the case for a nuisance is local in its nature, and the nuisance must be proved to have been committed in the county where the venue is laid; if no place and county are alleged where the nuisance is committed, the county in the margin shall be intended. *Warren v. Webb*, 1 Taunt. 379. *But see Jeffries v. Duncomb*, 11 East, 226; 2 Camp. 3.

In an action on the case for damaging the plaintiff's wharf, the declaration stated the wharf to be situate near the river Thames, to wit, "at Kingston, in the parish of St. Saviour, Southwark, in the county of Surrey;" though there was no such place as Kingston in that parish:—Held, that this allegation was to be referred to the venue, and not to the local situation of the wharf; and, therefore, that it was not necessary to prove it to be so situated. *Hamer v. Raymond*, 1 Marsh. 363; 5 Taunt. 789.

### 4. Other injuries to Lands and Houses.

One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance. *Forsdick v. Collins*, 1 Stark. 173—Ellenborough.

And such removal supersedes the necessity

ver. *Id.*  
A. has immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates, and thence passes through the contiguous soil of B., below the surface without producing visible injury. B. builds a new house in his land below the level of his soil, in the current of precolating water:—Held, that A. cannot justify filling his channel, if the precolating water thereby injures the house of B. *Cooper v. Barber*, 3 Taunt. 99.

The plaintiff, in 1822, had a remainder in fee in a wharf expectant on a tenancy for life of his father. The defendants, in that year, dug soil out of their dock, which was contiguous, and the water thereby undermined the wall of the wharf. In 1823, the plaintiff's father died; and, in 1824, the action of the water on the wall had undermined it so far that it fell:—Held, that the plaintiff had a right of action against the defendants, although they had done no act since the death of the plaintiff's father, by which the plaintiff came into possession of the freehold of the wharf. *Gillon v. Boddington*, 1 C. & P. 541; R. & M. 161—Abbott.

If a man in his own soil, do any thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land. *Raikes v. Twnshend*, 2 Smith. 9.

The declaration stated that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away from his house down a ditch at the back thereof. The evidence was, that the heap was not originally placed so as to obstruct the water, but that in process of time, earth from the heap was trodden and fell into the ditch and obstructed it:—Held, that this was a fatal variance. *Fitzsimons v. Inglis*, 5 Taunt. 534.

In case by the tenant in possession against a wrong-doer, it is sufficient to declare generally, without disclosing any title. *Grimstead v. Marlowe*, 4 T. R. 717.

But if a defendant justify under a right, it must be formally set out in the plea. *Id.* *And see Rider v. Smith*, 3 T. R. 766.

### IX. ACTION.

By 3 & 4 Will. 4, c. 42, s. 2, executors and administrators may maintain actions on the case for any injury to the real estate of the deceased, committed in his life time, at any time within six calendar months before his death; provided the action be brought within one year: and actions on the case may be brought against them.

In an action in case against six, the plaintiff may recover a verdict against two. *Cooper v. South*, 4 Taunt. 802.

In an action on the case in the King's Bench against ten defendants, the plaintiff declared, that before and at the time of the grievances complained of, they were proprietors of a certain stage-coach, for the conveyance of passengers for hire from A. to B.; and that being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from A. to B. for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskillfulness, and default of themselves and their servants, the coach was overset, by means whereof the plaintiff was hurt, and sustained other injuries: a jury having found a verdict against eight of the defendants only, and in favour of the other two, and judgment being rendered accordingly:—Held, that as the action was founded on a breach of duty, imposed by the custom of the realm, which was a breach of the law; and as the declaration was framed on a misfeasance; such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber in error. *Bretherton v. Wood*, (in error,) 6 Moore, 141; 3 B. & B. 54; 9 Price, 408.

## CATTLE STEALING AND INJURING— See CRIMINAL LAW.

### CERTIFICATE.

- I. OF ATTORNEY—See ATTORNEY.
- II. OF BANKRUPT—See BANKRUPT.
- III. OF COSTS—See COSTS.
- IV. OF MARRIAGE—See EVIDENCE.
- V. OF PAUPERS—See POOR.

### CERTIORARI.

#### I. WHEN IT LIES.

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#### IV. COSTS IN—See CRIMINAL LAW.

#### I. WHEN IT LIES.

##### 1. Generally and in Civil Cases.

Quære, whether the Vice-Chancellor has authority to order a writ of certiorari to issue? *Edwards v. Bowen*, 2 Russ. 153; 2 Sim. & Stu. 514.

A certiorari always lies to remove proceedings under penal statutes, unless it is expressly taken away; and an appeal never lies, unless it is ex-

pressly given by statute. *Rex v. Cashbury*, (Justices,) 3 D. & R. 35.

It does not lie to remove a recognisance. *Anon. Loft*, 321.

Nor for other than judicial acts. *Rex v. Lloyd*, Cald. 309.

A certiorari was ordered to be issued to the judge of an inferior jurisdiction to return and certify the practice of his court. *Williams v. Bagot*, (Lord,) (in error,) 4 D. & R. 315.

Where judgment is signed against a defendant in an inferior court of record, and he surrenders in discharge of his bail, but, before he is charged in execution, is removed to the Fleet by habeas corpus, the court of C. P. will grant a certiorari to remove the record in order to charge him in execution in the Fleet, by virtue of the statute, 19 Geo. 3, c. 70, s. 4. *Jordan v. Cole*, 1 H. Black. 532.

A certiorari lies to remove an ejectment from an inferior jurisdiction into K. B., and the cause need not be removed by habeas corpus cum causa. *Goodright d. Sadler v. Dring*, 2 D. & R. 407; *S. C. nom. Doe d. Sadler v. Dring*, 1 B. & C. 253; 1 Tidd's Prac. 403.

Even at the instance of the defendant, on an affidavit that he cannot have a fair and impartial trial below, although the lease on which the ejectment was founded was executed on the premises within the local jurisdiction. *Patterson d. Gradridge v. Eades*, 5 D. & R. 445; 3 B. & C. 550.

But it will not lie to remove the record of a judgment obtained against a defendant in the county palatine of Durham, for the purpose of enabling his bail to render him in K. B., though he be a prisoner for debt in the custody of the marshal. *Patterson v. Reay*, 2 D. & R. 177.

And a certiorari to remove proceedings from the courts of the counties palatine was not to be granted of course, and without special ground. *Zinck v. Langton*, 2 Dougl. 749.

A certiorari lies to remove a presentment in a court-leet; and when removed, the presentment is traversable in K. B. *Rex v. Roupell*, Cowp. 458.

The court will not grant a certiorari to remove the record and proceedings out of a court-leet, in order to inquire into the propriety of an amerceament, where the fine has been estreated into the duchy chamber of Lancaster, and paid. *Rex v. Ritson*, 2 T. R. 184.

Nor to remove such proceedings in the courts of great sessions in Wales, without special cause. *Williams v. Thomas*, 2 Dougl. 751, n.

By 1 Geo. 4, c. 87, s. 5, no proceedings in ejectment by landlord under the statute could be removed from the courts of great sessions in Wales, unless upon special cause shown.

The court of K. B., in its discretion, would not allow the plaintiff to remove a replevin cause by certiorari, per saltum, from the sheriff's court of Carmarthen into K. B.; for a certiorari lies of course only to inferior courts of record, and the sheriff's court is not a court of record for the purposes of a plaint in replevin: the proper course



rari. *Edwards v. Bowen*, 7 D. & R. 709; 5 B. & C. 206; 2 Russ. 153; 2 Sim. & Stu. 514. And see *Perreau v. Bevan*, 5 B. & C. 284.

It was sufficient cause for granting a writ of certiorari to remove proceedings in replevin from a court of great sessions in Wales, that the title to the freehold was in question. *Id.*

Where a plaintiff had removed the proceedings in replevin from a county court in Wales to the court of Great Sessions, and then applied to the court of Chancery for a certiorari to remove them into K. B., the court granted the writ without requiring the plaintiff to show any special ground for it. *Id.*

Where a certiorari issued without any special ground, and without notice, was delivered to the judges at the court of Great Sessions, the court of K. B. quashed the writ, and ordered the party who had issued it to pay the costs incurred below, as well as of the application. *Jones v. Davies*, 1 B. & C. 143.

A certiorari to the court of Great Sessions in Wales was quashed, it having issued without a special ground laid for it, and directing the tenor of the record, instead of the record itself, to be returned. *Pierce v. Thomas*, Jacob. 54.

A certiorari to remove a cause from the Great Sessions for the county of Carmarthen, was superseded on motion to the Exchequer, and a procedendo ordered, and the costs of the day in the court of Great Sessions, and the costs of the application, ordered to be paid by the defendant. *Stacey v. Evans*, 13 Price, 449.

A certiorari did not lie to remove proceedings in quare impedit from the court of sessions at Chester into K. B. where a special verdict was expected to be found; the proper course was to remove the special verdict when found into K. B. by writ of error. *Pickering v. Chester (Bishop)*, 6 D. & R. 489.

It is a general rule, that a certiorari does not lie to remove a cause from an inferior court after judgment signed there; especially where the defendant suffered judgment by default. *Walker v. Gann*, 7 D. & R. 769.

Therefore, where in an action for 16*l.*, brought in the forest court of Knaresborough, the defendant suffered judgment by default, and afterwards sued out a certiorari to remove the cause into K. B.:—Held, that the certiorari was too late, and that court made a rule for a procedendo absolute, though the defendant in opposition to that rule swore that the jurisdiction of the inferior court was limited to 5*l.* *Id.*

By 21 Jac. 1, c. 23, s. 4, and 21 Geo. 1, c. 29, s. 3, a certiorari does not lie to remove a suit from an inferior court, where the thing in demand does not exceed 5*l.*

Nor by 7 & 8 Geo. 4, c. 71, in causes under 20*l.*, unless a recognisance be entered into in the court below.

The court will not quash such writ because the damages laid in the record below, which was an

Bail in a civil action, for a convict of felony, are too late to have a certiorari to bring up the principal, to surrender in their discharge, after the principal is actually on board for transportation. *Fowler v. Dunn*, 4 Barr. 2024.

No certiorari is allowed from the court of Requests at Westminster, except in replevin. 23 Geo. 3, c. 33, s. 4.

But it is otherwise in the Southwark court of Requests. 4 Geo. 4, c. 123, ss. 15 & 16.

## 2. In Criminal cases.

*When granted in cases of Indictments.*—A certiorari was granted at the instance of the attorney-general on behalf of a prisoner, to remove an indictment for murder, found against him at the sessions for the city of Rochester; also a habeas corpus to bring the prisoner into K. B. *Rex v. Thomas*, 4 M. & S. 442.

Upon an indictment against a parish for not repairing a highway, the right to repair may come in question, so as to entitle the parish to remove it by certiorari, though the parish plead not guilty only. *Rex v. Taunton, (St. Mary)*, 3 M. & S. 465.

Seemle, that a certiorari may issue at the instance of the prosecutor of an indictment for a nuisance to a highway, without any affidavit that the repair would come in question, or recognisance. *Rex v. Farewell*, 1 East, 305, n.

An indictment found at the quarter sessions upon the Toleration Act, 1 W. & M. c. 18, for disturbing a dissenting congregation, may be removed into K. B. by certiorari before verdict. *Rex v. Hube*, 5 T. R. 542.

An indictment found at the quarter sessions upon 52 Geo. 3, c. 155, s. 12, for disturbing a religious assembly, may be removed into K. B. by certiorari before trial. *Rex v. Wadley*, 4 M. & S. 508.

The court refused a certiorari to remove an indictment for a misdemeanour, and proceedings thereon at the assizes, after conviction and before judgment, which was prayed for the purpose of applying for a new trial, on the judge's report of the evidence, upon the ground of the verdict being against evidence and the judge's direction. *Rex v. Oxford*, 13 East, 411.

A certiorari will not lie to the sessions to remove a conviction for a misdemeanour before judgment, for, the fine being uncertain, the court above cannot tell how to assess it: otherwise, where the punishment is certain. *Rex v. Nicola*, 13 East, 414, n.

After conviction and judgment on an indictment at the quarter sessions, the court will not grant a certiorari to remove the proceedings for the purpose of having such indictment quashed on motion for error on the record. *Rex v. Penegoes*, 2 D. & R. 209; 1 B. & C. 142.

The court quashed a certiorari, which was issued before, but not served until after judgment

A certiorari does not lie to remove an indictment for felony from the general sessions of oyer and terminer at Hicks's Hall, without the consent of the prosecutor. *Res v. Kingston (Duchess of)*, Cowp. 283.

But a certiorari was granted to remove an indictment from the Old Bailey, where the defendant was a public officer, and lived at Gloucester. *Anon.* 1 Chit. 571, n.

A certiorari lies to a Welsh quarter sessions of the peace, to remove an indictment into K. B. *Res v. Clece*, 4 Burr. 2456.

But not unless special cause be shown. *Res v. Gwyer*, 2 Ld. Ken. 441.

If a defendant who has been convicted on an indictment in an inferior jurisdiction, remove the record into K. B. by certiorari, between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, the court will send the record back by procedendo, without going into the objections to the indictment. *Res v. Jackson*, 6 T. R. 145.

The court would grant a certiorari to remove an indictment for a misdemeanour from the Great Sessions in Wales into K. B. *Res v. Griffith*, 3 T. R. 668.

No certiorari lies on the statute 30 Geo. 2, c. 24, against obtaining goods or money under false pretences. *Res v. Smith*, Cowp. 24: *S. P. Res v. Young*, 2 T. R. 472.

A certiorari pro rege lies on statute 13 Geo. 3, c. 78, s. 24, relative to highways, before traverse of the indictment or judgment thereupon. *Res v. Bodenham*, Cowp. 78.

*On what grounds granted.*—A certiorari is always granted, of course, upon the application of the crown. *Res v. Eaton*, 2 T. R. 89.

But not so when a defendant applies, he must lay some ground for it before the court, supported by affidavit. *Id.*

And full and satisfactory grounds must be shown. *Res v. Plumbe*, Lofft, 69.

The court will not grant a certiorari on behalf of the defendant to remove an indictment from the sessions, on an affidavit that difficult points of law might arise. But leave was given to renew the motion at chambers, if a better affidavit could be obtained. *Res v. Harrison*, 1 Chit. 571.

It is no objection to a certiorari to remove a presentment of a road, made by a justice of the peace under the 24th section of statute 13 Geo. 3, c. 78, that it is prosecuted by another than the justice presenting; if it be by his consent. *Res v. Penderryn*, 2 T. R. 260.

A certiorari to remove an indictment of an excise officer from the sessions, was granted on the motion of the attorney-general, without any affidavit. *Res v. Stannard*, 4 T. R. 161.

A general prejudice existing against the defendant is not a sufficient ground, unless it exist

The court refused to grant a certiorari to remove an indictment for murder from the county of York, in order to a trial at bar, or in another county, on the ground that the prisoners (who had pleaded the general issue to the indictment) could not have a fair and impartial trial in the former county, on account of certain statements having appeared in different newspapers and handbills, tending to excite a prejudice against them. *Res v. Mead*, 3 D. & R. 301: *S. C.* not *S. P.* 2 B. & C. 605.

Where a defendant, indicted at the quarter sessions for a conspiracy, had entered into insufficient recognisances to take his trial:—Held, that the court of King's Bench, on a removal by certiorari, might discharge them on motion, and compel him to enter into better security. *Res v. Hooper*, 1 Chit. 491.

The court will not grant a certiorari to remove an indictment against several defendants charged with a misdemeanour, unless they all concur in the application; and it seems that a consent by counsel is not sufficient, unless supported by an affidavit of such consent by the defendants themselves. *Res v. Hunt*, 2 Chit. 130.

Where a conviction is removed by certiorari, no motion can be made in arrest of judgment, unless the defendant be personally present. *Res v. Spraggs*, 1 W. Black. 209. *And see Res v. Cowle*, 2 Burr. 834; 2 Ld. Ken. 519.

### 3. To remove Convictions.

It is discretionary in the court to grant or refuse a certiorari to remove a conviction before justices of the peace; and if the court see that the justices have drawn the proper conclusion from presumptive evidence, they will not grant a certiorari. *Res v. Bass*, 5 T. R. 251; *Nolan*, 227.

A certiorari will not lie to remove a conviction by the commissioners of excise, for the double duties of beer. *Res v. Whitehead*, 2 Dougl. 549.

But a certiorari will lie to remove a conviction under statute 11 Geo. 1, c. 30, s. 16, for harbouring teas and spirits, either by justices of the peace or commissioners of excise. *Res v. Abbott*, 2 Dougl. 553, n.

But such certiorari will not be granted on an objection to the conviction founded on merits. *Id.*

And a certiorari lies to remove a conviction on 16 Geo. 3, c. 30, if the defendant has not appealed to the quarter sessions. *Res v. Eaton*, 2 T. R. 89.

The court granted a certiorari to remove a conviction, where the magistrate rejected the vendee as a witness, to prove that the defendant used the Winchester bushel. *Res v. —*, 2 Chit. 137.

The court of K. B. will not grant a certiorari to remove the assessments of the land tax; but if an information be moved for against the commissioners of the land tax, the court will admit



A certiorari will not be granted where a person has been committed by the justices to the sessions as a vagrant, against which commitment he had appealed. *Rex v. Sparrow*, 2 T. R. 196, n.

The court, on deciding on the legality of a conviction, cannot take cognizance of any fact contained in the certiorari, by which the conviction is removed and not apparent on the conviction. *Rex v. Liston*, 5 T. R. 338; Nolan, 259.

And therefore they refused to quash a conviction on stat. 12 Geo. 2, c. 28, directing the penalty to be distributed according to that act, though it appeared in the certiorari that the conviction was made at one of the seven public offices established by stat. 32 Geo. 3, c. 53, which directs that all penalties levied by the justices under that act shall be paid to the receivers appointed by that act. *Id.*

Two justices convicted summarily as of a common assault, where it appeared by the deposition that the defendant had laid hands upon the prosecutor in an indecent manner, but without violence. A certiorari being moved for on the ground that the offence, if committed, was accompanied by a felonious attempt, and therefore within 9 Geo. 4, c. 3, s. 29, the court refused to interfere, inasmuch as no excess of jurisdiction appeared on the face of the conviction, and the evidence (of which the magistrates were the judges) did not show an intention to commit felony. *Anon.* 1 B. & Adol. 382.

And semble, although this had appeared by the deposition, and the conviction had been consequently illegal, this court would not have interposed by certiorari. *Id.*

#### 4. To remove Orders.

Section 80, of the General Highway Act, 13 Geo. 3, c. 78, which takes away the certiorari, does not extend to cases where the justices at sessions act wholly without jurisdiction. Therefore, where justices at the petty sessions made an order for the allowance of the accounts of a surveyor of highways, which accounts had not previously been verified before one justice, pursuant to the requisites of s. 48 of the act:—Held, that they acted wholly without jurisdiction; that their order was not a proceeding had pursuant to the act; and, consequently, that a certiorari lay to remove it into K. B. for the purpose of having it quashed. *Rex v. Somersetshire (Justices)*, 6 D. & R. 469; 5 B. & C. 816.

A certiorari does not lie to remove the appointment of a surveyor under the General Highway Act, 13 Geo. 3, c. 78, s. 1. The remedy to the party aggrieved by the appointment is by appeal to the quarter sessions. *Rex v. St. Alban's (Justices)*, 5 D. & R. 538; 3 B. & C. 698.

The Road Act of 32 Geo. 2, c. 54, excludes the jurisdiction of the courts of Westminster Hall. *Rex v. Micklethayte*, 4 Burr. 2522.

ment of overseers for the purpose of having it quashed, on a suggestion that the justices made the appointment from corrupt and improper motives; the propriety of the appointment being matter of appeal to the sessions. *Rex v. Somersetshire (Justices)*, 1 D. & R. 443.

An appointment by two justices of overseers of the poor, may be removed into this court by certiorari, without appealing against it to the quarter sessions. *Rex v. Standard Hill*, 4 M. & S. 378. And see *Rex v. Great Marlow*, 2 East, 244.

Where an appeal against an order of removal is adjourned on the ground of the justices being equally divided, the court of K. B. will not grant a certiorari for the purpose of quashing the order of removal and the order of adjournment, upon affidavits showing that the apparent equality of votes was occasioned by the vote of a magistrate who was a rated inhabitant of the respondent parish, and had joined in making the order of removal, on the ground that the court of K. B. has no jurisdiction to review the order, even if erroneous. *Rex v. Uake*, 2 M. & R. 172; S. C. nom. *Rex v. Monmouthshire (Justices)*, 8 B. & C. 137.

A certiorari lies to remove orders on the Conventicle Act, even after appeal, trial, verdict and judgment. *Rex v. Morely*, *Rex v. Osborne*, *Rex v. Reeve*, and *Rex v. Norris*, 2 Burr. 1040.

A highway order may be removed by certiorari. *Rex v. Derbyshire (Justices)*, 2 Ld. Ken. 299.

Quære, whether the court will grant a certiorari to remove an order of sessions by which a soldier is continued in custody on a charge of bastardy, under statute 6 Geo. 2, c. 31? *Rex v. Bowen*, 5 T. R. 156; Nolan, 186.

Orders of justices of peace, made in pursuance of the excise laws, may be removed by certiorari. *Rex v. Berkley*, 1 Ld. Ken. 80.

A poor's rate cannot be removed by certiorari. *Rex v. Uttoxeter*, 1 Bott's P. L. 292.

The court will not grant a certiorari to remove a warrant of distress to levy poor rates. *Ex parte Taunton*, 1 Dowl. P. C. 54.

Justices are not bound to return examinations taken before them, and a certiorari for that purpose was refused. *Anon.* Loffl, 347.

#### 5. Restraint by Statute.

*General Construction of Statutes.*—A certiorari cannot be taken away by any general but only by express negative words. *Rex v. Reeves*, 1 W. Black. 231.

A statute taking away a certiorari does not take it from the crown, unless expressly mentioned. *Rex v. —*, 2 Chit. 136; S. P. *Rex v. Davies*, 5 T. R. 626. And see *Rex v. Tindal*, 15 East, 339, n.

If a statute, creating an offence, give cognizance of it to one justice, with an appeal to the sessions, and take away the certiorari as to all

for the punishment of the offender are given to the sessions, by another statute, which does not take away the certiorari: the clause for taking away the certiorari in the former act cannot be extended to the proceedings under the latter. *Res v. Terret*, 2 T. R. 735.

Therefore, where there have been proceedings under both statutes, those under the former act cannot be removed, but those under the latter may. *Id.*

If a statute authorizing a summary conviction before a magistrate give an appeal to the sessions, who are directed to hear and finally determine the matter; this does not take away the certiorari even after such an appeal made and determined. *Res v. Jukes*, 8 T. R. 542.

If jurisdiction be given to an inferior court of common law, to try a new offence created by statute, the proceedings may be removed by habeas corpus cum causa, or certiorari, unless expressly taken away; unless in cases where the statute creating the offence prescribes a special jurisdiction not known to the common law. *Hartley q. t. v. Hooker*, Cowp. 524.

**Particular statutes.**—By 7 & 8 Will. 3, c. 6, a summary remedy is given before two justices for the recovery of small tithes under the value of 40s., (increased to 10l. by 53 Geo. 3, c. 127, s. 4.) By the seventh section of the former statute, which gives an appeal to the sessions, the certiorari is taken away, "unless the title of the tithes should be in question." *Res v. Jefferey*, 2 D. & R. 860; *S. C.* not *S. P.* 1 B. & C. 604.

An indictment for not repairing a county bridge was removed by certiorari, notwithstanding the stat. 1 Anne, c. 18, s. 5. *Res v. Cumberland*, 3 B. & P. 354; 6 T. R. 194.

The general words of the stat. 25 Geo. 2, c. 36, s. 10, that no indictment for keeping a disorderly house shall be removed by certiorari, do not restrain the crown from removing the indictment by certiorari, there being nothing in the act to show that the legislature intended that the crown should be bound by it. *Res v. Davies*, 5 T. R. 696.

No certiorari lies to remove an indictment on stat. 30 Geo. 2, c. 24, s. 1. *Res v. Young*, 2 T. R. 472; *S. P. Res v. Smith*, Cowp. 24.

The stat. 30 Geo. 2, c. 24, s. 20, takes away the writ of certiorari; but where counts on that statute were joined with counts for a conspiracy at common law, to obtain goods by false pretences:—Held, that the certiorari was not taken away. *Res v. Saunders*, 5 D. & R. 611.

The statute 12 Geo. 1, c. 34, s. 3, makes it an offence for clothiers and other manufacturers to pay the wages of their workmen in goods instead of money; the statute 22 Geo. 2, c. 27, creates several new offences, and extends the provisions of the preceding statute to silk manufacturers; and the 17 Geo. 3, c. 56, s. 22, takes away the certiorari upon conviction under the 22 Geo. 2. A silk manufacturer having been convicted under 12 Geo. 1, c. 34, s. 3, and 22 Geo. 2, c. 27:—

By 10 Geo. 2, c. 27, s. 2, the certiorari is taken away. *D. & R.* 436; *S. C.* nom. *Res v. Rogers*, 5 B. & A. 773.

The statute 13 Geo. 3, c. 78, s. 80, prohibits the removal by certiorari into the court of K. B., of any proceedings had in pursuance of that act: where, therefore, an order was made by two justices, and confirmed by the sessions, for diverting a road, professedly under the authority of, but (as was alleged) without pursuing all the formalities required by the act:—Held, that the certiorari was still taken away; and after the proceedings had been in fact removed, the court quashed the certiorari, quia improvide emanavit, and refused to discuss the sufficiency or insufficiency of the order. *Res v. Casson (Justices)*, 3 D. & R. 36.

By 42 Geo. 3, c. 73, penalties were imposed on masters and mistresses working children in cotton mills more than a certain time during the day, and no certiorari was allowed. By 6 Geo. 4, c. 63, additional restrictions were imposed as to working on Saturdays and penalties (increased in amount) were extended to foremen; and it was further provided that all the powers, provisions, exemptions, penalties, forfeitures, payments, remedies, matters, and things contained in the former act, except as varied by the present statute, should be as effectual for carrying the same into execution as if re-enacted:—Held, on conviction of a foreman for employing children on Saturday contrary to the last mentioned statute, that the clause taking away certiorari was a provision of the former act, incorporated, by reference, in the new. *Res v. Fell*, 1 B. & Adol. 380.

The stat. 48 Geo. 3, c. 74, s. 15, giving to the party grieved an appeal to the sessions, against a conviction by justices of the peace for penalties incurred in respect of the duties on malt, and empowering the sessions "to hear and finally determine of and concerning the truth of the facts and merits of the case in question between the parties to such conviction respectively;" and, after enabling the sessions to amend defects of form, enacting the same clause that no certiorari shall be allowed to set aside the determination of the sessions; and providing that upon such appeal the sessions shall rehear, re-examine, and reconsider the truth of the facts and merits of the case, &c. and re-examine the same witnesses as before, and no other, does not preclude the crown from removing the conviction, and the order of the sessions quashing the same, by certiorari. *Res v. Allen*, 15 East, 333.

And the court will take cognizance of a case reserved by the sessions, accompanying the proceedings so removed. *Id.*

Where the appeal is against overseers' accounts by individuals paying rates within the parish, the certiorari is not taken away by 50 Geo. 3, c. 49, that Act only applying to appeals by the overseers against the disallowance of any items in their accounts by the magistrates. *Res v. Bird*, 2 B. & A. 522.

The Bread Act, 50 Geo. 3, c. 73, after reciting

of London, and by the fifth section of 50 Geo. 3, all powers given by the previous statutes upon the same subject, were incorporated, except those altered by that statute. The 31 Geo. 2, c. 29, ss. 36 & 37, respectively took away the writ of certiorari, and gave an appeal to the sessions:—Held, that the 50 Geo. 3, c. 73, s. 5, incorporated those sections, and that, on a conviction under the latter statute, the certiorari was taken away, and an appeal given. *Rex v. Liverpool (Mayor)*, 3 D. & R. 275.

The Metropolitan Paving Act, 57 Geo. 3, c. 29, s. 135, prevents the removal into the superior courts, of "any rate, proceeding, conviction, order, matter, or thing:—Held, that a case granted by the sessions for the opinion of the court, upon the affirmance of a conviction under the act, was a thing within the meaning of s. 35, and could not be removed by certiorari. *Rex v. Middlesex (Justices)*, 8 D. & R. 117.

Not allowed in proceedings on the Turnpike Act, 4 Geo. 4, c. 95.

No repair of bridges, 1 Anne, st. 1, c. 18.

A certiorari to remove a conviction under the Beer Act is not allowed. 1 Will. 4, c. 64, s. 27.

## II. HOW OBTAINED.

*Recognisance.*—By 5 Geo. 2, c. 19, s. 2, no certiorari is allowed to remove any judgment or order, unless the party before the allowance shall enter into a recognisance, with sufficient sureties, in 50*l.*, to prosecute it with effect at his own costs, and pay costs if confirmed; and on refusal to enter into such recognisance, the justices may proceed.

By s. 3, these recognisances are to be entered into in the court of K. B.; and may be enforced by process of attachment.

The party prosecuting a certiorari to remove a conviction, &c., must himself enter into a recognisance with other persons, in 50*l.* to prosecute it with effect, &c. *Rex v. Boughey*, 4 T. R. 281.

And the statute is not complied with by the party and his two sureties entering into a recognisance of 25*l.* each, but it must be in the entire sum of 50*l.* *Rex v. Dunn*, 8 T. R. 217.

A certiorari to remove a cause into K. B. out of the Mayor's Court quashed, because one of the several defendants had only put in bail for himself, and not for the other defendants. *Keat v. Goldstein*, 7 B. & C. 525; 1 M. & R. 305.

*Notice.*—The statute 13 Geo. 2, c. 18, s. 5, requires that the party suing forth any certiorari, shall have given six days' notice thereof to the justices whose order is in question.

A certiorari cannot be issued at the instance of any but the party who gave such notice, although he avowedly drops the proceeding, and although it is too late to give a fresh notice. *Rex v. Kent (Justices)*, 3 B. & Adol. 250.

And must be given before application for a rule to show cause why such certiorari should not be granted. *Rex v. Glamorganshire (Justices)*, 5 T. R. 279; Nolan, 249.

And though the justices move to enlarge the rule nisi, that is no waiver of the want of it. Six days' notice of such motion must be given to the justices, notwithstanding the order of sessions was made subject to the opinion of the court of K. B. on a case to be stated, which case was afterwards stated, and settled by the justices at the sessions. *Rex v. Sussex (Justices)*, 1 M. & S. 631.

A certiorari to remove an indictment from the sessions, may be sued out by the prosecutor, without giving the six days' previous notice, in the case of removing convictions, judgments, orders, and other (summary) proceedings. The effect of such writ is to remove all proceedings of the nature described therein, which have taken place between the teste and return, although the proceedings originated after the teste. The magistrates below are bound to obey the writ after production of it, and notice to them in form of such production, when sitting in their judicial capacity; and after that, all further proceedings before them on the matter are erroneous. *Rex v. Battams*, 1 East, 298.

The words, "party, person," &c. in the statute do not include the crown, therefore a certiorari, on the motion of his majesty's attorney general, was directed to issue, although the time limited by that statute for applications for such writs was elapsed, and the directions it it, relative to notice to the justices, had not been complied with by the crown. *Rex v. Berkley*, 1 Ld. Ken. 80.

A notice to justices, of a motion to be made for a certiorari, "on behalf of the churchwardens and overseers of S.," if signed by one churchwarden, is not a sufficient notice by the "party or parties suing forth" the writ, within the statute. *Rex v. Cambridgeshire (Justices)*, 3 B. & Adol. 887.

*Limitation of Time.*—By 13 Geo. 2, c. 18, s. 5, the time for applications for writs of certiorari is limited to six calendar months.

A certiorari to remove a conviction, must be applied for within six months after the date of such conviction. *Rex v. Boughey*, 4 T. R. 281.

So, if it is to remove an order of sessions. *Anon. Loft*, 544.

So a certiorari to remove an order of sessions, confirming an order of removal by two justices, must be moved for within six calendar months after such order of sessions made. *Rex v. Sussex (Justices)*, 1 M. & S. 631.

So, when the order was subject to a case to be stated, the certiorari must be applied for within six months after making the order of sessions,

The statute 12 Geo. 1, c. 34, s. 3, makes it an offence for clothiers and other manufacturers to pay the wages of their workmen in goods instead of money; and the statute 22 Geo. 2, c. 27, creates several new offences, and extends the provisions of the preceding statute to silk manufacturers. The 17 Geo. 3, c. 56, c. 22, takes away the writ of certiorari upon convictions under the 22 Geo. 2. Where, therefore, a silk manufacturer was convicted under 12 Geo. 1, c. 34, s. 3; and 22 Geo. 2, c. 27:—Held, that the six months limited by the statute for bringing the certiorari, was to be computed from the time the conviction was affirmed by the sessions, and not from the time of the conviction by the justices below. *In re Keye*, 1 D. & R. 436; S. C. nom. *Rex v. Rogers*, 5 B. & A. 773.

The court refused a certiorari to remove an order of bastardy, because it was not applied for within six months. *Rex v. Howlett*, 1 Wils. 35.

**Affidavits.**—In moving for a rule nisi for a certiorari, it is irregular to intitle the affidavits on which such motion is founded in any cause; and if they are intitled, they cannot be read. *Ex parte Nohro*, 1 B. & C. 267.

Corroborating affidavits may be read after a rule has been granted; but not those containing new matter. *Rex v. Berkley*, 1 Ld. Ken. 81.

On the motion of the attorney-general for a certiorari to remove an indictment, the right of the crown having been mentioned by him to be in dispute, an affidavit is required from the defendant, according to 5 W. & M., that the freehold is in question. *Rex v. Burgess*, 1 Ld. Ken. 135.

The court will not look to any special statement of facts in the certiorari, to determine a conviction to be illegal. *Rex v. Liston*, 5 T. R. 336; Nolan, 259.

The court will not grant a certiorari to remove a conviction under 52 Geo. 3, c. 93, for using a dog and gun without a certificate, on the ground that jurisdiction does not appear on the face of the conviction, without an affidavit negating the jurisdiction. *Rex v. Long*, 1 M. & R. 139.

An affidavit, stating that the defendants controverted the title to certain tithes, and also that the title to the tithes was then, and at the time of making the said affidavit, really in question, does not sufficiently show the title to be in question, in order to remove an order of justices upon some quakers by certiorari, according to stat. 7 & 8 Will. 3, c. 34, s. 4; and 1 Geo. 1, stat. 2, c. 62. *Rex v. Wakefield*, 1 Burr. 488; 2 Ld. Ken. 164.

**Rule and Writ.**—There must be a rule nisi in the first instance for a certiorari, to remove proceedings of the commissioners of sewers. *Anon.* 2 Chit. 137.

Third persons cannot object to the misdirection of a certiorari, to remove a cause from an inferior court, if the proper officers, in whose keep-

The proceedings of certiorari on a private act of 8 Anne, c. 25, were quashed, because the foundation of the inferior jurisdiction was not set out therein. *Rex v. Liverpool*, 4 Burr. 2244.

Where a certiorari was granted on the application of two parties, and one of them died before the matter came on for argument, the court heard the case notwithstanding. *Rex v. Yorkshire, N. R. (Justices)*, 9 D. & R. 204.

By 43 Eliz. c. 5, s. 2, a certiorari to remove a suit from an inferior court must be delivered before the jury are sworn.

By 21 Jac. 1, c. 23, s. 2, before issue or demurrer joined.

### III. RETURNS TO.

A return to a certiorari need not be under seal. *Rex v. Pickersgill*, Cald. 297.

The seals of justices of oyer and terminer are not essentially necessary for the removing and authenticating a record transmitted to the court of K. B. The return of justices to a certiorari is a mere ministerial act, which the court requires to be authenticated in a particular form; but as it is a form prescribed by no positive law of the land, the court which requires it may receive and adopt any other authentic certificate, that the record transmitted is the genuine record of the court below; and the omission of the particular form can only be objected to by the court itself. *Atkinson v. Rex*, (in error,) 3 Bro. P. C. 517.

A return to a certiorari was sent back to justices by the court to be amended, because they did not put their seals to it, or describe themselves as justices of L. *Rex v. Kenyon*, 6 B. & C. 640; 9 D. & R. 694.

Upon a certiorari to remove a conviction by a justice of the peace on the Deer Act, 16 Geo. 3, c. 30, a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient. Justices ought, in all cases, to return convictions to the sessions, whether an appeal lies or not. *Rex v. Eaton*, 2 T. R. 285.

The court refused a criminal information against a magistrate, for returning to a writ of certiorari, a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts. *Rex v. Barker*, 1 East, 186.

The defendants appealed to the sessions against a conviction on a penal statute, where the conviction was affirmed; afterwards the record was removed by certiorari, and the conviction was quashed for a defect in the information: then the prosecutor moved either that the certiorari should be sent back to the magistrates, in order that they might return the original information (which had not the defect,) or that a mandamus might issue to compel the magistrates to proceed on the original information; but the court



cor itself, and not set it out according to its tenor. *Askew v. Hayton*, 1 Dowl. P. C. 510.

The return to a writ of certiorari, to remove proceedings from an inferior court into K. B., setting out a copy of the record, but not returning the record itself, is irregular, and the court quashed the writ on motion. *Palmer v. Forsyth*, 6 D. & R. 497; 4 B. & C. 401.

After a rule for a certiorari has been made absolute, and the return thereto filed, if the certiorari issued improvidently, the court will order it to be superseded, and the return taken off the file. *Rex v. Wakefield*, 1 Burr. 489; 2 Ld. Ken. 164.

#### CHALLENGE—See CRIMINAL LAW.

#### CHAMPERTY—See CONTRACT.

#### CHARACTER, REPRESENTATIONS— See CASE. DEFAMATION.

#### CHARITY.

- I. CHARITABLE USES, 584.
- II. OTHER MATTERS, 585.

##### I. CHARITABLE USES.

[See *Grumbrell v. Roper*, 3 B. & A. 711. And see *Doe d. Tyme v. Copestake*, 6 East, 328; 2 Smith, 495.]

By 9 Geo. 2, c. 36, s. 1, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, nor any sum of money, goods, chattels, stock, securities for money, or any other personal estate whatsoever, to be laid out in the purchase of lands, tenements, or hereditaments, can be given for charitable uses, unless by deed indented and executed before two witnesses, twelve months before the death of the donor, and inrolled within six months after execution.

By s. 2, it is not to extend to purchases or transfers made for valuable considerations.

A grant by deed, executed and inrolled pursuant to the statute of mortmain, of lands to trustees and their heirs, to the use of one of them, his heirs and assigns, upon condition that he, his heirs and assigns, should, from time to time, repair a vault and tomb, standing upon part of the lands; and, if need be, rebuild it, and permit the same to be used as a family vault for the grantor and any of her family; and in default thereof, then over to the other trustee, his heirs and assigns, was held not to be within the words of the statute, which prohibit the granting of land, &c. &c. to charitable uses, unless the deed be without any condition or reservation for the benefit of the grantor, or any person claiming under him. *Doe d. Thompson v. Pitcher*, 3 M. & S. 407; 2 Marsh. 61; 6 Taunt. 359.

not within the act. *Id.*

Where there was a bequest to a man, and his heirs, to hold to the use of him and his heirs, with a desire that he would convey to some charitable uses, and the will afterwards contained a bequest to him of an estate for life.—Held, that the whole of the former devise, and not merely the trust, was void, because the stat. 9 Geo. 2, c. 36, makes void the legal estate given, as well as the trust. *Doe d. Burdett v. Wright*, 2 B. & A. 710.

The owner of land having, at his own expense, built a chapel, which was used for the purpose of public worship, and the congregation having subscribed a sum of money for the purpose of enlarging and improving the same, he, in consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a peppercorn rent during his life, and 10*l.* per annum after his death. A declaration of trust was afterwards executed by some of the lessors, declaring that they would hold the premises in trust for the congregation assembling at the chapel; and that in case the public worship should be there discontinued, then, that they would assign the premises to civil purposes.—Held, that this was a conveyance for the benefit of a charitable use, and therefore void within the 9 Geo. 2, c. 36, s. 1. Held, also, that neither the sum agreed to be expended on the premises, nor the rent reserved at the death of the lessor, could be considered a full consideration paid for the lease, so as to bring the case within the second section of that statute. Held, also, that the declaration of trust, although executed only by some out of the several lessors, was evidence against all of the purpose for which the lease was granted. *Doe d. Wellard v. Hawthorn*, 2 B. & A. 96.

A conveyance of copyhold lands to charitable uses in the life-time of the party, is equally within the operation of the statute 9 Geo. 2, c. 36, as freeholds, and must, therefore, be executed with the formalities required by that statute; and it seems that a bargain and sale and inrolment cannot be presumed to have been made, even after a long and undisturbed enjoyment. It is doubtful whether it would be sufficient, in the case of copyholds, to declare the uses by a deed, conformably to that statute, and to cause such deed to be inrolled in Chancery. *Doe d. Howson v. Waterton*, 3 B. & A. 149.

A grant by the crown of the right to lay chains in part of the Thames to moor ships, is an interest in land, and within the statute of mortmain. *Negus v. Coulter*, Amb. 367.

But a bequest out of real estate to erect a monument in a church to the testator's memory, is not. *Mellick v. Asydam*, Jacob, 181.

A pauper being in custody for having left his wife and children chargeable to a parish for several years, executed an indenture, reciting "that the present, as well as former parish officers, had

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A bequest of money to put out children apprentices as the testatrix's brother should think fit, is a public charity within 8 Anne, c. 9, s. 40. *Res v. Clifton-upon-Dunsmore*, Burr. S. C. 697.

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CHARTER—See CORPORATION.

—  
CHARTER-PARTY—See SHIP.

—  
CHEAT—See CRIMINAL LAW.

—  
CHECKS ON BANKERS—See BILLS AND NOTES.

—  
CHILDREN—See CRIMINAL LAW.

—  
CHIROGRAPH—See EVIDENCE, FINE AND RECOVERY.

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CHOSE IN ACTION.

[See *Creswell v. Lovell*, 8 T. R. 418; *Mann v. Sheriff*, 2 B. & P. 355; and *Byland v. King*, 7 Taunt. 274; 1 Moore, 24.]

The assignor of a chose in action, who is become a bankrupt, may sue the debtor for the benefit of the assignee. *Wynch v. Keeley*, 1 T. R. 619.

An assignment of a chose in action need not be by deed. *Howell v. Mac Ivers*, 4 T. R. 690; *S. P. Heath v. Hall*, 4 Taunt. 326; 2 Rose, 271.

If the obligor of a bond, after notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the court will set the plea aside; nor will they, under these circumstances, allow the obligor to plead payment of the bond. *Leigh v. Leigh* 1 B. & P. 447.

An allegation in pleading, that a debt has been assigned, does not import that notice of the assignment has been given to the debtor. *Dean v. James*, 1 Nev. & M. 393.

A trustee under the 54 Geo. 3, c. 137 (Scotch Bankrupt Act,) cannot sue in his own name for a chose in action. *Jeffery v. M'Taggart*, 6 M. & S. 126.

The assignee of a Scotch bond may maintain an action of assumpsit in K. B. against the obligor in his own name. *Innes v. Dunlop*, 8 T. R. 595.

The assignee of an Irish judgment by cognovit may sue in this country in his own name. *O'Callaghan v. Thomond (Marchioness)*, 3 Taunt. 82.

Where a bond is assigned by the obligee towards satisfaction of a debt, owing from him to another

any loss incurred by such forbearance. *Ex parte Mure*, 2 Cox, 63.

Specific performance was decreed of a contract for the purchase of a debt. *Wright v. Bell*, 1 Daniel, 95.

So specific performance was decreed at the suit of the vendor, of a contract for the sale of debts proved under a commission of bankruptcy. *Adderley v. Dixon*, 1 Sim. & Stu. 607.

A pension for past services may be alienated; but a pension for supporting the grantee in the performance of future duties is not alienable. *Davis v. Marlborough (Duke)*, 1 Swanst. 79.

The salary of the assistant parliamentary counsel to the treasury is not assignable; and the court will not appoint a receiver for it. *Cooper v. Reilly*, 2 Sim. 560; 1 Russ. & Mylne, 560.

The future half-pay of an officer is not assignable. *Lidderdale v. Montrose (Duke)*, 4 T. R. 246; *S. P. Barwick v. Reade*, 1 H. Black. 627.

Stock is a chose in action. *Res v. Copper*, 5 Price, 217.

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CHRISTMAS DAY—See BILLS AND NOTES.

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CHURCH—See ECCLESIASTICAL LAW.

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CHURCH RATES—See RATE.

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CLUB AND CLUB HOUSE.

If the rules of a club be contained in a book kept by the master of the club, and accessible to the members, every member of the club must be taken to be acquainted with them. *Raggett v. Musgrave*, 2 C. & P. 556—Abbott.

Every member of a club who either concurs in, or subsequently assents to, an order for goods, given by one of the members, is liable, unless it appear clearly that the tradesman meant to give credit to that member only; and making him a debtor in the tradesman's books, and sending the bill to him, does not sufficiently show such intention. *DeLauney v. Strickland*, 2 Stark. 416—Abb.

The master of a club-house is the proper person to sue one of its members for the arrears of his subscriptions; and if by one of its rules every member is to be taken as continuing so, unless he gives previous notice of his intention to discontinue being a member, he is liable to be sued for his arrears of subscription, unless he can prove that he gave such notice. *Raggett v. Bishop*, 2 C. & P. 343—Abbott.

A club book, kept regularly open in their room, was received as evidence of articles delivered to the members, though the servants who made the entries were not proved dead, or their absence accounted for. *Wiltzie v. Adamson*, 1 Phil. Evid. 253—Kenyon.

The 2 Will. 4, c. 175, (Metropolitan Coal Act) directs, that with any quantity of coals exceeding five hundred and sixty pounds, a paper or ticket describing the quantity, and if any particular sort is ordered or contracted for, the sort of the coals sent by the seller, shall be delivered to the purchaser, or his agent, or servant, before any part of such coals shall be unloaded; that a weighing machine shall be carried with every waggon, cart, or other carriage, and the carman is required to weigh, gratuitously, any sack or sacks of coals which shall be chosen by the purchaser, or his agent, or servant, and if any carman refuses to weigh such sack or sacks of coals as aforesaid, or drives away the wagon, cart, or other carriage before the coals are weighed, or otherwise obstructs the weighing thereof, he is liable to a penalty not exceeding twenty pounds.

In March, 1802, the stat. 3 Geo. 2, c. 26, s. 13, giving a penalty against dealers in coals within the metropolis and ten miles round, for not justly measuring coals sold by the chaldron, according to the lawful bushel directed by the stat. 12 Anne, st. 2, c. 17, s. 11, was a subsisting law; and held, that evidence of such coals proving short upon remeasurement, was admissible to prove the charge of their not having been justly measured. Quære, whether the stat. 3 Geo. 2, c. 26, were a subsisting law after July, 1802, when the stat. 26 Geo. 2, c. 108, was revived by the stat. 42 Geo. 3, c. 89? *Warren q. t. v. Windle*, 3 East, 205.

A dealer in coals by the chaldron, who sold to another by the chaldron, a certain quantity as and for ten chaldrons of coal, pool measure, without justly measuring the same with the lawful bushel of Queen Anne, was liable to the penalty of 50*l.* imposed by the 13th section of the stat. 3 Geo. 2, c. 26, upon such defaulters who sell coals by the chaldron or lesser quantity without so measuring them. *Parish v. Thompson*, 3 East, 525.

The offence of selling coals of a different description than those contracted for, upon the stat. 3 Geo. 2, c. 26, s. 4, was complete in the county where the coals were delivered, and not where they were contracted for; the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But the not justly measuring such coals was a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals were kept for sale, at which place the bushel of Queen Anne was required to be kept and used for the purpose of measuring the coals into sacks of a certain description, in which they were to be carried to the buyer: and, therefore, the offence was local, and must be laid in the county where the coals were put into the sacks without having been so justly measured. *Butterfield q. t. v. Windle*, 4 East, 385; 1 Smith, 66.

To found an action against the vendor of coals, not having obtained a coalmeter's ticket, for a penalty of 50*l.* on the 19 Geo. 2, c. 25, s. 11, the plaintiff need not proceed to convict the offender

of the act contained in the words, "being thereof convicted by the oath of two credible witnesses before one or more justices," &c. For, by the 21st clause, which enacted that all penalties above 5*l.* should be recovered by action in the superior courts, those words must be taken to apply only to the case of the 5*l.* penalty upon the carter, imposed by the same 11th clause. Semble, a coal wagon was within the clause, though the act contained only the words cart or carts. *Peto q. t. v. Hague*, 1 Smith, 417.

No appeal lies to the sessions against a conviction and commitment in execution for three months of a collier, under the stat. 6 Geo. 3, c. 25, for absenting himself from his master's service; the clause of appeal in that statute excepting an order of commitment; and the order of commitment in question containing a conviction of the collier for an offence within the act. *Rex v. Staffordshire (Justices)*, 12 East, 572.

The 47 Geo. 3, sess. 2, c. 68, recites that the several acts then in force for regulating the vend and delivery of coals, had been found insufficient to prevent the commission of frauds in the vend and delivery of such coals, and that it would tend greatly to facilitate the execution of the purposes intended by the said acts, if the same were repealed, and further and better provisions made for those purposes; and then by section 113 enacts, that the vendor of coals, sold and sent as and for wharf measures, from any ship, &c., or from any wharf, &c., and to be delivered to the purchaser thereof from any cart, &c., shall deliver a printed ticket, and the carman or driver shall deliver the same to the purchaser or his servants, before any part of the coals shall be delivered therefrom. It then gives the form of the vendor's ticket, which is to contain the number of sacks, the name of the coals sent, &c., the name of the vendor, and the name of the labouring meter; and it subjects any vendor of coals who shall not deliver such ticket to a penalty of 20*l.*

Section 29 provides, that all contracts for the sale of coals at the London coal market, shall be signed by the buyer and the factor; and the factor shall deliver a copy of the contract to the clerk of the market; and that the clerk shall enter it in a book. The 23d section makes such entries "evidence in all cases, suits and actions, touching any thing done in pursuance of the act."

Section 116 enacts, that if a purchaser be dissatisfied with the measure of his coals, he shall send a notice to the office of the principal land coal meters, whereupon a meter, within the space of two hours next after such notice left at the office, shall "attend from the office at the house of the purchaser," to remeasure the coals; and sect. 120 imposes a penalty upon the principal meter, if he shall neglect or refuse, within the space of two hours, after the receipt of the notice, to send a meter to the house of the purchaser.

These two sections must be read together. *Loader v. Thomas*, 3 Y. & J. 525.

Where a factor having coals consigned to him for sale by A., sold the same, and entered the contract in his book as having been made for C.,



and such contract was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, were inserted; and the latter had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. *Quære*, whether under these circumstances an action might be maintained, in the name of C. for the price of the coals? *Hudson v. Granger*, 5 B. & A. 27.

The production of an entry of a contract purporting to be signed by the buyer and factor, is not evidence of the sale in an action brought for the price of the coals, unless the buyer be proved aliunde to have signed the contract. *Brown v. Capel*, M. & M. 374—Tenterden.

The act makes it imperative on the vendor of coals to deliver a vendor's ticket signed by the meter, and the act having been passed to protect the buyer against the frauds of the seller, a vendor of coals, who had delivered a vendor's ticket to the purchaser, which was not signed by the meter, could not recover the price of coals from such purchaser. *Little v. Poole*, 9 B. & C. 192.

It is sufficient, to satisfy the words of the 117th section, if the meter leave the office within two hours after the receipt of the notice, and proceed with due diligence to the house of the purchaser, although he do not arrive there within that time. *Loader v. Thomas* 3 Y. & J. 525.

The penalty of 20*l.* per chaldron for every chaldron of coals of one sort sold as and for another sort, inflicted by the stat. 47 Geo. 3, sess. 2, c. 68, is a penalty exceeding 20*l.* and therefore recoverable in the superior courts, under s. 150 of that statute. *Reeve q. t. v. Poole*, 4 B. & C. 155; 1 C. & P. 622; *S. C.* nom. *Thompson q. t. v. Poole*, 6 D. & R. 29.

In an action of debt, q. t. for selling coals contrary to law, the contract upon which the penalty arises must be truly stated, and any variance is fatal; therefore, where the contract was stated to be with two persons, and in fact it was with those two and another, it was ruled to be a fatal variance, though the declaration stated the exact quantity which the two were to have. *Parish q. t. v. Burwood*, 5 Esp. 33—Ellenborough.

Where, in a declaration, the defendant is described as a meter for the superintending the delivery of coals, his being a deputy coal meter satisfies that averment. *Davy v. Lowe*, 5 Esp. 70—Ellenborough.

A person generally employed on commission to buy coals for a retail coal merchant, but who sometimes before the receipt of such orders bought coals, and then let his employer have what he pleased of them, paying him at the same rate as when he had ordered them before hand, is not to be considered, even with respect to the latter coals, as the vendor of them, so as to be liable to the coal meter for the inspection fee under 47 Geo. 3, c. 68, s. 95. *Bigg v. Megarey*, 1 M. & Rob. 35—Tenterden.

If an agent employed to sell coals make a bargain in his own name with a tradesman to fur-

ther return he is to receive goods on credit, and both the coals and goods are delivered; the real seller of the coals may recover the price from the tradesman, if his name be in the ticket sent with the coals as seller, because the tradesman after that is bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal. *Pratt v. Willey*, 2 C. & P. 350—Best.

Where the vendor of coals himself inserts in the vendor's ticket the description of them, it is not necessary in an action for penalties under the 47 Geo. 3, c. 68, to produce the ships-meter's certificate, required by the 55th sect. of that statute. *Reeve v. Starey*, 4 C. & P. 17—Tenterden.

Where several persons in a club join to buy a quantity of coals, and afterwards subdivide their shares, and the coals are delivered to each short of measure, each person cannot maintain an action for the penalty against the seller, for the contract of sale is joint. *Everett q. t. v. Tindal*, 5 Esp. 169—Ellenborough.

Where a local act for the improvement of a harbour, authorized certain commissioners to make an order for payment of duties on coals brought or delivered within certain limits, and they accordingly imposed a duty of three shillings per chaldron:—Held, that it was payable for coals brought in less quantities than a chaldron. *Mills v. Furnel*, 2 B. & C. 899; 4 D. & R. 561.

Coals sent from Newcastle to London paid a port duty according to the Newcastle chaldron. *Linakill v. Read*, Peake's Add. Cas. 68—Kenyon.

COGNOVIT—See BAIL—PRACTICE.

COINING—See CRIMINAL LAW.

COLLEGE—See UNIVERSITY.

#### COMMISSIONERS.

- I. OF BANKRUPT—See BANKRUPT.
- II. OF INCLOSURE—See COMMON.
- III. OF SEWERS—See SEWERS.
- IV. OF TAXES—See REVENUE.

#### COMMITMENT.

[See HARRAS CORPUS.]

- I. OF BANKRUPT—See BANKRUPT.
- II. BY JUSTICES—See JUSTICES OF PEACE.
- III. OF PRISONERS—See PRISONER.

#### COMMON.

- I. SEVERAL DESCRIPTIONS AND HOW CLAIMED, 589.
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# I. SEVERAL DESCRIPTIONS, AND HOW CLAIMED.

A claim of a right of common without stint, as annexed to an ancient messuage without land cannot as such exist by law. *Benson v. Chester*, 8 T. R. 396.

Common appurtenant may be claimed, as well by grant within time of memory, as by prescription; and after an unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, evidence that the lord's tenant of the land had, for fifty years past, enjoyed the right of common on the waste, is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage and land, with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that, by reason thereof, he was entitled to common of pasture, &c. *Cowlan v. Slack*, 15 East, 108.

A plea of prescription for common in a que estate is good after verdict, though it be not in express terms alleged that the owners of the estate have used it from time immemorial. *Clark v. King*, 3 T. R. 147.

The plaintiff prescribed for a right of sole pasture "from the feast of St. Thomas until the 18th April," and proved the exercise of the right between those periods—Held, on motion to set aside a nonsuit, that it was not necessary to allege the right in the pleadings from Old St. Thomas's day. *Smith v. Flower*, 3 Bing. 401: S. C. nom. *Smith v. Fowler*, 11 Moore, 264.

Plaintiff in replevin pleaded in bar to an avowry for damage feasant, that the locus in quo, from time whereof, &c. ought to be open and common, "on or before the 15th of October, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards;" that the plaintiff at the time when, &c. put in his cattle "the same time being when the said field was and ought to be open and common as aforesaid:"—Held, that the plea was bad for uncertainty, even after verdict, the right of common being too generally described, both in its

Common for cattle levant and couchant cannot be claimed by prescription, as appurtenant to a house without any curtilage or land. *Scholes v. Hargreave*, 5 T. R. 46.

Quære, if common appurtenant to a messuage without land may exist? *Bunn v. Channen*, 5 Taunt. 244.

Semble, common appurtenant may be converted to common in gross, by demising it. *Id.*

A right of common cannot be reserved in a demise under the word "land." *Smith d. Jerdon v. Milward*, 3 Dougl. 70.

A right of common (whether appendant or appurtenant not stated in the case) cannot be reserved from the land and converted into common in gross. *Id.*

By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom; and after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands, when inclosed, will be freehold and not copyhold. *Revell v. Jodrell*, 2 T. R. 415.

An ancient deed of feoffment, granting the wastes of a manor to feoffees in trust to permit the tenant and inhabitants, &c. to use and enjoy the same as they had formerly done, or been accustomed to do, must be taken to mean such a right of common as may by law exist, namely, a right of common restricted by levancy and couchancy. *Benson v. Chester*, 8 T. R. 396.

A copyholder who has common in a waste, without the manor of which his copyhold is parcel, has it annexed to the land, and not to his customary estate, and must prescribe in a que estate, through his lord, for him and all his customary tenants thereof. *Barwick v. Matthews*, 5 Taunt. 365; 1 Marsh. 50.

And such common, without the manor, is not extinct by enfranchisement of the copyhold, though there be no words of regnant. *Id.*

And after enfranchisement, the feoffee must prescribe in a que estate of his lord, for himself and his customary tenants, till the time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement. *Id.*

If a copyholder in the manor of A. has common in the wastes of the same lord's manor of B., for his cattle levant and couchant on his tenement in A., this is a proof that the manors were formerly in different hands; for the estate of the copyholder was too weak to support a grant by the lord to his copyhold tenant of common appurtenant in another manor. *Id.*

After an easement has been extinguished by unity of possession, a new easement is not created by a grant of a messuage and land with common appurtenant, though those who have occupied the tenement since the extinguishment have always used common therewith. *Clements v. Lambert*, 1 Taunt. 205.

In case of disturbance of common of pasture, plaintiff declared, in respect of a messuage and lands, for common for all his cattle levant and couchant:—Held, that a lease to plaintiff's testator, for years, determinable on lives, of a farm, &c. together with reasonable common of pasture, was sufficient to sustain the right of common alleged in the declaration, and that this right was not destroyed by a subsequent conveyance to the plaintiff in fee of the farm and common of pasture thereto belonging and appertaining; for this operated as a new grant of the common. *Doidge v. Carpenter*, 6 M. & S. 46. And see *Ballard v. Dyson*, 1 Taunt. 279.

A prescription for common of pasture, for a certain number of sheep, on A., every year, at all times of the year, is well laid, though the evidence which proves the right of common, proves also that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day. *Brook v. Willett*, 2 H. Black. 224.

Where a declaration set out a right of common for all commonable cattle, and it was proved that plaintiff turned out all the commonable cattle he had, but that he had no sheep:—Held, not a fatal variance. *Manifold v. Pennington*, 6 D. & R. 291; 4 B. & C. 161.

The allegation of a right of common for all the plaintiff's cattle, levant and couchant, is supported, although, according to the evidence, the common is not sufficient to feed all the cattle for any length of time. *Willis v. Ward*, 2 Chit. 297.

A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the locus in quo under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in court, of which the date and names of the parties are unknown. *Hendy v. Stephenson*, 10 East, 55.

Where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet, as the separation was not complete, so as to prevent cattle straying from one to the other by means of the highway, the common by vicinage still continued. *Gullett v. Lopes*, 13 East, 348.

The plaintiff being possessed of a house and land in E., had for sixty years exercised rights of common in W.; it appeared at the trial that this was done near the boundary of the two commons of W. and E., which lay open and uninclosed, and adjacent to each other, and that the parties exercising the right did not at the time know the exact boundary; that the plaintiff had on the previous inclosure of the common at E., obtained an allotment there in respect of his estate:—Held, that it was properly left to the jury to say, whether the evidence was referrible to an exercise of the right in E., and a mistake of the boundary,

If to an action of trespass in the common called A., the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. *Moorwood v. Wood*, 4 T. R. 157.

In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, it is necessary to allege that the house was out of repair, and that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose. *Peppin v. Shakespeare*, 6 T. R. 748.

Prescriptions and contracts must be proved in the extent alleged; but aliter of torts where the right stated is merely an inducement to the action. *Ricketts v. Salwey*, 2 B. & A. 360; 1 Chit. 104, 112.

In an action on the case for disturbance of common, where the right is alleged to be in respect of a messuage and land, it is not necessary for the plaintiff to prove the whole of such allegation; and where the plaintiff declared upon a right of common in respect of a messuage and 150 acres of land, with the appurtenances:—Held, that the declaration was divisible, and proof of common right in respect of the land was enough to entitle him to a verdict pro tanto. *Id.*

In an action for disturbing a common, the plaintiff must prove a right to the same kind of common as that alleged, but need not prove the same title. *Id.*

Plea to trespass, that an ancient messuage and twelve acres of land were immemorially parcel, and a customary tenement of the manor of A.; and that there is a custom in the manor, "that from time whereof, &c.: the customary tenant of the said customary tenement for all the time aforesaid has had right of common." &c.: replication traversing the custom on such pleadings: the plaintiff may prove that the messuage was built within twenty years, and not upon the site of an ancient house. *Dunster v. Tresider*, 5 T. R. 2.

The mere exercise of a right of common for more than twenty years, will not of itself authorize the presumption of a grant, if circumstances of great difficulty in the prevention of trespass appear. *Dawson v. Norfolk (Duke)*, 1 Price 246.

## II. USER OF COMMON.

The lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon a common of an adjoining manor. *Sefton (Earl) v. Court*, 5 B. & C. 917; 8 D. & R. 741.

In case of an absolutely stinted common in point of number, one commoner may distrain the supernumerary cattle of another, but not if an overmeasurement is necessary, as where the stint has relation to the quantity of the commoner's land. *Hall v. Harding*, 1 W. Black. 678; 4 Burr. 2466.

over the whole field, and B. having also a right of common over the whole field, they enter into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If, during the term, the cattle of B. come upon the land of A., he may distrain them damage feasant; and may, in his replication (in answer to a plea pleaded by B. of his right of common, in bar of the cognizance of A.,) set forth the special circumstances of the agreement and covenants. *Whiteman v. King*, 2 H. Black. 4.

In case for a surcharge of common, the plaintiff need not show that he turned on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common so beneficially as he ought. *Wells v. Watling*, 2 W. Black. 1233.

In an action on the case for a surcharge of common, the plaintiff may declare generally for the injury, without stating the defendant's right of common. *Atkinson v. Teasdale*, 2 W. Black. 817; 3 Wils. 278. And see *Cheeseman v. Hardham*, 1 B. & A. 706.

One commoner, who has surcharged, may nevertheless maintain an action against another for surcharging the common. *Hobson v. Todd*, 4 T. R. 71.

A commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle, though his proportion of the damage be found only to the amount of a farthing; at least the smallness of the damage found is no ground for a nonsuit. *Pindar v. Wadsworth*, 2 East, 154.

The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig clay-pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. *Bateson v. Green*, 5 T. R. 411. And see *Place v. Jackson*, 4 D. & R. 318. and *Clarkson v. Woodhouse*, 5 T. R. 412, n.

The occupier of a messuage and lands, who has common in the lord's waste, may set up a custom to cut rushes, as annexed to his right of common. *Bean v. Bloom*, 2 W. Black. 926.

A commoner cannot justify cutting down trees planted by the lord on the waste, although there be not a sufficiency of common left; but his remedy is by action on the case, or by assize. *Kirby v. Sadgrove (in error)*, 1 B. & P. 13; 3 Anst. 892; 6 T. R. 483.

A custom that all the customary tenants of a manor, having gardens, parcels of their customary tenements respectively, have immemorially, by themselves, their tenants and occupiers, dug, taken and carried away, from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same

cattle, as hath been fit and pi at all times of the year, as quantity as occasion hath requ as being indefinite and uncert of the common; and so is a taking and applying such tur making and repairing the bar of, and for the hedges and customary tenements. *Wilson* 121; 3 Smith, 167.

In an action of replevin for tiff's cattle, the defendant avo of common of pasture, from the to the burgesses of the borou plaintiff pleaded in bar, that t A. had been accustomed to ap and proper number of herds, things) taking care of the ea common; and also to appoint each such herd, a reasonable al of stints of each of such herds, thereon:—Held, sufficient, after it was urged that the number of and the duties required from have been set out with certai *Elliott v. Hardy*, 10 Moore, 347

Trespass lies for digging up a common. *Cooper v. Marsh* Same, 1 Burr. 259, 268; 2 Ld. K

To an action of trespass fterring, and digging up plaintiff ing up and spoiling the coney a plea of a right of common, tharows were wrongfully, unlawfull newly erected and kept up whereof the said common was spoiled, so that defendant coul common, as of right he ought; this in order to abate the said n no justification. *Id.*

### III. ENCROACHMENT

An inclosure made from the thirteen years before, and seen by the same lord from time to time, tion made, may be presumed by t been made by license of the lord; cannot be brought against the t passer, without previous notice t *Doe d. Foley v. Wilson*, 11 East, 5

If a licensee be given by a comm to build a cottage on a common, he tain an action for the encroachme no sufficient commoner remained *Reynolds*, 12 Price, 724; 1 C. & 1

To trespass on the case by a free right of common against a defend croachment, a plea of leave and lic to be supported by evidence that the permitted a former encroachment t ant, the plaintiff being then under since, when of full age, countenan encroachment by expressing his u

Where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years, without paying rent, and at the end of that time paid sixpence rent on four several occasions to the owners of the adjoining land:—Held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment. *Doe d. Jackson v. Wilkinson*, 5 D. & R. 273; 3 B. & C. 413.

A cottage standing in the corner of a meadow (belonging to the lord of a manor,) but separated from it and from a high-road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told that if he were allowed to resume possession, it would only be during pleasure. He did resume, and kept possession for fifteen years more, and never paid any rent:—Held, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord. *Doe d. Thompson v. Clark*, 8 B. & C. 717.

A., being possessed of a portion of a lawn as a field, over which a right of common existed part of the year took down the customary post and rail fence, containing gaps, through which the commoners' cattle might pass, and built a wall, with a single doorway, at which they might enter and return:—Held, that this was an encroachment. One farthing damages will sustain the verdict for the plaintiff in an action of trespass. *Kitchen v. Knight*, 1 M'Clel. 373.

Encroachments by the tenant on the waste do not belong to the landlord. *Doe d. Colclough v. Mulliner*, 1 Esp. 460—Kenyon. But see *Doe d. Challenor v. Davies*, 1 Esp. 461, and *Bryan d. Child v. Winwood*, 1 Taunt. 208.

#### IV. COMMON FIELDS.

By 13 Geo. 3, c. 81, intituled "An Act for the better cultivation, improvement, and regulation of the common arable fields, wastes, and commons of pasture," arable common field lands were to be ordered, fenced, cultivated, and improved in such manner, by the respective occupiers, under such rules, regulations, and restrictions, as three-fourths in number and value, having consent of the owners and tithe-owner, shall at a meeting convened on twenty-one days' notice by writing under their hands, constitute, direct, and appoint.

S. 2 provides, that such rules were not to be in force longer than six years or two rounds of husbandry.

By s. 3, field masters, or field reves, were to be appointed.

By s. 7, the occupiers, at a meeting convened on fourteen days' notice, were to settle the time of opening common field lands.

An averment in a declaration for disturbing the plaintiff's right of common, that the plaintiff was entitled to common of pasture for all his cattle levant and couchant upon his land, is well sup-

ported, upon which, after the corn was reaped and the field cleared, the custom was for the different occupiers to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field; although such cattle were not maintained upon such land during the winter; and although the custom proved was to turn out in proportion to the extent and not to the produce of the land, in respect of which the right was claimed:—Held, also, that it was not necessary to state his right to be with the exception of his own land, but that it was well laid to be over the whole common. *Cheesman v. Hardham*, 1 B. & A. 706.

#### V. APPROVEMENT.

By the statute of Merton (20 Hen. 8, c. 4.) and Westminster II., 13 Ed. 1, stat. 1, c. 46, enforced by 3 & 4 Ed. 6, c. 3, lords may approve against their tenants and neighbours, leaving a sufficiency of common.

By 26 Geo. 2, c. 36, the lords and tenants, by mutual consent, might inclose part of any common for the purpose of planting and preserving trees fit for timber or underwood.

By 31 Geo. 3, c. 41, these powers are declared to be vested in tenants for life, or years determinable on lives.

Any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common, though he is not the lord of the manor. *Glover v. Lane*, 3 T. R. 445.

A custom for one commoner to inclose against another, is good. *Barber v. Dixon*, 1 Wilk. 44.

A custom for the lord to grant leases of the waste of a manor, without restriction, from the time of the original grant, cannot be presumed, and is bad in point of law. *Badger v. Ford*, 3 B. & A. 153.

A custom for the lord, with the assent of the homage, to grant part of the waste in severalty, in exclusion of the commoners, is good. *Boswell v. Winmill*, 2 Camp. 261—Maddison.

A custom for the lord, with the consent of the homage, to grant parts of a common for building, is good. *Folkard v. Hemmett*, 5 T. R. 417, n.

A custom for the owners of a waste to set out to the owners of certain ancient messuages portions of the waste to be by them held in severalty for getting turves therein, and when the portions, set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their pleasure in severalty for ever, freed of all common of turbary and pasture, is good. *Clarkson v. Woodhouse*, 5 T. R. 412, n. And see *Bateson v. Green*, 5 T. R. 411; *Place v. Jackson*, 4 D. & R. 318.

It was at one time held that there could be no approver in derogation of a right of common of turbary. *Grant v. Gunner*, 1 Taunt. 435.

But semble, that a lord may approve against a right of common of turbary. *Arlott v. Ellis*, 7 B. & C. 346; 9 D. & R. 897; 9 B. & C. 671.

But the lord has not an unlimited right to inclose parts of a common without the consent of the homage. *Id.*

In pleading the right of a lord to inclose parts of a common, it must be stated that there was sufficiency of common left for the commoners. *Id.*

But this right of the lord may be given in evidence on an issue, joined on the right of common over the lo. in quo, at the time the trespass was committed, and need not be specially pleaded. *Id.*

The lord, or those claiming under him, must prove that there was a sufficiency of common left; and, in the case of a common of turbary, that what was left was also conveniently situated for the commoners. *Id.*

When a part and not the whole of a common had been inclosed, a commoner, in asserting his right of common, may throw down the whole of the hedge erected on the common, and a plaintiff, in trespass, cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle. *Id.*

On a similar issue, the plaintiff may give in evidence a custom for the lord to approve parts of the common, and that the locus in quo had been unapproved. *Id.*

Quære, whether the defendant was entitled to have the issue on the right of common of turbary found for him? *Id.*

Upon an issue of de injuriâ between the lord and the commoner, the plaintiff cannot give in evidence that there was sufficiency of common left. *D'Ayrolles v. Howard*, 3 Burr. 1385.

Trespass for entering plaintiff's close, and consuming the herbage: plea, that the locus in quo was part of a common, over which defendant had a right of common for sheep: replication, that the locus in quo had been inclosed by the consent of the lord: on special demurrer to the replication, it was held bad, for not going on to state, that after the inclosure there was sufficient common left for the commoners. *Rogers v. Wynne*, 7 D. & R. 521.

The lord of a manor, or his grantee, may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig sand, &c. if he leave sufficient common of pasture. *Shakespear v. Pep-pin*, 6 T. R. 741.

A custom of inclosing for the tenants in a manor, does not abridge the common law right of the lord to inclose. *Duberley v. Page*, 2 T. R. 392, n.

The lord has no right, under the statute of Merton, to inclose and approve the wastes of a manor, where the tenants of a manor have a right to dig gravel on the wastes, or take estovers there. *Id.*

Evidence that the lord of a manor has, from time to time, erected houses to the exclusion of those claiming a right of common, is not to be placed in competition with evidence of long en-

joyment, coupled with an acknowledgment of the defendant, the lord of the manor, by deed; that the confirmation of the commoners was essential to an alienation of part of such common. *Drury v. Moore*, 1 Stark. 102—Ellenborough.

# INCLOSURE.

## Construction of Acts generally.

By the 41 Geo. 3, c. 109, (the general inclosure act, to which local inclosure acts usually refer,) the course of proceeding applicable to inclosures is pointed out.

Inclosure bills are not to be considered as merely private acts. *Riddell v. White*, 1 Anst. 281.

The 6th sect. of 41 Geo. 3, c. 109, limiting the time for making claims before the commissioners, not only applies to allotments in respect of land, but extends to tithes also; and the lessor of the plaintiff, who had neglected to make a claim for tithes within the time required by that section, could not prevail in ejectment against a party in possession of the allotment, actually set out in respect of the tithes, although the party under whom he claimed title had also omitted to make a claim according to the statute. *Doe d. Watson v. Jefferson*, 9 Moore, 260; 2 Bing. 118.

A corporation, who were mentioned in an enclosure act as lords of the manor, and received under it an allotment in lieu of their manorial rights, are bound by the act. *Phillips v. Maile*, 4 M. & P. 770; 7 Bing. 133.

By a local inclosure act, it was provided that whenever the office of commissioner should be vacant, the lord of the manor, with the major part in value of the proprietors of lands and common rights in the parish, (such value to be ascertained according to their respective assessments in the last rates made for the relief of the poor of the parish, in the said parish,) present at a public meeting, should elect another. The office of commissioner having become vacant, a new one was elected by the lord of the manor and the major part in value of the proprietors of lands at a public meeting. No one there disputed that he had such majority, but no reference was made to the poor-rates:—Held, that, nevertheless, the appointment was valid. *Doe d. Harris v. Bodenham*, 9 B. & C. 495.

The stat. 52 Geo. 3, c. 71, for the better cultivation of navy timber in the forest of Woolmer, in the county of Southampton, which (s. 8,) enacts, "for the regulating and securing to the several persons now having right of common of pasture in and over the said forest, the power of cutting peat and turves within such parts of the said forest as shall not be inclosed by virtue of the act, that, after the enclosure shall be made and completed, it shall be lawful for all persons having right of common in the said forest, to cut and take peat and turves in any part of the said forest not inclosed under the act, without payment of any fee or sum of money to any keeper or other person having the care or superinten-

confers a new right, and authorizes those only who before had the right of estovers and common of pasture to cut without payment of fees, for the necessity of the dwelling-house, in respect of which the original right existed. *Att. Gen. v. Gawnlett*, 3 Y. & J. 93.

An inclosure act authorized the commissioners to award lands in exchange for other lands:—Held, that they were authorized in awarding lands given in exchange partly for other lands and partly for money. *Doe d. Suffield (Lord) v. Preston*, 7 B. & C. 392; 1 M. & R. 713.

The commissioners under an inclosure act were required to allot the lands directed to be inclosed unto the several proprietors thereof, in such shares, quantities, &c. as they should adjudge to be a just compensation for their several and respective lands, rights of common, &c. therein; and were empowered also to set out, allot, and award any lands, &c. within the parish, of A., "in lieu of or in exchange for any other lands, &c. within the said parish, provided that all such exchanges should be ascertained, specified, and declared in and by the award to be made by the consent of the owners of the lands exchanged." The commissioners awarded a certain allotment to A. B., "as a compensation for his open fields, lands, and rights of common, and an old inclosure given up by A. B. to be allotted by the commissioners in exchange:"—Held, that the commissioners had not pursued the powers vested in them by the act, and that A. B. could not make a good title to the allotment. *Wingfield v. Tharp*, 10 B. & C. 785.

## 2. Expenses.

The commissioners under an inclosure act are liable to suits at law, and in equity for acts which are done not according to their authority. *Speer v. Crawler*, 17 Ves. jun. 216.

A bond taken by the commissioners appointed under an inclosure act, to indemnify themselves against the expenses of a suit brought to try the right to allotment made by them, and in which they are, according to the directions of the Act, made defendants, is not void; though there be a fund provided out of which such expenses may in some cases be satisfied; at least if the commissioners doubt whether the case in question be one of those cases. *Iles v. Bozall*, 2 B. & P. 89.

By a local act, it was provided, that, out of the lands to be allotted, the commissioners should allot a part, in their judgment sufficient, when sold, to defray the expenses of carrying the act into effect; and if it should prove insufficient, the deficiency should be made up by the persons interested in the lands to be inclosed, and should be paid in such proportions, and at such times, as the commissioners should direct. The commissioners having set apart and sold a portion of the lands to be allotted in order to defray the expenses, found that there was a deficiency, and made a rate upon the parties interested in order to provide for that deficiency. One of those

Geo. 3. c. 29, s. 29, to recover the land allotted to him in respect of which the rate was imposed. *Doe d. Harris v. Bodenham*, 9 B. & C. 495.

By another clause it was enacted, that the commissioners should once a year lay their accounts before a justice of the peace, and get them allowed by him, and that no charge or item in such account should be binding on the parties concerned, or valid in law, unless the same should have been duly allowed by such justice; and an appeal was given against the accounts or rates to be made by the commissioners. The commissioners, instead of laying their accounts before a justice annually, had done so only twice in fourteen years, and had not done so for several years before the rate was made, but there never was any appeal against the accounts or the rate:—Held, that the commissioners had power to make such rate, notwithstanding their neglect in passing their accounts. *Id.*

By a local inclosure act, it was directed that the costs of carrying the act into effect, and all the charges of the commissioners and the persons employed by them, should be borne by the parties interested in the lands to be allotted, &c. as the commissioners should direct, and should be levied according to the general inclosure act; and the commissioners were required once a year at least to lay before a justice of the county, a statement of all the sums by them received and expended, or due to them for their own trouble and expense; and it was enacted that no charge or item in such account should be binding or valid, unless the same should have been duly allowed by such justice. Commissioners under the act levied by distress a sum of money, part of which was due for their own trouble and expense during several preceding years, and had not been accounted for annually, nor until a short time before the issuing of the distress warrant: Held, that the accounting was not a condition precedent to the levy, and that the distress was legal. *Smith v. Jones*, 1 B. & Adol. 328.

Where an inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and provided that persons advancing money should be repaid out of the first money raised by the commissioners; and expenses were incurred in the execution of the act before any rate was made; to defray which expenses the commissioners drew drafts on their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners; and the bankers for six years continued to advance considerable sums by paying these drafts:—Held, that the commissioners were personally responsible to the bankers for the amount of such drafts; and the latter, having from time to time made half-yearly rests in the account, and charged interest on the balance there struck; and the commissioners having consented to that method of keeping the accounts:—Held, that this mode of charging interest half-yearly was not illegal or usurious. *Eaton v. Bell*, 5 B. & A. 34.

missioners and their successors were appointed, and it was provided, that all acts or things done by any two of the commissioners should be valid; and it was further provided, that if any of them should die, or become incapable to act for the space of forty days, when occasion should require his or their attendance for carrying the act into execution, a new commissioner or commissioners should be elected and appointed in his or their stead:—Held, that an assessment made by two commissioners, after the death of one of the three appointed by the act, and before the election or appointment of a successor, was invalid, although such assessment was made for the purpose of carrying the act into execution. *Doe d. Nicholson v. Middleton*, 6 Moore, 532; 3 B. & B. 214.

By the same act the commissioners were required to make a statement or account of all monies received, expended, or due to them, in the execution of such act; and to lay the same before a magistrate, who was to examine and balance the same; and no charge or item in such account was to be binding, unless allowed by such magistrate. Quære, whether the commissioners, having made an assessment for the costs of carrying the act into execution, could proceed for the recovery of such assessment before it was allowed by a magistrate. *Id.*

But it was held that such clause did not take away an appeal given by a subsequent clause, "to the party grieved by any thing done in pursuance of that or the General Inclosure Act, other than and except such determinations as were by that or the General Inclosure Act declared to be binding, final, and conclusive," the allowance of the accounts by a magistrate not falling within that exception. *Rex v. Cumberland (Justices)*, 1 B. & C. 64.

### 3. Roads.

*Making and stopping up.*—By the 41 Geo. 3, c. 109, s. 8, the commissioners are authorized to set out and appoint the public carriage roads and highways through and over the lands and grounds to be inclosed; and to divert, and turn, and stop up, any of the roads and tracks upon and over all or any part of the said lands and grounds; provided that, in case the commissioners shall be empowered by any local act to stop up any old or accustomed road, passing or leading through any part of the old inclosures in such parish, the same shall in no case be done without the concurrence and order of two justices, and their order shall be subject to an appeal to the quarter sessions.

By the 11th section it is provided, that all roadways, &c. which shall not be set out as by the act is directed, shall be for ever stopped up and extinguished.

Under the 8th section, the commissioners are authorized to stop up or divert footways as well as carriage roads; and the proviso at the end of the section is not confined to carriage roads, but extends to every species of ways; and, therefore, where the commissioners were em-

all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held, that in order effectually to stop up a public footway passing partly over the lands to be inclosed, and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices; and no such order or concurrence having been obtained, it was held, that a footway which the commissioners ordered to be stopped up, had not been effectually stopped, but continued a public footway. *Logan v. Burton*, 8 D. & R. 299; 5 B. & C. 513.

A local inclosure act empowered the commissioners, with the concurrence and order of two justices of the peace, to stop up and discontinue roads, &c. On a special case, stating that an old footpath had been omitted by the commissioners in preparing a map of roads, &c. set out:—Held, that the old way was not stopped up and extinguished, according to the true construction of the acts of parliament, by the commissioners and two magistrates making and signing an order confirming the map; an express order of two magistrates being indispensably necessary to the stopping up of roads, whether they were public carriage roads, or private, or bridle and foot roads: and that merely not setting it out, is not sufficient to extinguish it. *Harber v. Rand*, 9 Price, 58.

The plaintiff having an allotment made to him by a commissioner, under an inclosure act, of land, over which the defendant had a private right of way before the passing of the act, but which way was not noticed or described amongst those set out by the commissioner appointed for executing that act, (the operation of which, as to the powers of setting out or stopping up roads, was left to the General Inclosure Act, 41 Geo. 3, c. 109.) may, under the 11th section of the latter statute, justify the stopping up of such way without any directions from the commissioner for that purpose in the award, or any other road being set out or appointed in lieu of it. *White v. Reeves*, 2 Moore, 23.

A rejoinder to a replication in trespass for stopping up a private way under an inclosure act, alleging that the commissioner did not direct the way to be stopped up, or give any orders relating to the same, or, by his award, set out, or appoint any other way in lieu of it, is bad for duplicity. *Id.*

An old footway passed from a public highway over wastes and old inclosures into another public highway. By an award of the commissioners under a local act for inclosing the wastes, the part of the waste over which the footway ran was allotted; but the footway was not mentioned in the award, nor was any new way set out therein. No power to stop up ways over old inclosures was given by the particular inclosure act:—Held, that the old footway was not extinguished by the allotment. *Thackrah v. Seymour*, 1 C. & M. 18.

By a clause in an inclosure act, a commissioner was empowered to stop up any way, pro-



to be subject to an appeal to the quarter sessions, in like manner, and under such forms and restrictions as if the same had been originally made by such justices; and by a subsequent clause, any party aggrieved might appeal at any time within six months next after the cause of complaint had arisen under the act; the commissioner with the concurrence and order of two justices, stopped up a road without giving the public notices required by the 55 Geo. 3, c. 68, s. 2.—Held, that a party aggrieved might, under these circumstances, appeal at any time within six months. *Rez v. Townshend*, 5 B. & A. 420.

Quære, whether it be necessary for a commissioner to give such notices as are required by the general act, where roads are stopped up under the provisions of a private or local inclosure act? *Id.*

Where a private act reserved to the lord all mines, &c. and liberty of laying such wagon ways, &c. as might be necessary or convenient for the full and complete enjoyment thereof: and trespass was brought for laying a wagon way over one of the allotments in an improper manner:—Held, that the real question was, whether such wagon way had been laid in such a manner as a person of reasonable or ordinary skill would have laid it; and such as a prudent person would have adopted if he had been making the road over his own land, and not over that of another. *Abson v. Fenton*, 1 B. & C. 195.

Allotments were set out under an inclosure act to a party claiming them, and possession given in or about 1817. There was no road to them, nor any access but through allotments made, or land sold under the act to other persons. On motion, in 1829, for a mandamus to the commissioners who had not yet published their award, to set out an occupation road to the first-mentioned allotments, the court held that the application came too late. *Rez v. Cockermouth Inclosure*, 1 B. & Adol. 378.

Where a public footway over crown land is extinguished under an inclosure act, but the public continue for twenty years afterwards to use the way, such user is not evidence of a dedication of the way, to the public, unless it appears to have had the consent of the crown. *Harper v. Charlesworth*, 6 D. & D. 572; 4 B. & C. 574.

It seems that an indictment against the commissioners under an inclosure act, for not obeying an order of sessions, directing them to set out a road as a public road, would not be such a remedy to the party, supposing him entitled to have the road so set out, as would make the court refuse to interfere by mandamus. *Rez v. Dean Inclosure*, 2 M. & S. 80.

But a mandamus was refused to commissioners, for not laying out public roads according to an act of parliament. *Anon. Loft*, 189.

*Expenses of making.*—By 41 Geo. 3, c. 109, s. 10, the commissioners are empowered to set

pense of the owners and proprietors of the lands inclosed.

Commissioners who had made private roads under the authority of that and a private inclosure act, (which said nothing about private roads,) had no power to make a rate for reimbursing themselves the expenses incurred. *Falmouth (Earl) v. Richardson*, 5 D. & R. 664; 3 B. & C. 837. And see *Rez v. St. Benedict*, 4 B. & A. 471.

Where commissioners, by an inclosure act, were empowered (inter alia) to make roads, and to defray the expense by a rate on the several proprietors, and they executed their award as to the allotments before the roads were completed, or sufficient funds were raised for that purpose:—Held, that they might afterwards make a rate to defray the expense of completing the roads. *Haggerston v. Dugmore*, 1 B. & A. 82.

Where an inclosure act gave the commissioners power to set out and make roads, &c. and directed that the expenses of making and repairing those roads, and all other expenses, should be borne by the proprietors in certain proportions, to be ascertained by the commissioners in one general rate, and then gave an appeal to the sessions in all cases where the parties should think themselves aggrieved: it was held, that an objection to the rate on account of the commissioners having expended money on an improper object, could not be tried in an action of trespass, but that the party aggrieved must appeal to the sessions. *Bonnell v. Beighton*, 5 T. R. 182.

The commissioners appointed by a local act, which enacts that the private roads set out by them should be repaired by such person or persons as they should award, have no power to impose on the parish at large the burden of repairing. *Rez v. Cottingham*, 6 T. R. 20.

*Rights afterwards.*—[An inclosure act, authorizing commissioners to make roads through inclosed lands, and declaring that the persons having common rights over such lands should be entitled to the herbage of the roads in such manner as the commissioners should award, does not authorize them to sell the herbage by auction or otherwise, to one individual commissioner. *Raines v. Robinson*, 2 Chit. 501.]

An inclosure act having directed that the allotments made by the commissioners, should forever remain for the benefit of the appointees:—Held, that an award and assignment of the herbage of a certain close to the surveyors of the highways and their successors, for the benefit of the parish of B. though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take the same, as if the terms of the award had been specifically enacted; and the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Johann v. Hodgson*, 8 East, 38.

to be inclosed, is not conclusive of the fact, as to what were the boundaries previous to such determination. *Rez v. St. Mary, Bury St. Edmund's*, 4 B. & A. 462.

Where the commissioners, with special powers to ascertain and fix boundaries were directed to insert in their award a description of such boundaries, corresponding with one to be advertised; but upon the award being made, it was found that the description in the award varied from that which had been advertised:—Held, that the award was not final, because the commissioners had not pursued their powers. *Rez v. Washbrook*, 7 D. & R. 221; 4 B. & C. 732.

The court would not consolidate several feigned issues to try the boundary of a manor, where they were empowered to do so by an inclosure act, as it appeared the different plaintiffs had conflicting interests. *Cranmer v. Pennington*, 5 Taunt. 167.

Upon an indictment against the parish of H. for not repairing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was held not to be admissible evidence for the defendants, without showing that the commissioners had given the previous notices required by the act, before they ascertained the boundaries; it appearing that the usage had not been pursuant to the award, the defendants having since the award, as well as before, repaired the highway. *Rez v. Haslingfield*, 2 M. & S. 558. And see *Maule v. Stowell*, 15 East, 99.

Where in an action of replevin for taking the plaintiff's cattle, the defendant avowed the taking, alleging that the cattle were damage feasant on his soil and freehold; and the plaintiff claimed under J. S. who had a manor in the parish of A., and the defendant had a manor in the adjoining parish of B., and J. S. had immemorially exercised acts of ownership over the locus in quo, and the defendant had also exercised such acts, but not to so great an extent as J. S.; and an act of parliament was passed for the inclosure of waste land in A., in which J. S. was stated to be the owner of a manor in A.; but no mention was made in the act of the parish of B., nor of any claim of J. S. in respect of property there; and by an adjudication of the quarter sessions under the act, the locus in quo was found to be in the parish of B., and the judge left it to the jury to say, whether it was in J. S. or the defendant:—Held, that it was properly left, and they having found a verdict for the defendant, the court refused to disturb it, although it was insisted that it should have been left for them to say, whether the parishes and manors were co-extensive and conterminous, and as there was no mention in the inclosure act for the parish A., of J. S. having any property in the adjoining parish of B., it was sufficient to warrant the jury to infer that the manor of J. S. did not extend into the latter parish. *Lester v. Kemp*, 9 Moore, 85; 2 Bug. 30.

his demesnes of the manor, over and above the allotment awarded to him by the act in respect of his right as lord of the manor. *Arundell v. Falmouth*, (Viscount), 2 M. & S. 440.

An owner of the soil sufficiently answers the description of lord of the manor, to take an allotment under an inclosure act, although the manor be, to other purposes, extinct. *Smith v. Smith*, 2 Price, 101.

Where by the terms of an inclosure act for inclosing the wastes of a manor, a certain portion was to be given to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, &c.: a saving clause reserving to the lord all seigniories incident to the manor, and all rents, fines, services, &c., and all other royalties and manorial jurisdictions whatever, will not reserve mines under those allotments to the tenants; though it appear that there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. *Townley v. Gibson*, 2 T. R. 701.

An inclosure act recited that the Duke of N. was lord of a barony and of manors in which certain wastes were situate, and, as such lord, was entitled to the soil and royalties belonging to the said manors; and that he and other owners of lands within the barony were also entitled to right of common on the wastes. It then directed the commissioners to set out to the duke an allotment in respect of his right of soil, and afterwards to allot the residue of the wastes to him and other persons entitled to common, in certain proportions, according to a rate already charged upon the lands in respect of which such common was claimed. Allotments were made to the duke accordingly. The lands in respect of which in part his allotments were given were exempted from all tithe by a modus. In an action brought for tithes of corn grown upon the allotment given in lieu of the duke's right in the waste, it was left to the jury whether the modus had extended to that right; and they found that it had:—Held, that the question was properly left, for that the duke's right upon the waste, though it could not strictly be a right of common appurtenant or appendant to land which was the duke's own, was yet treated by the act as a quasi right of common annexed to the land, and that it might, as such, be legally comprehended within the same modus:—Held, also, that the modus, as it covered all tithes both on the demesne land and common before the inclosure, covered likewise the tithe of any crop (as grain) raised afterwards upon the allotment given in lieu of common. *Askew v. Wilkinson*, 3 B. & Adol. 152.

#### 6. Allotments in lieu of Tithes.

An inclosure act empowered commissioners to allot to the rector of the parish of W. cum S. such lands within the township of S., and of the titheable parts of the township of W., as should

(quantity, quality, and situation considered) be equal in value to two-fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of tithes belonging to the rector, and arising within those lands and grounds. Another clause saved to all persons, their heirs, &c. (except the persons to whom any allotment should be made by virtue of the act, in respect of the interest or property for which such allotment should be made,) all such estate and interest as they had in respect of the waste lands before the passing of the act. The commissioners allotted to the rector, lands in W., lands in S., and lands in A.; such lands were more than two-fifteenths of the lands inclosed in S. and A., but less than two-fifteenths of the lands inclosed in W., S., and A. No one of the allotments was expressed in the award to be in lieu of the rector's tithes in W.:—Held, that the commissioners had not made the rector any allotment in lieu of his tithes in W., and that his right to tithes in kind there was reserved to him by the saving clause. *Cooper v. Walker*, 6 D. & R. 31; 4 B. & C. 36. And see *Chatfield v. Ruston*, 5 D. & R. 675; 4 B. & C. 863.

Where, under an inclosure act, the tithes payable in respect of certain old inclosures were extinguished, and in lieu thereof a corn rent substituted, which was directed to be paid for ever afterwards to the impropiator and vicar, by the person who for the time being should be in the possession or occupation of the land, out of which the rent should be issuing; and a power of distress was given for the recovery thereof, the same as for rent service or other rent in arrear; and for several years part of such land remained uncultivated, untenanted, and wholly unprofitable to the owner, who during that time resided on another estate; and he afterwards demised the land to another tenant, who entered and occupied, and brought it into cultivation:—Held, that during the time the land was unoccupied and uncultivated, the landlord was in the legal possession thereof within the meaning of the act, so as to subject him to the payment of the corn rent in arrear; and the tenant coming in under him was liable to be distrained upon for such payment. *Newling v. Pearce*, 2 D. & R. 607; 1 B. & C. 437.

An inclosure act directed that the commissioners should set out, allot and award certain portions of lands out of the commons to be inclosed, to the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were then required to distinguish by their award, the several allotments to such rectors and curates respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes:—Held, that the tithes were not extinguished until the commissioners had made their award. *Ellis v. Arnison*, 5 B. & A. 47; 1 B. & C. 70; 2 D. & R. 161.

A ditch which from time immemorial has been the only boundary between a common and adjoining township, is a fence within the meaning of the General Inclosure Act, 41 Geo. 3, c. 109. Therefore, where the issue was, whether a certain allotment was bounded by a sufficient fence within

the meaning of a local inclosure act, which required "that the allotments in lieu of tithes should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or other efficient fence; and the proof was, that part of the locus in quo was bounded by an old deep ditch:—Held, that this was a sufficient fence within the meaning of the statute. *Id.*

Where, to an action of covenant for not setting out tithes of certain garden ground, the defendant pleaded the above act, by which the plaintiff received an allotment of waste lands in the parish in lieu of tithe, but omitted to allege that the commissioners under the act had made their award in pursuance thereof; and after a finding for the defendant by the jury upon an issue of fact, the court entered judgment for the plaintiff non obstante veredicto. *Ellis v. Arnison*, 3 D. & R. 27.

By an inclosure act, referees were appointed to ascertain the average price of corn, in the week after the close of Easter next after the expiration of fourteen years after the division and allotments under the inclosure act were finished, and the exact amount of a yearly corn rent in lieu of tithes was to be declared by an order of quarter sessions. The referees delivered their report into the court of quarter sessions, who ordered it to be filed:—Held, that this was not an order as required by the statute, declaring the exact amount of the yearly corn rent in the manner therein directed. *Bendshye v. Pearce*, 4 Moore, 99; 1 B. & B. 460.

The allotments were made and finished in September, 1799, and the commissioners made their award on the 20th of October, 1800, and application was made at the Easter sessions, 1814. Quære, whether this was premature within the meaning of the act? *Id.*

The referees delivered their report into the court of quarter sessions, who ordered it to be filed:—Held, that the commissioners under the act, having made minutes of their proceedings in writing, no parol evidence could be admitted to show when the division and allotments were made and completed, as such minutes were neither produced, nor proved to have been destroyed. *Id.*

Where commissioners, under an inclosure act of 1769, were to make allotments to persons possessing interests in the contiguous townships of A., B., and C.; and they made allotments to a rector in B. and C., in respect of tithes and glebe to which he was entitled in those townships, and in A., in respect of glebe to which he was entitled in A., but omitted to make any specific allotment in A. in respect of tithes to which he was there entitled:—Held, as the act contained a saving clause for all persons other than those to whom allotments or compensations should be made in respect of their several interests, that the rector was not barred from suing for his tithes in 1825, although the award was to be final unless appealed against in six months. *Thorp v. Cooper* (in error,) 5 Bing. 116; 2 M. & P.

245; 2 Y. & J. 445; *S. C. nom. Cooper v. Thorpe*, 1 Swans. 92.

The award would not be vitiated by error in the allotment. *Id.*

The act having directed the commissioners, in estimating the proportion, to have regard to quality, quantity, and situation, deficiency in quantity is not proof of error. *Id.*

A mandamus was granted to the commissioners of an inclosure act, to inquire whether there was any modus. *Anon.* 2 Chit. 251.

But the court will not grant the writ where discretion was given to commissioners under an inclosure act, and they had exercised it, and no ground was shown that they had acted wrongfully. *Rex v. Flockwood Inclosure*, 2 Chit. 251.

#### 7. Allotment to Commoners.

**Rights of the Parties.**—The owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement upon different wastes in different manors under several lords; and therefore an allotment under one inclosure act in lieu of his right of common upon one of such wastes, will not do away or lessen his claim for an equal allotment with other commoners under a subsequent act for inclosing the other waste. Semble, aliter, if the different wastes had appeared to have been originally holden under the same lord. *Hollingshead v. Walton*, 7 East, 485.

If a person who has common within the manors of A. and B. for all his cattle levant and couchant on his tenement in A., receives under an act for inclosing the wastes in A. an allotment in satisfaction of his common in A., he is nevertheless entitled under an act for inclosing wastes in B. to an allotment thereof in respect of his common in B., and that to the same extent as if he had never had any common or allotment in A. *Barwick v. Matthews*, 5 Taunt. 365; 1 Marsh. 50.

And though the estate in respect of which he claims be partly enfranchised, and becomes freehold, it does not extinguish his right as to that part. *Id.*

Where allotments were made and awarded to W. L., in respect of several customary estates, of which he was seised in fee according to the custom of the manor, under an agreement between the lord of the manor and the commissioners, and an award made thereon, which were confirmed by an inclosure act, and which agreement contained a clause saving to the lord all mines, and all royalties and privileges in tam amplo modo as he had enjoyed the same within the ancient customary tenements, and the award contained also a clause, saving to the lord seignories and royalties incident to the manor, and the act saved to him seignories, and all rents, services, courts, &c., and all other royalties, jurisdictions, and pre-eminences incident to the manor, in tam amplo modo as he might have enjoyed the same in case the act had not been made; and also contained a clause that nothing

should alter or annul any settlements, &c. affecting the lands to be inclosed, but that the several allotments should be held by the several persons to whom allotted, to the same uses and for the same estates, and subject to such limitations, &c. as the lands in respect of which such allotments were made were limited:—Held, that the allotments so made were freehold and not customary estates; and therefore were not within the custom of the manor, that customary estates were not devisable by will. *Doe d. Lowes v. Davidson*, 2 M. & S. 175.

The lord of a manor, by a copy of court roll, granted an ancient tenement to A., B. and C., for life, successively, according to the custom of the manor. A. died in 1825, and B. 1826, leaving C. surviving. After the grant, an act passed for inclosing the waste lands of the manor, enacting that all persons having rights of common over the waste lands should give the commissioners a written statement of their claims, and that the determination of the commissioners should be final; that the commissioners should allot the waste lands among all persons and proprietors interested therein in respect of their ancient tenements, and that the act should not extend to alter or annul any will or settlement of the lands intended to be inclosed, but that the lands allotted should, immediately after such allotment, enure to the same uses and purposes as the tenements in respect of which the allotments should be made then were, or would have been if the act had not passed. Neither A. nor C. made any claim before the commissioners; B. did make a claim, and the commissioners awarded allotments to B. and to the lord, according to their respective rights and interests in respect of the ancient tenement:—Held, that the claim by B. enured for the benefit of all parties interested in the ancient tenement, and that the award vested the legal estate in the allotment in A., B. and C. successively. *Doe v. Hellard*, 4 M. & R. 736; 9 B. & C. 789.

Where a right of common was awarded by the commissioners under an inclosure act, by which the award of the commissioners was declared to be final, unless appealed from by an action upon a feigned issue to be brought at the next or following assizes:—Held, that after the expiration of the time limited for disputing the award, the original right of common could not be called in question. *Phillips v. Maile*, 4 M. & P. 770; 7 Bing. 133.

Where lands are allotted under an inclosure act, in respect of rights of common appurtenant to other lands, of which the land tax has been redeemed, the land tax does not attach upon the allotment. *Boehm v. Wood*, 1 Turn. & Russ. 334.

Where commissioners, under an inclosure act, awarded that certain persons, entitled to a right of common in certain commonable lands, "should for ever thereafter use and enjoy the said commonable place as a common pasture, exclusive of all others whatsoever:"—Held, that the right of the commoners was still subservient to the right of the lord to take stone, it appearing, that, both before and since the award, the lord had exer-

cised that right; and that an action was not maintainable against his lessee, although the soil had latterly been subverted to an unusual extent: it seems, however that if the lord wantonly and unnecessarily exercise manorial rights, to the injury of the commoners' pasture, he is liable to an action. *Place v. Jackson*, 4 D. & R. 318.

*When vested.*—By the General Inclosure Act 41 Geo. 3, c. 109, the legal title to an allotment is not acquired until the execution and proclamation of the commissioners' award; and where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might fence their allotments after they had been marked, staked out and confirmed, and before the signing the award, and might also, within three months before the execution of the award, sell and convey their interests in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, after the execution of the award, to hold the allotted lands in such manner as the vendor would have done if there had been no sale, provided, where the allotments were copyhold, that the deed should be inrolled in the court rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, viz., after the execution of the award:—Held, that this authority to inclose and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that therefore, these provisions, not sufficiently countervailing those of the General Inclosure Act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. *Farrer v. Billing*, 2 B. & A. 171.

Where commissioners under an inclosure act made an allotment in respect of R.'s lands, in 1824:—Held, that the allotment passed by a subsequent conveyance of the land in 1824, although the commissioners' award was not executed till 1827. *Doe d. Dixon v. Willis*, 5 Bing. 441; 3 M. & P. 24.

By 1 M. & 2 Geo. 4, c. 23, s. 1, landlords may enter upon land allotted, and distrain for rent, notwithstanding the commissioner's award shall not be executed.

By s. 2, they may also bring actions for injuries.

Sec. 3, provides that the right of appeal against the award is not to be taken away.

Specific performance of a contract for sale of an allotment under an inclosure act was decreed, before the award was made, where the act expressly enabled a sale, and declared the conveyance valid before the award, and the purchaser had notice of the circumstances. *Kingsley v. King*, 18 Ves. jun. 207.

#### 8. Award.

*Form.*—No technical form is necessary in the award of commissioners of inclosure; but if they

substantially pursue their powers in shutting up old roads, those roads effectually cease. *Piet v. Clarke*, 2 W. Black. 1318.

The preparation of plans and maps for the purpose of carrying an inclosure into effect, is no evidence of an allotment under the act, which requires an appeal against an allotment to be made within six months after the cause of complaint has arisen; and it suffices to appeal within six months from the making of the conclusive allotment. *Rez v. Middlesex (Justices)*, 1 Chit. 366.

*Stamps and Inrolment.*—An award made by commissioners under an inclosure act, which stated an exchange of lands authorized by the act, need have only an award stamp, and does not require an ad valorem stamp. *Doe d. Sufield (Lord) v. Preston*, 7 B. & C. 392; 1 M. & R. 713.

By 41 Geo. 3, c. 109, s. 35, awards are to be inrolled in one of the courts at Westminster, or with the clerk of the peace of the county.

By 3 & 4 Will. 4, c. 87, all awards already made, but not inrolled, are declared valid; and any proprietor may cause inrolment to be made.

#### 9. Appeal.

A private inclosure act, which gives an appeal to the quarter sessions within four months after the cause of complaint shall have arisen, to the party grieved by any thing done in pursuance of that or of the General Inclosure Act (other than and except such determinations as are by that or by the General Inclosure Act declared to be binding, final, and conclusive,) does not give any appeal against their determination to a party complaining that the commissioners have omitted to set out a particular road as a public road; and supposing it did, yet he must appeal within four months, and cannot after that time, when the commissioners set out the road as a private road, appeal against that determination; his cause of complaint being, that it is not set out as a public road, and not that it is set out as a private road. *Rez v. Dean Inclosure*, 2 M. & S. 80.

By an inclosure act, an appeal was given to the next sessions within six months after the cause of complaint; an appellant moved the court of sessions in due time, to receive and resume his appeal to the next sessions, which was refused: and the court of K. B. would not grant a mandamus to the justices at the sessions to receive it. *Rez v. Derbyshire (Justices)*, 4 T. R. 488.

By 51 Geo. 3, c. 61, (inclosure act,) the party aggrieved by any thing done in pursuance of the act, may appeal to the quarter sessions within six calendar months after the cause of complaint. The commissioners in 1812 made an allotment upon the map to the vicar, in lieu of his tithes, which the vicar inspected at a meeting held November, 1812, and appointed an agent, who attended a subsequent meeting, when an alteration was made in the map, which the agent approved, and it was understood that all objections to the

vicar's allotments were reconciled. In November, 1813, the commissioners gave notice that they had ordered all tithes, &c. to cease from the 29th of September then last:—Held, that the vicar was not out of time to appeal to the next quarter sessions after that notice. *Rez v. Gloucestershire (Justices)*, 3 M. & S. 127.

An appeal to the next sessions after an inclosure, made by virtue of an inquisition taken on a writ of *ad quod damnum*, is too late, if those sessions be not the next after the inquisition taken, and entered, and recorded at the sessions: therefore, where the sessions dismissed such appeal as being out of time, the court of K. B. refused a mandamus to them to enter continuances, &c. *Rez v. Bucks (Justices)*, 2 M. & S. 230.

Where a clause in a private inclosure act, in which the general inclosure act (41 Geo. 3, c. 109,) was recited, gave an appeal to any person aggrieved by any thing done in pursuance of that act, in all cases, "except as to such acts, determinations, or proceedings of the commissioners, as by the general inclosure act were directed to be final, binding, and conclusive;" and an order was made by a commissioner and a magistrate, jointly, for stopping up a private road, set out under the local act:—Held, that an appeal lay to the sessions against such order, because it was not an order of the commissioner alone, but of him and a magistrate together; and there being no words contained in the general inclosure act, which rendered the decision of the commissioner and justice final and conclusive, or that an order of a commissioner should be final, as far as regarded private roads. *Rez v. W. R. Yorkshire (Justices)*, 3 D. & R. 306; 2 B. & C. 228.

An inclosure act gave to the party aggrieved a right of appeal for any thing done in pursuance of the act, or of the recited general inclosure act, on giving to the commissioner and to the parties concerned, ten days' notice in writing. Notice of appeal against an order ascertaining the boundaries between two townships, was served on the commissioner, but not on the lady of the manor, who was a party materially concerned in the question:—Held, that the notice was insufficient; although the general inclosure act authorized the commissioner to ascertain the boundaries between the several parishes, and gave a right of appeal on giving notice to the commissioner only. *Rez v. Lancashire (Justices)*, 1 B. & A. 630.

Under an act, which requires an appeal against an allotment, to be made within six months after the cause of complaint has arisen: it suffices to appeal within six months from the making of the conclusive allotment. *Rez v. Middlesex (Justices)*, 1 Chit. 366.

#### 10. Issues to try Rights.

By most of the inclosure acts, the rights of parties, in case of dispute, are directed to be tried upon feigned issues, in order to obviate the expense and annoyance consequent upon each individual being allowed to try his rights by an action.

By 51 Geo. 3, c. 30, "any person dissatisfied with the determination of the commissioners, may bring an action against the person in whose favour such determination shall have been made; and if it shall appear that the party claiming is entitled to a qualified or less interest, the jury may declare the same on their verdict, to be indorsed on the postea, in addition to the verdict given on the issue joined; but the costs of such action shall abide and be determined by the verdict given upon the issue joined."

An action having been brought against defendant for claiming a right of common in respect of ninety-one acres, and upon the general issue, (the declaration consisting only of one count,) there was a verdict for plaintiff as to thirty acres, and for defendant for the residue, and an indorsement on the postea, that the jury found the right of common in respect of sixty acres, &c.:—Held, that the plaintiff was entitled to general costs. *Durham v. Hertford (Marquis)*, 3 M. & S. 323.

An inclosure act directed that the parties who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff; and if against such determination, then by the proprietors at large:" a proprietor brought an action, claiming nine distinct rights, and recovered for three only:—Held, that he should only have his costs on those issues found for him, and that the defendant should have his costs of the other issues. *Braithwaite v. Bradford*, 6 T. R. 599.

#### COMMON RECOVERY—See FINE AND RECOVERY.

#### COMPANY—See PUBLIC COMPANY.

#### COMPOSITION DEED—See DEBTOR AND CREDITOR.

#### COMPOUNDING.

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## I. MAKING THE CONTRACT.

1. *By Letters*.

In order to constitute an agreement by letters, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of any new or different terms. *Holland v. Eyre*, 2 Sim. & Stu. 194.

Letters passing between buyer and seller of goods, do not constitute a note in writing under the statute of frauds, if they vary in their description of the terms of the contract. *Smith v. Surman*, 4 M. & R. 455.

Where a letter contains the entire terms of an agreement for the purchase of lands, it is not necessary for the plaintiff to prove that he accepted the terms. If it require the plaintiff to supply a term in the agreement, there must be a special acceptance in writing supplying that term, in order to take the case out of the statute of frauds. *Boys v. Ayerst*, 6 Madd. 316.

A. by letter offers to sell to B. certain specified goods, receiving an answer by return of post: the letter being misdirected, the answer notifying the acceptance of the offer arrived (two days later than it ought to have done) on the day following that when it would have arrived, if the original letter had been properly directed. A. sold the goods to a third person:—Held, that there was a contract binding the parties, from the moment the offer was accepted, and that B. was entitled to recover against A. in an action,



for not completing his contract. *Adams v. Lind-sell*, 1 B. & A. 681.

In an action for the breach of an agreement in not delivering a certain quantity of coals, a letter from the defendant, containing the terms of the contract between him and the plaintiff, concluded by stating, as to the proposition therein contained, that it was desirable that he should have an answer per return, as he could have a vessel to charter at the price stated, which would not wait any longer for the defendant's answer; and failing her, he feared he should not be able to get another; and there was no averment in the declaration, that the plaintiff had sent an answer per return:—Held, that this amounted to a mere request, and formed no part of the contract, and consequently that the plaintiff was entitled to recover. *Johnson v. King*, 2 Bing. 270; 9 Moore, 482.

In order to form a contract by letter, of which the court will decree a specific performance, nothing more is necessary than that the amount and nature of the consideration to be paid on one side, and received on the other, should be ascertained, together with a reasonable description of the subject-matter of the contract. *Kennedy v. Lee*, 3 Mer. 441.

The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee an extension of lease at a certain yearly rent; and in another letter, fixes the time, when the term which he thus purposes to grant, is to expire; this is a valid agreement within the statute of frauds, and, under it, the sub-lessee has a right to a lease which shall commence from the expiration of the existing term. *Verlander v. Codd*, 1 Turn. & Russ. 353.

An agreement to purchase was established upon a correspondence referring to the terms of such agreement. *Ogilvie v. Foljambe*, 3 Mer. 53.

Quære, whether letters referring to other letters which have been suppressed, but not containing in themselves certain terms of agreement, can be made the foundation of a specific performance? *Collett v. Butler*, 3 Swanst. 402.

If the terms of a contract are proposed and accepted by letters, but are afterwards varied by the contract as drawn up, the construction of the contract cannot be affected by the letters. *Furquharson v. Barston*, 4 Bligh, N. S. 560.

An agreement to employ the plaintiff in a particular situation, cannot be inferred from a direction upon a letter addressed by the defendant to the plaintiff in that character, the letter relating to the quantum of salary only. *Chiodi v. Waters*, 1 Stark. 335—Ellenborough.

## 2. Acceptance of Offer.

Where the defendant offered to purchase a house from plaintiff, and to give him six weeks for a definitive answer:—Held, that before the offer was accepted, the defendant might retract it at any time during the six weeks. *Routledge v.*

*Grant*, 4 Bing. 653; 1 M. & P. 717; 3 C. & P. 267.

Where defendant offered to purchase on certain terms, "possession to be given on or before 25th July," and plaintiff agreed to the terms, and said he would give possession on the 1st August:—Held, no acceptance of defendant's offer. *Id.*

A. having proposed to sell goods to B, gave him a certain time at his request to determine whether he would buy them or not; B, within the time, determined to buy them; and gave notice thereof to A.; yet, held that A. was not liable in an action for not delivering them, for B. not being bound by the original contract, there was no consideration to bind A. *Cooke v. Oxley*, 3 T. R. 653.

A. and B. being together, B. offers goods to A. at a certain price, and gives A. three days to make up his mind. Before the three days expire, B. offers the goods to C. A. cannot declare against B. as upon an absolute bargain; and semble, that B. had a right to retract. *Head v. Diggon*, 3 M. & R. 97.

A. having a horse to sell, agreed to let B. have him for thirty guineas, if he liked him, and that he should take him a month upon trial: B. accordingly took him, and kept him about a fortnight, and then told A. he liked the horse, but not the price, and A. desired him, if he did not like the price to return the horse; B. however kept him ten days more, and then returned him, but A. refused to receive him, and brought an action on the contract for thirty guineas, the price of the horse:—Held, that he could not maintain such action. *Ellis v. Mortimer*, 1 N. R. 257.

## 3. Mutuality.

The want of mutuality in a contract is sufficient ground to refuse a specific performance. *Howell v. George*, 1 Madd. 1.

A written agreement "to remain with A. B. two years, for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument by A. B. to teach. *Lees v. Whitcomb*, 5 Bing. 34; 2 M. & P. 86; 3 C. & P. 269.

It will not support a declaration, stating the consideration to be, that C. D. would "receive" A. B. "into his service." *Id.*

The written undertaking of one party will be enforced, although the other party is not mutually bound by writing. *Palmer v. Scott*, 1 Russ. & Mylne, 391.

For, an agreement signed by one party only is good to charge him within the statute of frauds. *Seton v. Slade*, 7 Ves. jun. 289.

And semble, that a contract signed by one party only may be enforced in equity by the other. *Martin v. Mitchell*, 1 J. & W. 426.

Where a contract is signed by one party only, the other, by filing a bill for specific performance, makes it binding on himself. *Id.*

Where a contract has been signed by one party only; quære, whether he is not at liberty to,



recede from it, until the other party has done some act to bind himself? *Id.*

If a written agreement is not signed by the defendant, the plaintiff need not give it in evidence although he has signed it, and it relates to the matter in issue between the parties. *Wilson v. Bowie*, 1 C. & P. 8—Park.

#### 4. Price fixed by Arbitration.

According to the Roman and English law, as administered both in courts of law and equity, a fixed price is an essential ingredient in a contract of sale; a contract, therefore, which does not settle the price, is valid and complete only, when, and if the party to whom it is referred shall fix it, and it is otherwise totally inoperative. *Milnes v. Grey*, 14 Ves. jun. 408.

An agreement of sale according to the valuation of two persons, one chosen by each party, or of an umpire, to be appointed by those two, in case of disagreement, was carried into effect. *Id.*

Specific performance was refused under a contract for sale, at a price to be fixed by arbitrators within a certain time, or if they should not agree to make their award within the time, by an umpire, also, within a limited time; the construction of the contract, which required the delivery of the award in writing to each party being, that though the consequential acts, such as executing the conveyances, &c., might be done by representatives, it was with reference to the terms to be fixed by the award, personal upon the parties. *Blundell v. Buttargh*, 17 Ves. jun. 232.

Under a contract for sale at a price to be fixed by an award within a limited time during the lives of the parties, the death of one is not an accident against which the court will relieve. *Id.*

#### 5. Other Matters.

An instrument in terms intending to be a conveyance of lands, but which, not being by deed, cannot operate as such, is an agreement. *Rex v. Ridgwell*, 6 B. & C. 665; 9 D. & R. 678.

If there are parol negotiations, which are afterwards reduced into writing, the writing must be looked to as showing the final arrangement; but when a question arises as to whether a transaction has an usurious character, questions may be put to ascertain whether other matters which do not appear on the face of it, were not previously talked of. *Sinclair v. Stevenson*, 2 Bing. 514; 1 C. & P. 582.

Plaintiff received an order from defendant's landlord, directing defendant to pay him part of the rent which should next become due. Defendant afterwards promised his landlord to pay the plaintiff, and then paid the balance of his rent, receiving a receipt for the full rent:—Held, that plaintiff had no right of action against the defendant. *Wharton v. Walker*, 6 D. & R. 288; 4 B. & C. 163.

## II. OPERATION OF STATUTE OF FRAUDS.

### 1. Statute.

By 29 Car. 2, c. 3, s. 4, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

That part of the statute which directs certain agreements to be in writing, will be taken notice of by the court in the trial of an issue out of the court of Chancery; however, if the jury should think that there was an agreement made, which was not in writing, the judge will indorse that finding on the *postea*, as special matter. *Burand v. Nerot*, 1 C. & P. 578—Best.

### 2. What Contracts within it.

#### (a) Not to be performed within a year.

Executory contracts for goods are not within the statute of frauds, 29 Car. 2, c. 3. *Clayton v. Andrews*, 4 Burr. 2101. But see 9 Geo. 4, c. 14.

If it appear to have been the understanding of the parties to a contract at the time, that it was not to be completed within a year, though it might and was in fact in part performed within that time, it is within the statute; and if not in writing signed by the party to be charged, &c., it cannot be enforced against him. And his signature in a book intitled "Shakspeare subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the "Boydell Shakspeare," cannot be connected together, so as to take the case out of the statute, as such connexion could only be established by parol evidence. *Boydell v. Drummond*, 11 East, 142; 2 Camp. 157.

But in a recent case, where a party agreed to take a work which was to be published in twenty-four numbers, at intervals of two months, and after receiving several numbers, refused to take any more, though he had notice from the publisher that the others were ready for him if he would send for them; and the plaintiff, the assignee of the publisher, who had become bankrupt, sued him for the value of the whole. The jury having found a verdict for the plaintiff, for the price of the numbers received by the defendant, the court refused to disturb it although it was contended that the contract was entire and void under the 4th section of the statute of frauds, it not having been reduced into writing, or to be

performed within a year. *Mavor v. Pyne*, 11 Moore, 2; 3 Bing. 285; 2 C. & P. 91.

An agreement to hire a carriage for more than one year, determinable by the custom of the trade, at any time, upon payment of a year's hire, is an agreement not to be performed within one year from the making thereof, and must be signed by the party to be charged therewith. *Burch v. Liverpool (Earl)*, 4 M. & R. 380; 9 B. & C. 392.

Where an agreement is to be performed on a contingency, which may happen within the year after it is made, and it does not appear on the face of the agreement that it is to be performed after the year, it does not fall within the statute: where, therefore, a debtor to the plaintiff, stated to the plaintiff's solicitor, on being applied to for payment, that he, the debtor, could not pay then or during his lifetime, but that he had provided for payment by his will, and directed his executors to pay:—Held, to be binding on the executors, although there was no promise in writing by the testator to pay. *Wells v. Horton*, 12 Moore, 176; 4 Bing. 40.

An agreement to leave money by will need not be in writing, although uncertain as to the time of performance. *Fenton v. Emblers*, 3 Barr. 1278; 1 W. Black. 353.

But, an agreement to enter into partnership for ten years must. *Williams v. Jones*, 7 D. & R. 548; 5 B. & C. 108.

A contract for a year's service to commence at a subsequent day, is a contract not to be performed within the year, and by the statute must be in writing; therefore, no action can be maintained for the breach of a verbal contract made on the 27th May, for a year's service, to commence on the 30th June following. *Bracegirdle v. Heald*, 1 B. & A. 722.

A wharfinger having acknowledged that certain timber on his wharf was the property of the plaintiff:—Held, that he was thereby estopped from disputing the plaintiff's title in trover; and that it was not necessary that the acknowledgment should be in writing. *Gosling v. Birnie*, 5 M. & P. 160; 7 Bing. 339.

#### (b) Contract executed.

Where an agent who received instalments of annuities for his principal, paid over instalments he had not received, and charged commission on them, it was held that the agreement to be responsible to his principal for the annuities need not be in writing, as the contract was executed when he paid over the money he had received. *Shaw v. Woodcock*, 7 B. & C. 73.

The services of a clerk had been continued for some years. In an action for dismissing before the end of a current year, it was held that the agreement need not be in writing. *Buston v. Collyer*, 4 Bing. 309; 2 C. & P. 607.

Plaintiff having distrained, for rent in arrear, goods which the tenant was at that time about to sell, agreed with defendants to deliver up the goods, and permit them to be sold by one of the

defendants for the tenant, upon defendants' joint undertaking to pay the plaintiff all such rent as should appear due to him from the tenant; and he thereupon delivered up the distress:—Held, that this agreement was not within the statute of frauds. *Edwards v. Kelly*, 6 M. & S. 204.

Semble, that it is no variance if the declaration on an executed contract state the consideration as executory. *Payne v. Wilson*, 1 M. & R. 708; 7 B. & C. 423.

Declaration on a promise to pay the debt of another, in consideration that plaintiff would consent to suspend proceedings. The writing proved was, "the plaintiff's having at my request consented to suspend proceedings, &c."—Held, no variance. *Id.*

#### 3. Signature.

Provided the name be inserted in an instrument, in such a manner as to have the effect of authenticating it, the requisition of the act with respect to signature is complied with, and it does not matter in what part of the instrument the name is found. *Ogilvie v. Foljambe*, 3 Mer. 53.

A letter from a mother to her son, beginning, "My dear Robert," and concluding, "Your affectionate mother," is not signed so as to constitute a binding agreement on the part of the mother, within the intent of the statute of frauds. *Selby v. Selby*, 3 Mer. 2.

There must be a signing, either by an actual signature of that name, or something intended by the writer to be equivalent to a signature; such as a mark by a marksman, &c. *Id.*

Though an agreement be not signed, the party is bound by a letter containing the terms, which by the contents can be connected and identified with the agreement. *Coles v. Trecothick*, 9 Ves. jun. 250.

Quære, whether bonds of arbitration are sufficient to take the case of an agreement out of the statute. *Cooth v. Jackson*, 6 Ves. jun. 17.

If an agreement purport, by the words attached to the signature of a particular person, to have been signed by that person on the behalf of another having an interest, but not being a party, such person may be examined to prove that he signed in reality for a different person named as a party, and whose signature was not to the agreement, and that the statement of his having signed for the first-mentioned person was written by mistake. *Rumball v. Wright*, 1 C. & P. 589—Best.

A paper written by a party is admissible in evidence against such party, although it is signed by a third person. *Alexander v. Brown*, 1 C. & P. 288—Best.

#### III. VALIDITY GENERALLY.

Contracts not prohibited by positive laws, nor adjudged illegal by precedent, may nevertheless be void as against principle. *Jones v. Randall*, Cowp. 39.

the benefit of it, subject to all rights, known or unknown at the time, which are against the contract. *Clarke v. Johnson*, Loft, 756.

The courts will relieve a man who comes to overthrow an illegal contract, although particeps criminis, but not if he comes to demand performance. *Walker v. Chapman*, Loft, 342.

The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. A. bets an illegal wager of twenty-five guineas with B. on a horse-race, of which C., at his own request, stakes ten. A. wins, and pays C. ten guineas, in the expectation of receiving the whole amount of the bet from B. B., however dies, and A. never receives it:—Held, that A. could not recover back the ten guineas which he had paid to C., because he could not establish his claim, without going into proof of the illegal transaction, in which both were equally engaged. *Simpson v. Bloss*, 2 Marsh. 542; Taunt. 246.

Overruling the decision at nisi prius, where it was held that he could recover. *Simpson v. Bliss*, Holt, 237—Gibbs.

An illegal contract, if rescinded as to part, must be rescinded in toto. Therefore where goods were delivered under an agreement to take a specific parcel of copper money in payment, a delivery of such copper, though in fact counterfeit money, will be a bar to an action. *Alexander v. Owen*, 1 T. R. 225.

A contract may continue to carry interest, though the security itself be void. *Robinson v. Bland*, 1 W. Black. 262.

Quere, whether a legal contract giving a right of action, can arise out of illegal transactions, as by payments made on account of another in settling differences upon transactions within the stock-jobbing act? *Ex parte Daniels*, 14 Ves. jun. 191.

The plaintiff may recover upon actions arising out of illegal transactions, which are malum prohibitum only, unless it be directly upon the contracts, in which case he is precluded. *Ex parte Bulmer*, 13 Ves. jun. 213.

The court of Chancery has jurisdiction to declare an instrument forged, and to order it to be delivered up. *Peake v. Highfield*, 1 Russ. 559.

#### IV. VALIDITY AS REGARDS PUBLIC POLICY.

##### 1. *Compromise of Legal Proceedings.*

*Civil Proceedings.*—Where two parties come to an arrangement, and one is ignorant of his rights, the agreement is not in general binding upon him. *Baddley v. Oliver*, 1 Dowl. P. C. 598; 1 C. & M. 219.

If a person after due deliberation, enter into an agreement for the purpose of compromising a claim made bonâ fide, to which he believes him-

self to be entitled, the agreement; and a court of equity, without considering whether he was in truth liable to the claim, will compel a specific performance. *Atwood v. —*, 1 Russ. 353; 5 Russ. 149.

If a declaration aver, that in pursuance of an agreement, an action was discontinued, evidence that since the agreement no steps had been taken in the cause, is not sufficient to support the allegation. *Fanshawe v. Heard*, 1 M. & P. 191; 3 C. & P. 190.

Such an averment cannot be supported without proof of a rule to discontinue. *Id.*

Semble, that it cannot be made one of the terms of the compromise of a suit, that the solicitor's bill shall be paid without taxation. *Halse v. River*, Jacob, 307.

An undertaking to pay the costs of the plaintiff's attorney in an action still pending, in consideration that the plaintiff will, with the consent of that attorney, give an authority to the defendant to pay over the debt sued for, to a creditor of the plaintiff, is not binding. *Taylor v. Watson*, 4 M. & R. 259.

Where a person having a clear title to 12l. for rent, and claiming the property of the land, is induced, by the representations of two professional persons, that he had no right to either rent or land, to agree to accept 10l. in full, for rent and land: the court will not entertain a bill for the specific performance of the agreement. *Stanley v. Robinson*, 1 Russ. & Mylne, 527.

A warrant of the Lord Chancellor for the commitment of a person, appointed a receiver by the court of Chancery, for the non-payment of a balance certified against him, is only in the nature of a civil execution: therefore where D., being appointed receiver in a suit in Chancery, was in custody of the officer under such warrant, and the defendant, in order to procure his discharge, joined with him as surety in two promissory notes to the plaintiff, who was a party to the suit in Chancery, and his solicitor, who sued out the warrant, for the amount of the debt and costs, and was thereupon discharged by the direction of the solicitor:—Held, that the discharge was a legal consideration for the notes, and that an action might be maintained on them; and although there were other parties to the suit in Chancery, who did not concur in the discharge: and therefore though D. remained liable to be taken again, yet the consideration had not failed; and that it was no objection to the validity of the notes, that the sum given to cover costs exceeded the costs due, no fraud being intended. *Brett v. Clerk*, 16 East, 293.

Securities given to persons who would be prejudiced by the passing of a private bill in parliament, in consideration of their withdrawing their opposition to it, are illegal on the ground of public policy. *Vauxhall Bridge Company v. Spicer (Earl)*, Jacob, 64; 2 Madd. 357.

*Bankruptcy and Insolvency.*—A bankrupt who

had obtained a verdict in an action brought by him to try the validity of his commission, pending a rule nisi for a new trial, confessed judgment to one of his assignees, who was a petitioning creditor for a sum of money in discharge of his debt, in consideration of his not opposing the bankrupt's petition for a supersedeas; the court set aside the judgment on the bankrupt's application. *Thomas v. Rhodes*, 2 Rose, 104; 3 Taunt. 478.

If an insolvent debtor apply for his discharge, a security obtained by a creditor, who threatens an opposition, to cease opposing is void. *Rogers v. Kingston*, 10 Moore, 97; 2 Bing. 441.

A creditor of an insolvent withdrew his opposition, after stipulating for, and receiving a promissory note for the amount of his debt; the insolvent, after his discharge, was arrested for non-payment of this note, but settled the action by giving a warrant of attorney, in which his brother joined him, to confess a judgment for the debt, costs, and interest, to be paid by instalments; the court, on motion, set aside this warrant of attorney, after payment of the first instalment. *Id.*

Where an insolvent petitioned the Insolvent Court to be discharged under the 1 Geo. 4, c. 119, and a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted; but, to induce the latter to withdraw his opposition, the insolvent agreed to execute a warrant of attorney for the debt within three days after his discharge, and in the mean time to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney; and the insolvent was discharged on the delivery up of the note: the court set aside such warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the act as it enabled the creditor to take to himself a large portion of the future effects of the insolvent, which were intended by the legislature to be distributed amongst all his creditors. *Jackson v. Davison*, 4 B. & A. 691.

An agreement by which A., an opposing creditor of B., an insolvent, undertakes to withdraw his opposition, on the terms that A. shall be sole assignee, and shall in that capacity receive a certain sum within a given time, is contrary to public policy, and therefore void. *Murray v. Reeves*, 2 M. & R. 423; 8 B. & C. 421.

Where a debtor applied to take the benefit of the Insolvent Act, and one of his creditors, an attorney, by threats of opposition, obtained from him promissory notes for the amount of his debt, and the creditor afterwards indorsed one of them to a bona fide holder, without notice of the circumstances under which it had been obtained: the debtor being afterwards arrested on the note, and having given a bail bond, the court directed the bond to be given up to be cancelled, on filing common bail; but refused to make the attorney deliver up the other notes, though part of the debt for which they were given was work and labour done as an attorney, the notes having been obtained in his character of creditor and not of attorney. *Kay v. Masters*, 1 Dowl. P. C. 86.

An agreement by a debtor with his creditor, not to entitle himself to take the benefit of the Lord's Act, will not be supported by a court of law. *Parish v. Wolstoncroft*, 3 Smith, 51.

*Criminal Proceedings.*—It is not illegal to compromise indictments for misdemeanours. *Elworthy v. Bird*, 9 Moore, 430; 2 Bing. 258; 13 Price, 222; 2 Sim. & Stu. 372.

*Secus*, as to indictments for felony. *Id.*

The construction to be put upon an agreement to discontinue an indictment is, that a nolle prosequi should be regularly entered by the attorney-general. *Id.*

Where, in a declaration for the breach of an agreement, in which one of the considerations for the defendant's undertaking was, that all indictments and actions which were then pending should be discontinued; it was averred, that all such indictments and actions had been wholly discontinued, and not further proceeded with; and it appeared that three indictments which were pending against the defendant at the time the agreement was executed, had been afterwards moved by certiorari into K. B., and that the prosecutors had taken no steps by nolle prosequi, or otherwise, towards putting an end to such indictments:—Held, that the word "discontinuance" meant putting an end to the indictments and actions in a legal way; and that the plaintiffs, not having shown that this had been done, they could maintain no action on the agreement. *Id.*

*Quære*, whether such an agreement be legal? *Id.*

A note given for compounding a misdemeanour, may be recovered at law. *Drage v. Ibberson*, 2 Esp. 643—Kenyon.

There is no objection to the legality of an agreement to pay money in consideration of putting off the trial of an indictment. *Harvey v. Morgan*, 2 Stark. 17—Ellenborough.

Upon a conviction before magistrates for a breach of the excise laws, a warrant to levy the penalties was directed to an excise officer, who, by way of indulgence to the party, took from him a promissory note for the amount, without any previous authority from his superiors:—Held, that it was a valid security. *Sugars v. Brinkworth*, 4 Camp. 46—Ellenborough.

In an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against the Toleration Act, (1 W. & M. c. 18, s. 18), in disturbing a dissenting congregation, and a commitment for want of sureties under it to the next sessions: and that before the next sessions, it was agreed between the prosecutor and the plaintiff, with the consent of the defendants, that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged, in full satisfaction and discharge of the assault and imprisonment:—Held, this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a public misdemeanour, and thereby impeding the course of justice, or the satisfaction, if any, was

moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and their consent afterwards to the prosecutor dropping the prosecuting being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgcombe v. Rodd*, 5 East, 294; 1 Smith, 515.

A person, who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate, upon a charge of having instigated an escape, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor, may, at any rate, countermand the application of the money before it is so applied, and recover it back in an action for money had and received. *Taylor v. Lenday*, 9 East, 49.

A security for the fair expenses of the prosecution, agreed to be given, at the recommendation, of the court of quarter sessions, by a defendant who stood convicted before them of a misdemeanour, in ill-treating his parish apprentice, for which the parish officers had been bound over by recognisance to prosecute him under the stat. 32 Geo. 3, c. 57; and the giving of which security, was considered by the court, in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal. *Beeley v. Wingfield*, 11 East, 46.

A promissory note given by a defendant in prison after conviction for misdemeanour, and before sentence, in pursuance of a recommendation of the court to compromise, is valid; although the court is not apprized of the terms of the compromise, and although the costs of the prosecution are included in the note. *Kirk v. Strickwood*, 1 Nev. & M. 275; 4 B. & Adol. 421.

An agreement to forego a criminal prosecution is illegal, but the plaintiff may recover on a bill given by the defendant for the costs of a civil proceeding against a third person, and the amount of a composition with him, although the plaintiff had instituted a prosecution against such third person, which he afterwards abandoned, unless it be expressly proved that the abandonment of the prosecution formed part of the consideration of the bill. *Harding v. Cooper*, 1 Stark. 467—Ellenborough.

An agreement by the payee of a bill of exchange to discharge a person liable upon it, in consideration that the latter would not move the court of King's Bench against him for a misdemeanour, is illegal and void. *Pool v. Bousfield*, 1 Camp. 55—Ellenborough.

A transfer of stock under an agreement to satisfy the deficiency in the accounts of a banker's clerk, though he is not a party, amounts to a composition of felony to prevent a prosecution. *Claridge v. Hoare*, 14 Ves. jun. 59.

A party who had been defrauded of goods by the apprentice of another, might legally agree not to proceed against the master who had received the goods at an under price. *Drage v. Ibberson*, 2 Esp. 643—Kenyon.

A bond given by way of indemnity, to one who had given his note for 350*l.* to a prosecutor on an indictment for perjury, to induce him to withhold his evidence, is void, ab initio, and the facts may be specially pleaded. *Collins v. Blastern*, 2 Wils. 341, 347.

A bond, conditioned (on the obligee's agreeing not to prosecute) to remove certain public nuisances, and not erect any others of the same kind, is good. *Fallowes v. Taylor*, 7 T. R. 415; Peakes' Add. Cas. 155.

The nuisance must be entirely done away. *Id.*

Semble, that a private person should not take a bond conditioned to remove a public nuisance. *Id.*

## 2. Trading Combination.

An agreement entered into by a number of dyers, pressers, bleachers, &c. at a public meeting, that they would not receive any more goods to be dyed, &c., but on condition that they should respectively have a lien on those goods for their general balance, is good in law; and any one who after notice of it delivers goods to either of those persons, must be taken to have assented to those terms; and consequently cannot demand goods so delivered to any such dyer, &c., without paying the balance of his general account. *Kirkman v. Shawcross*, 6 T. R. 14.

An agreement between two coachmasters not to oppose each other, and to charge the same prices, is legal. *Hearn v. Griffin*, 2 Chit. 407.

An agreement between several persons jointly interested, to horse a coach, each of them one stage, on the road from L. to B.; and that, in case of default, one of them should sue the defaulter for a penalty, which when recovered, was to be divided amongst the non-defaulters:—Held, to be such an agreement as an action might be maintained on against the defaulter, by one of the parties appointed by the others to sue, and that the others need not join in the action. *Radenhurst v. Bates*, 3 Bing. 468; 11 Moore, 421.

An agreement between three persons carrying on the trade of trunk and box makers, and travelling by themselves and their servants into various parts of England to vend trunks and boxes, to divide, and not interfere with certain districts of the several cities, boroughs, towns, and villages, as set forth by them on Bowles's post map of England; and that each during his life, by himself and his agents duly authorized, shall travel into, to sell trunks and boxes in his way of business, without any interruption whatever by either of the other two, during their joint lives, in certain cities, boroughs, towns, and villages, and not to suffer any goods in the said trade to be manufactured at their respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of on the ground to be travelled by the other parties thereto; and not to aid and assist any person to oppose all or any and either of the parties; and not to purchase any tea-clothes or chests, black or green, at a higher price than 6*d.* or 8*d.* each in Oxford; and in case, at any

time, during their joint lives, any person or persons shall set and oppose any or either of the parties, to meet together and enter into such mutual agreement, to the intent therein agreed to, as shall be beneficial to the mutual interests of the parties, it being their declared intentions not to do any act prejudicial to the interests of each other, but to aid and assist each other in their said trade and business to the utmost of their power; does not operate in general restraint of trade, and, as an agreement contemplating a partial restraint only, if founded on a sufficient and valid consideration, is good: therefore, counts setting forth the same, and averring, by way of breaches, that the defendant travelled in the districts of the plaintiff, and sold boxes therein, were held good on general demurrer. *Wickens v. Evans*, 3 Y. & J. 318.

### 3. Prohibited Trades.

In a lease for years of a messuage and premises in a public street, the lessee covenanted that he, his executors, &c. should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business that might be, or grow or lead to be, offensive, or any annoyance or disturbance, to any of the other tenants of the lessor, &c." The lessee granted an underlease of the premises (subject to the like covenant) to A., who opened them as a public-house, in the business of a licensed victualler, which was not one of the businesses enumerated in the covenant:—Held, that such an act did not amount to a breach of covenant. *Jones v. Thorne*, 3 D. & R. 152; 1 B. & C. 715.

Where a lessee of a house and garden for a term of years, covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the license of the lessor, &c.; and afterwards, without the license of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises:—Held, that the assignment was a breach of this covenant, and the lessor entitled to re-enter, under a proviso for re-entry for non-performance of covenants. *Doe d. Bish v. Keeling*, 1 M. & S. 95.

A covenant in a lease that the lessee shall not exercise the trade of a butcher upon the premises, is broken by his selling raw meat by retail, although no beasts were there slaughtered. *Doe d. Gaskell v. Spry*, 1 B. & A. 617.

On a covenant that (in consideration of a weekly payment to A. and his executors for a term certain) A. shall not exercise a particular trade, the executors of A. are not bound to abstain from exercising it. *Cook v. Calcraft*, 2 W. Black. 856; 3 Wils. 380.

### 4. Trading within a limited Distance.

Contracts by bond on otherwise, entered into between two persons, to restrain one of them from setting up, or exercising a particular trade,

within a certain limited district, and for a valuable consideration, are valid. *Cheesman v. Nainby* (in error,) 1 Bro. P. C. 234; *S. P. Morris v. Colman*, 18 Ves. jun. 438.

A covenant to restrain a person from exercising a trade, is not illegal, if it be not to the general prejudice of the public, and the consideration be reasonable. *Horner v. Ashford*, 11 Moore, 91; 3 Bing. 322.

A declaration stated that the defendant, for the considerations mentioned in the deed declared on, which the plaintiff brought into court, covenanted to submit to certain particular restraints in the carrying on of his trade, which covenant he afterwards broke:—Held, on general demurrer, that this was a sufficient statement of consideration for the restraint agreed to. *Id.*

An agreement in partial restraint of trade can only be supported by an adequate consideration. Thus an agreement by which a brass-founder was to work exclusively for certain factors, for his and their lives, they not undertaking to find him full employment, but on the contrary reserving liberty to employ others to execute their orders in his trade, if they should think fit, and to put an end to the agreement at three months' notice, is bad, though London and six miles round were left open to the party to take orders from. *Young v. Timmins*, 1 Tyr. 226; 1 C. & J. 331.

A note given by a party for damages arising by his working for others, contrary to an agreement which was in restraint of trade, and therefore bad, is bad for want of consideration. *Id.*

And cannot be set off in an action at the suit of the assignees of a party, for work done. *Id.*

A trader may sell a secret in his trade, and restrain himself generally from the use of it. *Bryson v. Whitehead*, 1 Sim. & Stu. 74.

An agreement that defendant, a moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff, determinable at three months' notice:—Held, unreasonable and void, being a restraint of trade, not founded on an adequate consideration. *Horner v. Graves*, 7 Bing. 735; 5 M. & P. 768.

A bond by an apothecary, not to set up business within twenty miles of A., is not illegal, as being in restraint of trade. *Hayward v. Young*, 2 Chit. 407.

So, where a surgeon took an assistant, who entered into a bond not to practise on his own account for fourteen years, within ten miles of the place where the surgeon lived: the bond was held good in law. *Davis v. Mason*, 5 T. R. 118.

An agreement by an attorney, first to relinquish his business, and recommend his clients to two other attorneys for a valuable consideration; secondly, not to practise in such business within certain limits: and thirdly, to permit the purchasers to make use of his name in their firm for a certain time, without any interference on his part, was held valid. *Bunn v. Guy*, 4 East, 190;



1 Smith, 1. *But see Hughes v. Statkam*, 6 D. & R. 219; 4 B. & C. 187.

Articles under which A. had served his clerkship to an attorney, contained a proviso that A. should not practise within a certain distance; and also a covenant, on the part of his father, that A. should, within a month after he came of age, execute a bond, in a specified penalty, to insure his fulfilment of the proviso; A., who was an infant at the time of the execution of the articles, served under them for three years after he attained full age, but was never called on to execute any bond, and, with a knowledge of the purport of the articles, completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within that district, was refused with costs. *Capes v. Hutton*, 2 Russ. 357.

A coachmaster having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from R. to London, or prejudicial to the business which he had sold, an injunction was granted, restraining him from running a coach from P. through R. to London. *Williams v. Williams*, 2 Swans. 253.

In assumpsit for the breach of an agreement, a clause contained therein, (although illegal, as being in restraint of trade,) if it form no part of the consideration, need not be set out in the declaration. *McAllen v. Churchill*, 11 Moore, 483.

In the construction of an engagement (a bond) not to open shop within a mile of a certain spot, the shortest way of access is by the footpath is to be taken. *Woods v. Dennett*, 2 Stark. 89—Ellenborough.

In a covenant not to keep a public-house within half-a-mile of a particular spot, the distance must be estimated by the nearest mode of access at the time of the covenant—per Tenterden and Littledale; or as the crow flies—per Parke. *Leigh v. Hind*, 4 M. & R. 579; 9 B. & C. 774.

##### 5. Dealing with particular Persons.

An agreement in a lease, that in case the lessee ceased to purchase beer of the lessor, his rent should be advanced, was held to be extremely injurious to the public interest and welfare, and not to be favoured by the courts. *Cooper v. Twibill*, 3 Camp. 286, n.—Ellenborough.

A plea in bar to an avowry for such advanced rent, stating the beer delivered to the plaintiff to be bad, nauseous, and unwholesome, was considered to be a good defence. *Id.*

Where such an agreement was in the alternative, either that the publican should take all his beer of the brewer, or pay an advanced rent:—Held, that it could not be enforced, unless it was proved that good beer was supplied. *Holcombe v. Hewson*, 2 Camp. 391—Ellenborough.

Contracts by which brewers bind publicans to deal with them, are not to be favoured in law, because they tend to prejudice the health of the subject. *Thornton v. Sherratt*, 8 Taunt. 529.

A condition in a deed of composition, that a publican shall continue to deal for twelve years with his creditors, in the articles of their respective trades, may be valid; but it is qualified by the implied condition that such articles shall be good, and of a marketable quality. *Id.*

Where in the conditions of sale of a public-house, it was described as a free public-house, and the lease contained a covenant of this nature, it was held, that the purchaser was not bound to complete his purchase, and might recover back his deposit, even although the lease was read over by the auctioneer at the time of sale. *Jones v. Edney*, 3 Camp. 285—Ellenborough.

Quære, whether a covenant by a lessee of a public-house, that he and his assigns will buy all their beer of the plaintiffs, is binding on the assignees? *Hartley v. Pehall*, Peake, 131—Kenyon.

Where the lessee of a public-house covenanted for himself, his executors, and assigns, with his lessors (brewers) to take all his beer of them or their successors in their said trade, and the lessors sold their trade and the public-house, with other premises, to third persons, who moved the plant, &c. to a distance of two miles, and there carried on the business of brewers:—Held, that the trade of the lessors was thereby determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer. *Doe d. Colvert v. Reid*, 10 B. & C. 849.

By indenture between A. and B. and C., dissolving their partnership as rope-makers, A. and B. covenanted to allow C., during his life, 2s on every cwt. of cordage which they should make on the recommendation of C. for any of his friends and connexions, and whose debts should turn out to be good; and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connexions whom they should be disinclined to trust. And C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts;) and that all debts contracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of A. and B.; and that C. should, during his life, exclusively employ A. and B. and no other person, to make all the cordage ordered of him by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage, on any pretence whatsoever:—Held, that the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, &c. (A. and B. not being obliged to work for any other than such as they chose to trust) was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C. was still at liberty to work for any of his friends who were refused to be trusted by A. and B.; by

which construction the restraint on C. was only co-extensive, as in reason it could only be intended to be, with the benefit to A. and B.; and therefore the restraint on C. could be no prejudice to public trade. *Gale v. Reed*, 8 East, 80.

The plaintiff demised a public-house to the defendant; the defendant to take all his malt of the plaintiff; the plaintiff upon every reasonable request to deliver good malt, and if he did not, the defendant to be at liberty to buy it of any other: breach, that the defendant used a quantity of malt not bought of the plaintiff, and without requiring the plaintiff to deliver such: plea, that the plaintiff had delivered bad malt to the defendant, who thereupon bought malt of others:—Held, that the plea was bad; for, as one failure by the plaintiff would not operate as a total suspension of the covenant, the defendant should have alleged a request to send him good malt, and that he had purchased the malt of others on the plaintiff's failure to do so. *Weaver v. Sessions*, 1 Marsh. 505; 6 Taunt. 154.

Merchants in London agreeing to become sureties for a West India planter, on being secured by a conveyance of his plantation, in trust, with a covenant that they should be considered as consignees till the expiration of five years after the reimbursement of what they might advance, held entitled to the benefit of this covenant. *Bunbury v. Winter*, 1 J. & W. 255.

Quære, whether a covenant to continue a mortgage as consignee after payment of the debt is valid? *Id.*

A contract with the proprietors of a theatre not to write dramatical pieces for any other, is legal, not resembling a covenant restraining trade generally. *Morris v. Colman*, 18 Ves. jun. 437.

So would a similar restraint of a performer. *Id.*

### 6. Brokerage.

An agreement to procure a situation for a medical man, by the assignment of patients by a third person, to whom a premium was to be paid, is not illegal. *Edgar v. Blick*, 1 Stark. 464—Ellenborough.

So, an action lies for brokerage in procuring a medical partnership. *Id.*

But an agreement to allow poundage to a person upon the amount of the bills of all customers recommended by such person, is illegal, as a fraud upon the customers. *Wyburd v. Stanton*, 4 Esp. 179—Ellenborough.

A demurrer was allowed to a bill of discovery in support of an action to recover the expenses of entertainments, given by the plaintiff under an agreement with the defendant to introduce him to a woman of fortune, with a view to marriage. *King v. Burr*, 3 Mer. 693.

An action will not lie to recover back money deposited for the purpose of being paid to a person, for his interest in soliciting a pardon for a person under sentence of death. *Norman v. Cole*, 3 Esp. 253—Eldon.

### 7. Goodwill.

A court of equity will not execute a contract for the sale of a good will, but will leave the parties to law. *Barter v. Conolly*, 1 J. & W. 576.

Quære, whether a court of equity will enforce the performance of a contract for the purchase of a subject-matter, of which the goodwill of a public-house, unconnected with any fixed interest in the premises, forms the principal part? *Coslake v. Tull*, 1 Russ. 376.

Specific performance was decreed of an agreement to sell the goodwill of a trade and business, exclusive of a secret in dyeing. *Bryson v. Whitehead*, 1 Sim. & Stu. 74.

Specific performance of an agreement to purchase the business of an attorney, refused upon the bill of the vendor, there being no express stipulations by which the court might be enabled to carry it into effect on his part, in return for the defendant's purchase money; and there being no conditions generally applicable to transactions of this nature, so as to come within the description of "usual clauses" to be inserted in an instrument to be drawn up in pursuance of the agreement. Quære, whether such an agreement is in its nature valid, upon the ground either of morality or of public policy? Quære, if legally a valid agreement, whether it is of such a nature as is capable of being enforced in equity? *Bozon v. Farlow*, 1 Mer. 459.

The sale of a trade with a goodwill does not prevent the vendors setting up again a similar trade, unless there is an express covenant, or fraud by representing it as a continuation of the old trade, or conduct encouraging others to involve themselves in the confidence that he would not trade again, &c. *Crutwell v. Lye*, 17 Ves. jun. 335.

The remedy for a breach of an undertaking upon the sale of the goodwill of a trade not to carry on the same business, and to use the best endeavours to assist the purchaser, is an action or issue quantum damnificatus; and an injunction against proceeding under a judgment for the consideration; upon affidavits before answer was refused. *Shackle v. Baker*, 14 Ves. jun. 438.

### 8. Marriage Contracts.

*Restraint of Marriage*.—An agreement or bond, engaging not to marry any one but the obligee, who did not engage to marry the obligor, is void, because against policy and reason. *Low v. Pure*, Loft, 345; S. C. nom. *Lowe v. Peers*, 4 Barr. 2225.

A wagering contract for fifty guineas, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and therefore void; no circumstances appearing to show that such restraint was prudent and proper in the particular instance. *Hartley v. Rice*, 10 East, 22.

Where the condition of a bond was that one defendant should not marry any other person but the plaintiff, and to pay 1200*l.* in case she did so, or refused to marry him within a month after her father's death; sensible, that when she mar-



ried the other defendant, although her father was alive, the bond was forfeited, and the money payable. *Box v. Day*, 1 Wils. 59.

A bond to marry a woman, or pay a sum of money, being established at law, an injunction was granted till the hearing, on the grounds of public policy; it being an engagement founded upon expectations under the will of a third person, (though no relation,) from whom it was kept secret, to marry at his death, and no mutual obligation. *Cock v. Richards*, 10 Ves. jun. 429.

*Separation.*—A deed made between husband and wife, and a third person, (a trustee,) with a covenant by the husband, to pay such third person an annuity, in case the wife should live separate and apart from her husband, and should take one of her children to reside with her, is, it seems, void, as being a deed made in contemplation of a future separation at the pleasure of the wife, and therefore contrary to the policy of marriage. *Durant v. Tilley*, 7 Price, 577.

A covenant by a husband, to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of such trustees, or their executors, &c., is valid in law. *Rodney (Lord) v. Chambers*, 2 East, 283.

By indenture, between husband and wife, of the first and second parts, and a trustee for the wife, of the third, reciting that unhappy differences had arisen between the husband and wife, and that they had mutually agreed to live separate, and the husband covenanted to pay an annuity of 80*l.* during so much of the wife's life as he should live, in full satisfaction of her support and maintenance, and of all alimony whatsoever, and that he would not, at any time thereafter, sue her for the restitution of conjugal rights; and the trustee covenanted that the wife should release her husband's real and personal estate from all claims for jointure, dower, or thirds, and that he would indemnify the husband from debts incurred by the wife after separation:—Held, that such indenture was valid in law, and that a plea by the husband, "that the wife had instituted a suit in the Ecclesiastical Court, for restitution of conjugal rights, in which cause he had put in an allegation and certain exhibits, charging her with adultery, and that a decree of divorce *à mensâ et thoro* was thereupon pronounced by that court," was no answer to an action by the trustee for arrears of the annuity. *Jee v. Thurlow*, 4 D. & R. 11; 2 B. & C. 547.

An agreement by husband and wife to live separate is legal; and the former cannot set up adultery to avoid such agreement. *Scholey v. Goodman*, 8 Moore, 350; 1 C. & P. 36; *S. C.* not *S. P.* 1 Bing. 349; *Baymore v. Battley*, 8 Bing. 256; 1 M. & Scott, 339.

But if the parties live together after the agreement, it will have the effect of avoiding it altogether. *Id.*

Where husband and wife entered into a deed, with a provision, that in a certain event, and upon the consent of trustees, the wife should be permitted to live separate; *quære*, whether the

deed was valid? *Chambers v. Cusfield*, 6 East, 244; 2 Smith, 356.

Where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation; but, in fact, no separation then took place, nor was intended to take place at that time:—Held, that the deed was void. *Hindley v. Westmeath (Marquis)*, 6 B. & C. 200; 9 D. & R. 351. *And see S. C.* 1 Dow. and Clark, 519.

A bequest of an allowance to a feme covert, on condition that she lived apart from her husband, was held void, as being *contra bonos mores*. *Brown v. Peck*, 1 Eden, 140.

*Quære*, whether a gift of an annuity to the separate use of a married woman, on condition of her living apart from her husband, is good? *Westmeath v. Westmeath*, Jacob, 137.

*Quære*, whether a covenant in a deed of separation not to sue for the restitution of conjugal rights is binding, and if not, whether the rest of the deed can stand? *Id.*

### 9. Foreign Loans.

It is illegal for a person residing in this country to raise money by way of loan, to assist subjects of a foreign state, so as to enable them to prosecute a war against a government in amity with our own. *De Witt v. Hendricks*, 9 Moore, 586; 2 Bing. 314.

A foreigner has no right to negotiate in England, a loan for the use of a state which has separated itself from, and is at war with one of England's allies, (such state not being at the time recognised by England,) without the permission of the English government. *Yraserri v. Clement*, 3 Bing. 432; 11 Moore, 308; 2 C. & P. 221.

If several persons are jointly engaged in a bubble, to raise money for a non-existing state or government, one cannot maintain an action for money had and received against another, for the money so raised. *Mac Gregor v. Lowe*, 1 C. & P. 200; R. & M. 57—Abbott.

Nor where the original contract was made with a government not acknowledged by Great Britain, can a court of equity give relief. *Thompson v. Poyles*, 2 Sim. 194.

*Quære*, whether the king's courts will interfere upon the subject of a contract with a country which he does not recognise, or will assist in the recovery of money advanced by the subjects of this country to a colony at war with its parent state, the parent state being at peace with this country? *Jones v. Gracia del Rio*, 1 Turn. & Russ. 299.

### 10. Foreign Illegality.

A written contract made in Jamaica, which, by the laws of that island, is void for want of a stamp, cannot be recovered upon here. *Alston v. Hodgson*, 7 T. R. 241; 2 Esp. 598.

The value of paper made for the purpose of forging assignats upon, to be exported to France.

may be recovered in our courts, although the plaintiff knew for what purposes the paper was to be applied. *Smith v. Marconnay*, Peake's Add. Cas. 81.—Kenyon.

### 11. Champerty and Maintenance.

Champerty is the unlawful maintenance of a suit, in consideration of a bargain for part of the thing, or some profit out of it; and is not confined to courts of common law. *Stevens v. Bagwell*, 15 Ves. jun. 139.

Assignments to navy agents of part of the subject of a prize suit then depending, are void, as amounting to champerty. *Id.*

An agreement between the seller and purchaser of an estate, that the purchaser bearing the expense of certain suits commenced by the seller against an occupier for arrears of rents, should have the rent to be so recovered, and any sum that could be recovered for dilapidations, and might use the seller's name in actions he might think fit to commence against the occupier for arrears of rent or dilapidations, is not void, as savouring of champerty. *Williams v. Protheroe*, 5 Bing. 309; 2 M. & P. 779; 3 Y. & J. 129.

A., B., C. and D. employed a broker to effect a policy of insurance on goods on board a certain vessel, and upon a loss happening, an action was brought in the broker's name against the underwriter's; A.'s evidence being necessary to the maintenance of the action, he, in order to render himself competent, executed a release to the broker, for a nominal consideration, of all liability to him for the money to be recovered in the action; and after action brought, he conveyed all his interest in the policy to L. and R. for a nominal consideration, having, with his co-assured, previously executed a bond of indemnity to the broker for the costs of the action:—Held, in error, that A. was still liable for costs to the attorney who brought the action, and was therefore an incompetent witness. Semble, that the machinery resorted to for the purpose of making A. a competent witness amounted to maintenance. *Bell v. Smith*, (in error,) 7 D. & R. 846; 5 B. & C. 188.

A gift obtained from an heir-at-law ignorant of his rights, by one who undertook to support him in obtaining possession of his estate, was set aside under the circumstances; also money having been advanced to him by a subscription from different persons, and among the rest from his attorney, to enable him to prosecute suits; and an absolute bond having been taken from him for double the sum lent, with a defeasance executed some days after, declaring that, if he did not recover the estate, or half of it, the bond was to be delivered up:—Held, to be unconscionable, savouring of champerty, and dangerous to public justice. *Strachan v. Brander*, 1 Eden, 303.

Where a creditor who had instituted proceedings at law and in equity against his debtor enters into an agreement with the debtor to abandon those proceedings, and give up his securities, in consideration of the debtor giving him a lien on securities in the hands of another creditor,

with authority to sue such other creditor, and agreeing to use his best endeavours to assist in adjusting his accounts with the holder of the securities, and in recovering his securities:—Held, that the agreement does not amount to champerty, but would have done so if it had stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit. *Hartley v. Russell*, 2 Sim. & Stu. 244.

An agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence in procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, is illegal, as it amounts to champerty. *Stanley v. Jones*, 7 Bing. 369; 5 M. & P. 193.

An agreement made by parties out of possession of premises, to proceed in a court of equity, to recover, and to divide lands, &c., when recovered, is contrary to the policy of the law as well as the statute of Hen. 8 against pretended titles. *Cholmondeley v. Clinton*, 4 Bligh, N. S. 4.

A count in a declaration alleging that the plaintiff, at the request of the defendant, and upon the defendant's undertaking to indemnify, defended an action for the recovery of money, in which the defendant claimed an interest; that judgment was given against plaintiff for 42*l.*; and that he was imprisoned and paid the money under a ca. sa.:—Held, not to disclose a contract which was void on account of maintenance. *Williamson v. Henley*, 6 Bing. 299; 3 M. & P. 731.

### 12. Fraud.

If A. agree to give B. a certain sum for goods, in advancement of C., any secret agreement between B. and C., that the latter shall pay a further sum, is void as a fraud on A., although the bill of sale is made to A.; and B. cannot recover such further sum against C. *Jackson v. Duchaire*, 3 T. R. 551.

Government having contracted to furnish forage for a certain number of horses to be kept by a sutler, and the contractor for forage having agreed not to commute the forage for money; an agreement between the sutler and the contractor, that the latter should allow the former a sum of money for each ration of forage allowed for the whole number of horses, and should retain the forage, is void. *Willis v. Baldwin*, 2 Dougl. 450.

A brewer who supplies goods to a public-house, cannot charge any person as a primary debtor, but the person licensed to keep the house; and if goods be so applied on the credit of a person not licensed, the brewer cannot recover against such person, on the ground that it is a fraud upon the excise. *Meux v. Humphries*, 3 C. & P. 79; M. & M. 132—Tenterden.

An agreement between two sons to divide equally whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or otherwise, from him, is not contrary to public policy, but will be

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enforced in equity. *Wethered v. Wethered*, 2 Sim. 183; *S. P. Harwood v. Tooke*, 2 Sim. 192.

A deed of gift by a client to an attorney, or by an heir to his guardian; the purchase of a reversion from a young heir, and a sale of property by a trustee, are severally contracts contrary to the policy of the law, and may be set aside without evidence of actual fraud. *Morse v. Royal*, 12 Ves. jun. 371.

### 13. Intoxication and Duress.

It is a general rule, that a court of equity will not assist a person who has obtained, or wishes to get rid of an agreement or deed, on the mere ground of intoxication. The exception is, where any contrivance was used to draw him into drink, or any unfair advantage taken of his situation, or that extreme state of intoxication depriving a man of his reason, which even at law would invalidate a deed. *Cook v. Clayworth*, 18 Ves. jun. 12.

An agreement by a person in a state of complete intoxication is void. *Pill v. Smith*, 3 Camp. 33—Ellenborough.

A lease obtained by fraud and imposition from a person who was intoxicated is void. *Butler v. Mulinhill*, 1 Bligh, 137.

A lease was set aside with costs, where it was obtained by the contrived and habitual intoxication of the lessor immediately on coming of age, at a very inadequate rent; and acts of confirmation were held not sufficient to establish it. *Say v. Barwick*, 1 Ves. & B. 195.

A publican cannot recover for beer furnished to third persons, by the order of an individual who has previously become intoxicated by drinking in his house. *Brandon v. Ord*, 3 C. & P. 440—Best.

In an action by the indorsee against the drawer of a bill, if it appear that the defendant drew the bill without consideration, and under duress, it is incumbent on the plaintiff to prove that he gave value for it, although it was indorsed to him before it became due. *Duncan v. Scott*, 1 Camp. 100—Ellenborough.

### 14. Weak Intellectuals.

On a question whether a deed was void in law, on the ground of unsoundness of mind in the person by whom it was executed, the judge directed the jury that the question for them to try was, whether J. S. was a person of sound mind or not; and that to constitute such unsoundness of mind as should avoid a deed at law, the person executing such a deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without any glimmering of reason, and that as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him. To this direction a bill of exceptions was taken, upon the ground that the judge refused to tell the jury that, in

order to avoid the deed at law, the unsoundness of mind must amount to that which constitutes idiocy, according to the strict legal definition of an idiot:—Held, that this direction was right, and that the case could not be argued or decided upon an objection that the direction was too general and vague, because such objection was not taken at the trial, and did not form part of the bill of exceptions. *Ball v. Mannin*, 3 Bligh, N. S. 1; 1 Dow & Clark, 880.

J. M., a man 83 years old, being entitled under the provisions of a trust disposition and settlement to the annual produce of a fund during his life, estimated at the value of 6000*l.*, but subject to a deduction in the proportion of one-third upon the event of a suit, executed a deed, by which he renounced all his interest in the fund, and assigned it to his daughter and her husband, to whom the reversion belonged, in consideration of an annuity of 49*l.* a year to be paid to him for life out of the fund, and his funeral expenses. In a suit instituted to reduce this deed, it was admitted that he was weak and infirm, and addicted to intoxication; and it appeared that the deed was drawn up by the agents of the daughter and her husband, and that no agent or other person was employed on the part of the father. Under these circumstances the deed was held void and reduced, and the judgment affirmed on appeal. *McDiarmid v. McDiarmid*, 3 Bligh, N. S. 374.

If a person perfectly imbecile in mind is imposed upon, and induced to sign a promissory note, which is drawn in an unusual form, such note is bad even in the hands of an indorser. *Sentance v. Poole*, 3 C. & P. 1—Tenterden.

The grant of an annuity fraudulently obtained by a person having a spiritual ascendancy over a woman who was under a state of religious delusion, was set aside upon principles of public policy. *Norton v. Rely*, 2 Eden, 286.

A voluntary settlement by a widow upon a clergyman and his family was set aside, as being obtained by undue spiritual influence, and abuse of confidence in the situation of agent undertaking the management of the affairs of a person of weak mind. *Huguenin v. Baseley*, 14 Ves. jun. 273.

No person can in defending an action be allowed to stultify himself; and, therefore, a defendant cannot in an action for work and labour, set up his own insanity as a defence, unless he has been imposed upon by the plaintiff in consequence of his mental imbecility. *Brown v. Jodrell*, 3 C. & P. 30; *M. & M. 105*—Tenterden. *S. P. Levy v. Baker*, *M. & M. 106*, *n.*

A lunatic may contract for necessities suitable to his degree, and an action will lie against him, notwithstanding an inquisition of lunacy, for the amount. *Bagster v. Portsmouth (Earl)*, 7 D. & R. 614; 5 B. & C. 170; 2 C. & P. 178.

If it appear that he has been imposed upon, it might be otherwise. *Id.*

Quære, whether a person can set up his own lunacy as an answer to an action? *Id.*

Therefore, where a person of rank ordered carriages suitable to his condition, and the coach-

fraud, and they were actually used by the party:—Held, that an action would lie upon the contract, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the carriages were ordered. *Id.*

A court of equity will not interfere to set aside a contract overreached by an inquisition in lunacy, if fair and without notice, especially where the parties cannot be reinstated. *Niell v. Morley*, 9 Ves. jun. 478.

Upon a bill for specific performance of a contract overreached by a commission of lunacy, the plaintiff not having traversed the inquisition, an issue was directed, whether the defendant was a lunatic at the execution, if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval. *Hall v. Warren*, 9 Ves. jun. 605.

#### 15. Misrepresentation.

The specific performance of an agreement is the subject of discretion; and it will therefore be refused in the case of mistake, though there is no fraud. *Mason v. Armitage*, 13 Ves. jun. 25.

If A., in contracting with B., falsely represents himself to be the agent of C., and thereby obtains better terms, the court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. *Fellows v. Gwyder (Lord)*, 1 Sim. 63; 1 Russ. & Mylne, 83.

An agreement will not be avoided by reason that representations, made by one party to the other, upon the subject of the agreement, are not correct, if it be manifest that the party making the representations is speaking, not from personal knowledge, but with reference to accounts which were equally open to both parties, and if the representations be justified by those accounts. *Harris v. Kemble*, 1 Sim. 111.

A., a shareholder in a theatre, entered into an agreement with B., C., and D., three other shareholders, by which the theatre was to be leased to them at a certain rent. He subsequently filed a bill against them for specific performance, on which they proved that another agreement, of which they had before had no notice, had been entered into some years before between A. and other parties, his then co-shareholders in the theatre, and that the earlier agreement contained conditions incompatible with the performance of that into which they had entered; they also proved that two transactions, with regard to the letting of boxes, had not been truly represented to them. The Vice-Chancellor held, that as the theatre had in substance the benefit represented to accrue from these lettings, the misrepresentation as to mere form was no bar to A.'s claim for a specific performance. The Lord Chancellor reversed that decision, and the reversal was held right by the House of Lords. *Harris v. Kemble*, 2 Dow & Clark, 463.

A contract for the sale of iron mines was rescinded on the ground of fraudulent misrepresentations of the value of the estate, and of the

quantities of iron, notwithstanding possession had been taken, the mines worked, and other acts of ownership had been exercised, and notwithstanding some acts in confirmation of the contract. *Small v. Attwood*, 1 Younge, 507.

When a contract is rescinded for fraud or misrepresentation, it is the same as if no contract had ever existed, and the parties are restored to the situation in which they were before the contract, as nearly as possible. *Id.*

A party obtaining an agreement by a partial misrepresentation, is not entitled to a specific performance on waiving the benefit effected by the misrepresentation. The effect of partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely, and to operate as a personal bar to the party who has practised it. *Clermont (Viscount.) v. Tasburgh*, 1 J. & W. 118.

#### 16. Fraudulent Advantage.

To form a case for relief on the ground of oppression on the one side, and distress on the other, the disadvantage of the bargain must be within the view of the parties. *Ramsbottom v. Parker*, 6 Madd. 5.

A sale by an heir apparent of interests in possession and in reversion, was set aside, the consideration being inadequate, and advantage having been taken of the vendor's embarrassments. *Portmore (Earl.) v. Taylor*, 4 Sim. 182.

A bond given at full age, and not in distress, but under a notion of honour, will, if attended with money actually advanced, maintain a former bargain, however disadvantageous; but it is no confirmation, if it is not given freely, as if under distress, or terror, or apprehension from the original transaction, though unfounded. *Crowe v. Ballard*, 1 Ves. jun. 220.

A patient executed instruments, whereby he secured to the defendant, his surgeon, an annuity of 100*l.* during the life of the defendant, in consideration that the defendant would live with him, and give him the benefit of his professional assistance during his life. Four days before the execution of these instruments, the defendant called in an eminent physician to visit the patient, who stated to the defendant his opinion, that the patient could not recover, nor live long; and, about the same time, the defendant expressed to a witness in the cause, that the patient could not live more than a month or six weeks. These instruments cannot be maintained, even if the patient were of sound mind and capable of business. *Popham v. Brooke*, 5 Russ. 8.

The court refused to set aside a voluntary deed, executed by an old and infirm man, in favour of a person who had attended him as a surgeon, and had been occasionally consulted by him respecting his property, and received the dividends of some stock for him; it appearing that the nature and effect of the deed were fully explained to the grantor by his solicitor before he executed it, and that he executed it of his

of a bankrupt, were ignorant of a circumstance considerably increasing the value. *Turner v. Harvey, Jacob, 169.*

### 17. Family Agreements.

Family compromises are favoured, if reasonable, and upon a doubtful right, even in the strongest case, as where one party was drunk at the time. *Stockley v. Stockley, 1 Ves. & B. 23.*

Quære, where upon a mere supposition of right, proving erroneous? *Id.*

Family agreements without fraud, are established, though founded in mistake. *Gordon v. Gordon, 3 Swan. 463.*

They are not supported if founded in the mistake of either party to which the opposite party is accessory. *Id.*

A family agreement may bind the parties, though neither of them had a valid title to the property in question. *Id.*

Family agreements require communication of all material circumstances. *Id.*

A father having advanced a child in his infancy, upon his coming of age takes a bond from him to a greater amount than the sum advanced:—Held, that the bond was obtained by parental influence, and decreed not to stand as security for the sums advanced; but to be set aside altogether. A loose expression in a letter from the son, held not to be a confirmation. *Carpenter v. Heriot, 1 Eden, 338.*

## V. VALIDITY AS REGARDS STATUTES.

### 1. Offices.

*Statute.] By 5 & 6 Edw. 6, c. 16, ss. 1, 2, & 3, all bargains, sales, premiums, bonds, agreements, covenants, and assurances of any office, or deputation of office, which concerns the administration of justice, or the receipt, control, or payment of the revenue, the crown lands, the customs, the keeping of fortresses, or the clerkship of any court of record, are void.*

S. 4, excepts offices whereof persons are seised of an estate of inheritance.

*By 49 Geo. 3, c. 126, s. 1, the provisions of that act are extended to Scotland and Ireland, and to all offices in the gift of, and appointed by the crown, and to all commissions, civil, naval, or military, and to all places and employments of government at home or in the colonies at the East Indies.*

S. 3, makes buying or selling offices, and receiving money or reward for offices, a misdemeanour.

S. 8 & 9, except commissions in the army at the regulated prices, offices excepted by the 5 & 6 Ed. 6, and all offices then legally saleable.

*What Offices within the Statute.]—The office of a clerk to the deputy registrar in the Prerogative Court of Canterbury, is not an office connected with the administration of justice, within*

ing the alienation of the income of a public office. *Aston v. Gwynnell, 3 Y. & J. 136.*

The office of private secretary does not fall within the meaning of the stat. 5 & 6 Ed. 6; therefore, an assignment of the profits of all offices which the defendant might acquire, is good as to all those which may be legally assigned. *Harrington v. Kloprogge, 6 Moore, 31, n.; 2 B. & B. 678, n.; 2 Chit. 475; 4 Dougl. 5.*

A demurrer will not lie to a bill stating a sale of the office of secondary to the Wood Street Compter, and praying an account of the profits of the office; for, upon demurrer, the nature of the office does not appear, nor, consequently, whether such sale is illegal under stat. 5 & 6 Ed. 6. *Hicks v. Raincock, 1 Cox, 40.*

A declaration under the stat. 49 Geo. 3, c. 126, s. 6, alleges that the defendant advertised a proposal for a promise to give the sum of 150 guineas to any one who would procure A. B. a place under government: the words "for a promise" are surplusage: and the words "under government" are sufficient, though the words of the statute are office in the gift of the crown. *Clarke v. Harvey, 1 Stark. 92—Ellenborough.*

*Illegal Procurement.]—It seems doubtful whether a person paying money for procuring an office under government, can recover it back in an action for money had and received. *Pickard v. Bonner, Peake, 221—Kenyon.**

Assumpsit will not lie upon a promise to pay plaintiff 2*l.* per cent. to procure a purchaser of plaintiff's place of surveyor of the baggage of the port of London, being contrary to the statute. *Stackpole v. Earle, 2 Wils. 131.*

A bond given for the purchase of an office in which the groom of the stole had the power of recommendation, is invalid. *Harrington v. Dechatel, 1 Bro. C. C. 124.*

A condition to assign all offices is a valid condition, and will be taken to apply to such offices as are by law assignable. *Harrington v. Kloprogge, 4 Dougl. 5; 6 Moore, 31, n.; 2 B. & B. 678, n.; 2 Chit. 475.*

A sale of a commission in the army is not bad of itself, but a sale of public office or any obligation to be made good out of that is so. *Hartwell v. Hartwell, 4 Ves. jun. 815.*

*Sharing Profits.]—An agreement by which a deputy officer, appointed by his principal, is to receive all the fees, and pay the principal a fixed sum per annum, is void under stat. 5 & 6 Ed. 6. Aliter, where a sum certain is reserved payable out of the fees; for in that case the deputy is not to pay unless the fees amount to so much. *Godolphin v. Tudor (in error), 1 Bro. P. C. 135.**

Where an auditor of Wales agreed with his deputy that he should receive all the fees, upon payment of 200*l.* per annum, both the deputation and agreement are void by the statute. *Id.*

Where, after the recital of the appointment of A. to be deputy to B., in the execution of an office within the purview of 5 & 6 Ed. 6, c. 16, or 49 Geo. 3, c. 126, A. paying thereout to B. an annual sum; the condition of the bond in suit is stated to be for the payment by A. to B. of such annual sum generally, it is a good plea in bar, to say that the bond was given in pursuance of an agreement to pay such sum absolutely at all events. Semble, that the condition taken per se shows the bond to be given upon an illegal contract. *Greville v. Atkins*, 4 M. & R. 379; 9 B. & C. 462.

A., by the interest and on the application of B., is appointed custom-house officer of a port, having previously signed an agreement, declaring that his name was used in the application in trust for B., that he would appoint such deputies as B. should nominate, and would empower B. to receive the profits of the office to his own use. On the failure of A. to comply with the agreement, no action upon it will lie against him. *Garforth v. Fearon*, 1 H. Black. 327.

If a covenant is entered into, that if the plaintiff will procure the defendant to be appointed to an office, he will pay the plaintiff a share of the emoluments, and this be without the knowledge of the person who has the right of appointing to the office; it is such a fraud on him as will avoid the covenant, whether the office is one lawfully saleable or not. *Waldo v. Martin*, 6 D. & R. 364; 4 R. & C. 319; 2 C. & P. 1.

An agreement to allow a certain share of the profits of an office in a dock yard, in order to induce the possessor to procure himself to be superannuated, is void. *Parsons v. Thompson*, 1 H. Black. 322.

A. being possessed of an office in a dock yard, B., in order to induce him to procure himself to be superannuated, and retire on the usual pension, agrees (without the knowledge of the Navy Board, to whom the appointment belongs,) in case B. should succeed A. in the office, to allow him a certain annual share of the profits. A. retires; B. is appointed to succeed him, but does not perform the agreement. A. can maintain no action against B. on the agreement. *Id.*

An attorney, town-clerk and clerk of the peace for the borough of D., in the county of L., upon the dissolution of partnership which had existed between him and two other persons, entered into an agreement to pay to one of them (C. D.) a certain sum of money, and use his endeavours to procure for him one-fourth of the prosecutions arising in the town clerk's office. In an action by C. D. on this agreement, it appeared that the magistrates of the borough of L. commit some offenders to be tried at the borough sessions, others at the county sessions, and others at the county assizes:—Held, that the defendant, as clerk of the peace of the borough, could not legally enter into such an agreement as that set out in the declaration. *Quære*, whether it would have been legal had he been town-clerk only, and not clerk of the peace. *Hughes v. Statham*, 6 D. & R. 219; 4 B. & C. 187.

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An assignment to trustees of all the emoluments and profits, which during the life of J. S. and his continuing to hold the office of clerk of the peace for Westminster, should arise or become due to him as such clerk of the peace, or in respect of his office, after deducting the salary of his deputy for the time being, upon trust to pay the interest arising on certain debts due from J. S., and from time to time render the residue, after satisfying the trusts, to J. S., is invalid in law. *Palmer v. Bate*, 6 Moore, 28; 3 B. & B. 673.

## 2. Attornies.

By a memorandum, dated in November, 1822, A., an attorney, agreed with B., for a valuable consideration, to take C. (the son of B.) into partnership, as attornies and solicitors, for ten years, and to allow him a moiety of the profits. The memorandum did not state when the partnership was to commence. C. was not admitted an attorney until April, 1823, but he conducted the business in the name of A. from the beginning of January, 1823. In an action by A. against B. for part of the consideration money:—Held, first, that the agreement, though legal on the face of it, upon proof that C. had not been admitted an attorney until after its execution, became illegal within 22 Geo. 2, c. 46, s. 11, and void. Secondly, that such proof was properly admitted on the part of the defendant. Thirdly, that proof on the part of the plaintiff, that the agreement was to be kept as an escrow, and not acted upon till after C.'s admission, was not admissible, and properly rejected. *Williams v. Jones*, 7 D. & R. 548; 5 B. & C. 108.

*Quære*, whether an agreement, whereby the town-clerk of a borough undertook that in consideration of plaintiff having consented to a dissolution of partnership with him as an attorney, "he would use all his best endeavours, and exercise his influence to procure the prosecutions for felony arising in the town-clerk's office," to be divided between plaintiff and three others, is not void, as being contrary either to the 22 Geo. 2, c. 46, s. 14, or to the general policy of the law? *Hughes v. Statham*, 6 D. & R. 219; 4 B. & C. 187.

Semble, that an agreement by an attorney to pay a share of the profits of his business to another person who is not an attorney, is not illegal. *Candler v. Candler*, Jacob, 225.

A., an attorney, agrees to conduct a cause for B. for 100 guineas, besides his taxed costs; if tried, A. to pay all expenses, if not, he was to receive the same sum; if tried, and a verdict against B., A. to have no demand on B. for costs. *Quære*, whether this agreement be legal or not? *Guy v. Gower*, 2 Marsh. 273.

An agreement by an attorney to conduct all his client's suits, in consideration of having exclusively the drawing of his leases, when stated as a defence to an action on the attorney's bill, is not vacated by proving that other persons have been employed to draw the leases. *Parker v. Harcourt*, 5 Esp. 249—Ellenborough.



East, 300; 2 Smith, 300.  
Nor can an attorney, by that statute, give an undertaking to a sheriff's officer to appear and put in bail, even before the arrest is made, and it is not in the power of the officer to execute the writ. *Parker v. England*, 2 Smith, 52. And see *Rez v. Southerton*, 6 East, 143; and *King v. Price*, 1 Price, 341.

So, an agreement in writing to put in bail, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of the sheriff, in consideration of his discharging the party arrested, is void by 23 Hen. 6, c. 10. *Rogers v. Reeves*, 1 T. R. 418.

But an undertaking of an attorney, given to the plaintiff in order to procure the discharge of the defendant, to put in bail or pay the debt, is not within the statute, because it is not given to the sheriff. *Id.*

A promise of a bribe to a bailiff to take bail is illegal, and assumption will not lie upon the promise. *Smith v. Statesbury*, 1 W. Black. 204; 2 Burr. 924.

#### 4. Bankrupts.

A promise made by a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him, touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as being against the policy of the bankrupt laws. *Neret v. Wallace* (in error), 3 T. R. 17.

Quære, whether the creditors having consented to the agreement made by the assignees, would have varied the case? *Id.*

A bill given to a creditor, to induce him to sign a bankrupt's certificate, is void, in whose-soever hands it may be, and whatever the consideration given by the holder; but a bill given to a creditor, to keep him from taking steps to oppose the certificate, would be good in the hands of a holder for value without notice. *Birch v. Jervis*, 3 C. & P. 379—Tenterden.

If a creditor has taken money for signing a bankrupt's certificate, it shall be recovered back in an action for money had and received. *Smith v. Bromley*, 2 Dougl. 696, n.

A bond, given to a creditor of a bankrupt, in order to induce him to withdraw a petition, which he had preferred to the Chancellor against the allowance of the certificate, is void by stat. 5 Geo. 2, c. 30, s. 11. *Sumner v. Brady*, 1 H. Black. 647. And see *Jackson v. Lomas*, 4 T. R. 166; *Feise v. Randall*, 6 T. R. 146; 1 Esp. 224.

A covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the

committal act of bankruptcy whereon a commission shall issue, is good. *Roe d. Hunter v. Galliers*, 2 T. R. 133.

A promissory note, given by a bankrupt to a commissioner acting under his commission, for a debt contracted before the bankruptcy, is an invalid security. *Haywood v. Chambers*, 1 D. & R. 411; 5 B. & A. 753. And see *Wells v. Girling*, 4 Moore, 78; 1 B. & B. 447.

Even, though the note was dated after the issuing of the commission, and before the signing of the certificate, and the debt for which it was given was not proved. *Id.*

An agreement between a bankrupt and a third person, that the former should receive a certain sum from the latter, on his obtaining the assent of his assignee, to the sale of his house to such person at a certain price, is void in law. *McShane v. Gill*, 1 C. & P. 149—Abbott.

Unless, as it seems, a communication be made to all the creditors; but a communication to the assignees alone is not sufficient. *Id.*

If standing timber be sold to a trader, with a proviso that, in case of bankruptcy, the vendor may retake it, such a condition is void, under the statute 21 Jac. 1, c. 19, s. 11, if the bankrupt has the disposition of the goods; and the property passes by the assignment. *Holroyd v. Gyeant*, 2 Taunt. 176; 1 Rose, 113.

A creditor may legally contract to vote out a commission of bankruptcy against his debtor, in consideration that a friend of the debtor will give the petitioning creditor 5s. in the pound for his debt: and a bill given for the agreed sum is a valid bill. *Fry v. Malcolm*, 5 Taunt. 117.

#### 5. Poor Laws.

A covenant with a lessor of premises in a parish, to indemnify the parish against any persons which the covenantor may cause to be settled in it, is valid, although it was objected that it was unreasonable, in restraint of trade, and contrary to the policy of the poor laws. *Walsh v. Fussell*, 3 M. & P. 457; 6 Bing. 163.

A bond given to parish officers, reciting that B. had taken a house in the parish for a term of seven years, and conditioned to indemnify the parish against any charges which they might sustain on account of B. and his family becoming inhabitants of and belonging to the parish, is not discharged by B.'s purchasing an estate of the value of 30l. in the parish, and residing on it upwards of forty days after the expiration of the seven years' lease. *Edwards v. Bobbit*, 1 M. & S. 120.

A bond to indemnify a parish against a pauper, is forfeited, though the parish, to avoid the expense of removal, choose to pay a weekly sum for his maintenance in another parish. *Allen v. Foxhall*, 2 W. Black. 1177.

### 6. Revenue Regulations.

The breach of mere revenue regulations, which tend to insure the due payment of duties imposed upon the manufacture of an excisable article, does not render the trade itself illegal, so as to incapacitate the manufacturer from recovering the price of such article, or from suing upon a guarantee given for the due payment thereof. *Brown v. Duncan*, 5 M. & R. 114; 10 B. & C. 93.

The stat. 17 Geo. 3, c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them. *Law v. Hodson*, 11 East, 300; 2 Camp. 147.

Although when sold, they were selected by the purchaser himself, and they were afterwards used by him in building a house, without any complaint being made as to their size or quality. *Id.*

A contract declared by a statute to be illegal, is not made good by a subsequent repeal of the statute. *Jaques v. Wilky*, 1 H. Black. 65.

## VI. VALIDITY AS REGARDS ORDERS IN COUNCIL AND BYE-LAWS.

### 1. Orders in Council.

A. commissions B. to get a charter-party effected on his ship, Russian built and British owned. She is accordingly chartered to go to America, and take in there a cargo of permitted goods, rice and cotton being specified, and to sail thitherwith to Cadiz, Lisbon, or Gottenburgh, as directed. By a previous agreement, it appeared to have been in the contemplation of the parties to carry the goods to some port in the united kingdom, and that the ship should carry no license:—Held, that this was not an illegal contract, so as to deprive B. of his right to his commission, for procuring the charter-party to be effected. *Haines v. Busk*, 1 Marsh. 191; 5 Taunt. 521.

Where A. agreed to sell to B. one-third share of a ship, which was then to be employed on a joint adventure, in the exportation of military stores to South America, contrary to an order in council then in force:—Held, that (the agreement being entire, and containing on the face of it an illegal stipulation) it lay on the party seeking to enforce the same, to show that means had been used to obtain a license, or that the illegal purpose had been abandoned: and that in failure thereof, A. could not recover for the share of the ship. *Holland v. Hall*, 1 B. & A. 53.

To debt on bond, the defendant pleaded that the bond was given to secure payment of the price of goods, agreed to be sold and delivered in London by the plaintiff to the defendant, to be by the latter shipped to Ostend, and from

thence reshipped for the East Indies, and there trafficked with clandestinely:—Held a sufficient bar to the action; the case being within the 7 Geo. 1, c. 21, which avoids all contracts for supplying cargoes to foreign ships in such a trade. *Lightfoot v. Tenant*, 1 B. & P. 551.

### 2. Sale of Ship's Command.

A sale (by the owner) of the command of a ship, employed in the East India Company's service, without the knowledge of the company, is illegal, and no action will lie on the contract. *Blachford v. Preston*, 8 T. R. 89; *S. P. Hartwell v. Hartwell*, 4 Ves. jun. 815.

For, the command of an East India ship is a public trust; and the sale of it, contrary to a public regulation of the company, is a breach of a public duty. *East India Company v. Neave*, 5 Ves. jun. 181.

The statute 49 Geo. 3, c. 126, relative to the sale of offices under the East India Company, applies only to their public offices, and not to the command of their ships, which are merely in their trade as merchantmen. *Richardson v. Melish*, 2 Bing. 253; 1 C. & P. 24.

Where the defendant, having purchased twelve sixteenth shares of an East India ship commanded by the plaintiff, and then chartered to the company by the former owners for four voyages, proposed to the plaintiff that he should resign the command in favour of the defendant's nephew, on receiving in exchange the command of another ship, of which the defendant was sole owner, and then chartered to the company for one voyage only, and to which the plaintiff assented, and the company acceded to the exchange; and it was agreed, that in case the defendant's nephew died, or resigned before the expiration of the four voyages, the plaintiff should succeed him: and, as a further inducement to the plaintiff to resign the command of the ship chartered for four voyages, the defendant undertook to procure a beneficial alteration in the destination of the other, chartered for the one voyage only; and the person who acted as the plaintiff's agent undertook, without his knowledge, to pay the defendant 2000*l.* if the plaintiff should refuse to resign: and the destination of the latter vessel was altered with the assent of the company, and the plaintiff and defendant's nephew sailed on their respective voyages, and the plaintiff's adventure failing, he became bankrupt on his return home from his voyage, and the nephew died in the course of his second voyage; and the plaintiff having required the defendant to reappoint him to the command for the two remaining voyages, which he refused, the plaintiff sued him in assumpsit for a breach of agreement; and the jury found a verdict for the plaintiff:—Held, 1st, that after verdict there was a sufficient consideration for the defendant's agreement; 2dly, that the agreement was not illegal, although it was insisted, that it was made in violation of the by-laws of the company, a fraud on the part of the owners, and contrary to public policy; and lastly, that the judge properly



directed the jury to take into their consideration of damages, the profits the plaintiff might have expected to have derived from the two remaining voyages, although the last had not been commenced at the time of the action; and that after verdict the court would presume, that the captain might have a right to retain the command for more than one voyage. *Richardson v. Melish*, 9 Moore, 435; 2 Bing. 229; 1 C. & P. 251; R. & M. 66.

A contract for the sale of the command of an East India ship, cannot be enforced by suit in equity against the fund paid by the company, as a compensation under the regulation of 1796, to restrain the practice in future. *Thomson v. Thomson*, 7 Ves. jun. 470.

Where A. and B., the husbands and managing owners of nine-sixteenths of a ship under a charter to the East India Company, for six successive voyages, two of which had been performed, sold by deed five-sixteenths to C., and covenanted that the latter should be appointed to the command; and that A. and B. should continue to have the management of the ship as husbands, and should elect the tradesmen and appoint all the officers, &c.:—Held, that the deed was void, being founded on a contract for the sale of the shares, coupled with a stipulation for the appointment to the command, and the continuance in the management. It seems, however, that if the covenant to continue A. and B. as agents in the management of the ship, was independent, and stood alone, it would have been legal and operative. *Car v. Hope*, 4 D. & R. 164; 2 B. & C. 661.

Where the plaintiff filed his bill for an account of the captain's profits of a voyage to India, in one of the company's ships, to a share of which the plaintiff was entitled under an agreement with the captain; and it was alleged by the captain's executors that the agreement was made in consideration of the plaintiff having procured for the captain the command of the ship; the court directed an issue to ascertain the consideration, reserving the question, whether such an agreement would or not be void. *Money v. Macleod*, 2 Sim. and Stu. 301.

## VII. VALIDITY AS REGARDS MORALITY.

### 1. Cohabitation.

Agreements entered into with a view to future cohabitation and prostitution are illegal and void, as being against public morality. *Walker v. Perkins*, 3 Burr. 1568; 1 W. Black. 517.

A warrant of attorney, given to induce a plaintiff to live in prostitution with the defendant, is void, and the court will order it to be given up, and will set aside any judgment and proceedings which have been had under it. *James v. Hoskins*, 1 Tidd's Prac. 593.

But an agreement by defendant to allow plaintiff, with whom he cohabited, in case they should separate, an annuity for her life, provided she

should continue single, was held a valid agreement. *Gibson v. Dickie*, 3 M. & S. 463.

A bond given in consideration of past cohabitation is good. *Turner v. Vaughan*, 2 Wils. 339.

But a bond for cohabitation with a woman seduced by the obligor, and for maintenance after his death, is void. *Walker v. Perkins*, 3 Burr. 1568; 1 W. Black. 517.

A voluntary bond given by a person to a woman after he had kept her two years, was not relieved against upon a bill by the executor of the obligor. *Hill v. Spencer*, Amb. 641.

A voluntary bond was given during cohabitation to a woman previously of a very loose life; and soon afterwards another bond was given, expressly securing a continuance of the connexion by an annuity, in case of separation. A bill by the executor, to have the bonds delivered up, was dismissed with costs, the former being considered unimpeached, and the latter void at law. *Gray v. Mathias*, 5 Ves. jun. 286.

A bond for securing a provision to a woman who had been seduced by the obligor, and for her children, given after cohabitation determined, is good, notwithstanding the obligor was married when the connexion commenced. *Knye v. Moore*, 2 Sim. & Stu. 260.

Where a married man living with his wife or habited with a single woman, who knew that he was married, and at the termination of the illicit intercourse gave her a bond to secure the payment of an annuity for the support of herself and two young children, the offspring of their cohabitation:—Held, that the bond was valid. *Nye v. Moseley*, 9 D. & R. 165; 6 B. & C. 133.

And that an action at law might be maintained on the bond to recover the arrears of the annuity. *Id.*

In an action on an annuity bond given by a man to a woman with whom he cohabits, the question for the consideration of the jury is, whether at the time it was given there was or was not an intention and agreement to continue the connexion for the future; for if there was such intention, and the bond was given in furtherance of such arrangement, the plaintiff cannot recover. *Friend v. Harrison*, 2 C. & P. 584.—Best.

Where a declaration stated that the plaintiff had cohabited with the defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that the defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour; and that thereupon, in consideration of the premises, and that the plaintiff would give up the annuity, the defendant promised to give her as much as the annuity was worth;—Held bad on general demurrer. *Bisnington v. Wallis*, 4 B. & A. 650.

### 2. Prostitution.

If a party lets lodgings to an immodest woman, to enable her to consort with the other sex, he cannot recover in an action for lodging so sup-

plied; but if the woman merely lodges there, and receives her visitors elsewhere, he may. *Appleton v. Campbell*, 2 C. & P. 347—Abbott.

So, although he did not know, at the time of letting the lodgings, of the defendant's habits, if he afterwards became acquainted with the fact, and permitted her to remain as a tenant. *Jennings v. Throgmorton*, R. & M. 251—Abbott. *S. P. Girardy v. Richardson*, 1 B. & P. 340; 1 Esp. 13.

But an agreement to pay for the washing and getting up of expensive articles of dress for a prostitute has been held valid, although it was known to the party by whom the work was done, that the dressers were to enable her to appear at public places in the exercise of her avocation. *Lloyd v. Johnson*, 1 B. & P. 340.

And so held, in nearly a similar case at Nisi Prius, unless it were proved that the plaintiff had furnished them with an express view to enable the defendant to carry on her prostitution, and expected to be paid from the profits of it. *Bowry v. Bennet*, 1 Camp. 348—Ellenborough.

### 3. Other Immorality.

The printer of an immoral and libellous work cannot maintain an action for his bill against the publisher who employed him. *Poplett v. Stockdale*, R. & M. 337; 2 C. & P. 198—Best.

A. agreed to supply B. with a manuscript of a work, to be printed by the latter, the profits of which were to be equally divided between them:—Held, that B. might maintain an action against A. for refusing to supply manuscript after part of the work had been printed: but it seems that it would be a good defence to such action, to show that the intended publication was of an illegal nature: but this is not to be presumed, the work itself not having been produced at the trial. *Gale v. Leckie*, 2 Stark. 107—Ellenborough.

Nor will an action lie for the price of libellous, obscene, or immoral prints. *Fores v. Jones*, 4 Esp. 97—Laurence.

Nor for pirating a work of a libellous or immoral tendency—as the amours of a courtesan. *Stockdale v. Onwhyn*, 7 D. & R. 625; 5 B. & C. 173; 2 C. & P. 163.

## VIII. CONSTRUCTION OF CONTRACTS.

### 1. Generally.

The place of making a contract should be considered in expounding it, unless the parties have a view to another kingdom. *Robinson v. Bland*, 1 W. Black. 234, 256.

Where a contract was made between A. and B., whereby A. having a quantity of apples, agreed to sell his cyder to B. at a certain price per hogshead, to be delivered at T. at a future time, and to lend such pipes as he had for the use of the cyder, to be manufactured on his, A.'s, premises, and to be paid for before it was re-

moved; and A., in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by B. to manufacture the cyder on A.'s premises, and before the cyder was completely manufactured it was seized by the excise officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as B.'s property, together with the casks; and, in assumpsit for goods sold and delivered, brought by A. against B., it appeared that the word cyder, at the place where the contract was made, meant the juice of the apples as soon as it was expressed: it was thereupon held, that the contract must be construed to have been for the sale of cyder in that sense of the word, and that the property passed to B. as soon as the apple juice was delivered to his servant; secondly, that it was B.'s duty to enter the premises; and as through his fault it became impossible for A. to deliver the goods at T., the failure to do so did not bar his action: thirdly, that A. might recover in this action the price of the casks lent to defendant. *Study v. Sanders*, 5 B. & C. 628.

Under an agreement to perform one of two things, the option is in the person who is to perform; and if one of the two things be prohibited under a penalty, no action will lie for the penalty, until the party makes his election by performing the prohibited part of the contract. *Layton v. Pearce*, 1 Dougl. 15.

In general, where the contract is in the alternative, the election is in the party who is to do the first act. *Chippendale v. Thurston*, 4 C. & P. 98—Parke.

A contract by A. to let, and by B. to take, the milking of thirty cows, at 7l. 10s. per cow per annum, from 14th February, the rent to be paid quarterly in advance, and by C. to pay the rent, is an entire and not a divisible contract. *Whitcher v. Hall*, 8 D. & R. 22; 5 B. & C. 269.

Plaintiff's intestate bought a coach of defendant, and gave him bills for the price, and agreed that defendant "do have and hold a claim upon the coach until the debt be paid:—Held, that this agreement operated only as a personal license from testator to defendant to take the coach if the bills were not paid, but was not a bar to an action of trover by the administrator. *Hovoes v. Ball*, 7 B. & C. 481; 1 M. & R. 288.

Plaintiff entered into an agreement to buy the next presentation to a living. The vendor afterwards entered into an agreement with defendant, with the consent of the plaintiff, to sell this presentation to defendant on having such title as he had received for 7500l., of which 500l. was to be paid to plaintiff, "absolutely with the consent of the vendor," on a certain day:—Held, in an action for the 500l., first, that the vendor was not bound to make out a good title; second, that he was not bound to tender a conveyance; third, that the consent of the vendor to the payment of the 500l. was given at the time of making the agreement, and that his having objected at the time of paying the money, was of no avail. *Wilnot v. Wilkinson*, 6 B. & C. 506.

A., the creditor of B. by bills, for which C. and D. are sureties, by a deed to which B. and C. are parties, discharges B. & C., reserving his remedies against D.; such reservation is not defeated by a stipulation that the bills shall be delivered up; it appearing that such stipulation was intended to be so modified as to give to A. the benefit of such reservation. *Malby v. Carstairs*, 1 M. & R. 549; 7 B. & C. 735.

By agreement, A. stipulated that he would, as soon as he should become possessed of a certain public-house, execute a lease thereof to B. from the 21st December 1825, for fourteen or twenty-one years. At the time of making the agreement, the house was upon lease, which would not expire till Midsummer, 1827; the legal estate being in trustees, first, to pay debts, and then to pay an annuity, and subject thereto to the use of A. if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease had expired, he and the trustees had joined in a lease to C. for twenty-three years:—Held, that A. having thereby put it out of his power so long as the latter lease of 1825 subsisted, to grant any lease to B., had committed a breach of his agreement, and was liable to an action for a breach of that agreement, although the first lease had not expired. *Ford v. Tiley*, 6 B. & C. 325.

## 2. Condition Precedent.

**As to Time.**—The time at which a contract is to be performed is not essential in equity as at law. *Radcliffe v. Warrington*, 12 Ves. jun. 328.

The lapse of time, if not an essential object of a contract, is no objection to a specific performance. *Hearne v. Tenant*, 13 Ves. jun. 287.

Where it was a part of the condition precedent to the claim of a sum of 80*l.*, in addition to the purchase-money for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st April; it was held, that the delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. *Maryon v. Carter*, 4 C. & P. 295—Tindal.

In an agreement by a tenant at will of a public house, for the sale of the possession, trade, and good-will of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms being, that possession should be taken, and the money paid on a given day, time is of the essence of contract; and a purchaser who was not in a condition to fulfil his part of the contract on that day, cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase. *Coatlake v. Tilt*, 1 Russ. 376.

Defendant agreed to sell plaintiffs a certain quantity of sponge; plaintiffs agreed to sell defendant ochre, to be delivered free of expense, on or before a certain day:—Held, the delivery of the ochre by that day, to the extent of the value of the sponge, was a condition precedent to the delivery of the sponge, and the plaintiffs, not

having done so, they could not recover for the non-delivery of the sponge. *Parker v. Reslings*, 4 Bing. 280; 12 Moore, 529.

**Other Matters.**—A party published a prospectus for the publication of a county map and gazetteer, stating that the map would contain "the exact limits of every parish and township in the county." The defendant agreed to take a copy of each. They were published, and there were lines on the map denoting the boundaries of townships, but no distinct lines to show the boundaries of those parishes which consisted of several townships:—Held, that the map was not according to the prospectus, and that the defendant was not bound to take the map, although, by reference to the gazetteer, it could be ascertained what townships were in each parish. *Tecdale v. Anderson*, 4 C. & P. 198—Tenterden.

Certain stock of the plaintiffs was transferred under a forged power of attorney: the Bank of England offered to replace the stock, if the plaintiffs would first prove the amount under a commission of bankruptcy issued against a firm in which the forger of the power had been a partner: after this offer the plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy:—Held, that they could not sue the Bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy. *Stacy v. England (Bank)* 6 Bing. 754; 4 M. & P. 639.

The defendant, the master of a vessel, agreed in writing to take out to the Cape of Good Hope a boat belonging to the plaintiff, not exceeding thirty feet in length and ten in width. The plaintiff tendered a boat within these dimensions, but it was a decked boat. The defendant refused to take it on board, unless the deck were removed; and he offered to take it off, and replace it on the arrival of the vessel at the Cape. This the plaintiff declined. The defendant proved that it was the custom to remove the decks of such boats, as they tended to impede the navigation of the vessel:—Held, that such evidence was properly received, and that the plaintiff could not recover against the defendant in an action for a breach of the agreement for not taking out the boat. *Haynes v. Halliday*, 5 M. & P. 572; 1 Bing. 587.

Declaration stated that the plaintiff agreed to let, and A. B. agreed to take, the milking of thirty cows, for the sum of 7*l.* 10*s.* per annum per cow, from the 14th of February, the rent to be paid quarterly in advance, on the 14th of February, the 14th of May, the 14th of August, and the 14th of November, and the defendant agreed to pay the rent at the times therein mentioned. The plaintiff then averred performance of the agreement by him, and that A. B. took the milking of the thirty cows, and alleged as a breach the non-payment by the defendant of the rent, which became due on the 14th of November. It appeared in evidence at the trial, that in May it was agreed between the plaintiff and A. B., the latter having then thirty-two cows, that the plaintiff,

instead of taking away two at that time, should be at liberty to take four at the fall of the year, and it appeared that between the 4th and the 20th October, the plaintiff did take away four cows, leaving A. B. after that period less than thirty. It was proved that this alteration in the mode of using the cows, made no substantial difference as to profit or loss:—Held, by Bayley and Holroyd, Justices, (Littledale, J. dissentiente,) that this was an entire contract for the letting of thirty cows, neither more nor less, and that the plaintiff in this action against a surety, was bound to prove a literal performance of that contract; that he had not done so, inasmuch as he had shown that during part of the year he had allowed A. B. to have the milking of twenty-eight cows only. *Whitcher v. Hall*, 5 B. & C. 269; 8 D. & R. 22.

Assumpsit, in consideration, that plaintiff at defendant's request would consent to suspend proceedings against another person, defendant promised to pay the debt on a certain day: averment, that plaintiff did suspend the proceedings. The agreement proved was in writing as follows: "the plaintiff having at my request consented to suspend proceedings, &c."—Held, 1st, that, as the request must have preceded the consent to suspend proceedings, the contract was properly declared on, as an executory contract; 2dly, that the consideration for the promise was good, as it must be taken as a consent to suspend the proceedings, at least until the day defendant was to pay the debt; 3dly, that after verdict, the averment that "plaintiff had suspended proceedings" was sufficient without specifying for what period. *Payne v. Wilson*, 7 B. & C. 423; 1 M. & R. 708.

A. & B. were litigant parties in several actions, C. was the attorney of B., and, at a meeting to settle the actions, it was agreed between A. and B., in the presence of C., inter alia, that C. should give his promissory note at two months, as a collateral security from B. to A. of a sum of 450*l.*, and it was added that all the effects which A. had of B.'s, should be delivered up to C., as B.'s attorney; C. signed the note at the meeting immediately after the signing of the agreement:—Held, in an action on the note by A. against C., that the delivery up of the effects was not a condition precedent to the right of A. to claim the money. *Irving v. King*, 4 C. & P. 309—Tenterden.

## IX. PROCEEDINGS IN EQUITY.

### 1. Inadequacy of Consideration.

Contracts entered into by parties knowing their rights, though upon inadequate consideration, shall not be set aside. *Stephens v. Bateman*, 1 Bro. C. C. 22.

A contract was executed, though the consideration was inadequate, as it did not amount to fraud; but without costs. *Burrows v. Lock*, 10 Ves. jun. 470.

Inadequacy of value is not in itself sufficient

to set aside a contract. *Griffith v. Spratley*, 1 Cox, 363.

But when gross, it is strong evidence of fraud. *Lowther v. Lowther*, 13 Ves. jun. 103. And see *Low v. Barchard*, 8 Ves. jun. 133.

It is a badge of fraud, upon which a contract shall be set aside. *Heathcote v. Paignon*, 2 Bro. C. C. 167.

Mere inadequacy of price, where it cannot be used as evidence of fraud, is not in itself sufficient to prevent the court from decreeing a specific performance of an agreement for the purchase of land. *Collier v. Brown*, 1 Cox, 428.

Relief was given in equity upon inadequacy of consideration, so extreme, as to satisfy the court, that there must have been imposition or oppression. *Underhill v. Horwood*, 10 Ves. jun. 209.

A bill was filed to compel the transfer of certain stock, the reversionary interest in which had been formerly purchased by the plaintiff, and had now become vested in possession. The transfer was resisted by the vendor, and the trustees of the settlement under which he claimed, on two grounds—first, fraud, or undue advantage—and secondly, inadequacy of the consideration. The first wholly failed in evidence. On the second point, the effect of the evidence was, that the price given was sufficient, according to the opinion of auctioneers, and persons of that description, but was about two-thirds of the value, calculated by actuaries from the tables:—Held, that the inadequacy of the consideration was not sufficiently proved. *Potts v. Curtis*, 1 Younge, 543.

### 2. Impossibility of Performance.

A court of equity will relieve against a contract, become impossible to be performed. *Smith v. Morris*, 2 Bro. C. C. 311.

On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a degree of inconvenience and absurdity, so great as to afford judicial proof that such could not be the meaning of the parties. *Pribble v. Boghurst*, 1 Swans. 329.

Specific performance of an agreement to build may be decreed if sufficiently certain, but a general covenant to lay out a certain sum in a building of a certain value, cannot be so executed. *Mosely v. Virgin*, 3 Ves. jun. 184.

### 3. Other things.

A person executing a deed for the purpose of defrauding the law, cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of; and, therefore, if A. convey an estate to B. as a qualification to kill game, equity will not compel a reconveyance. *Roberts v. Roberts*, 1 Daniel, 143; S. C. nom. *Doe d. Roberts v. Roberts*, 2 B. & A. 369; 2 Chit. 272.

Two parties, treating for a lease, agree by articles in writing, that the amount of rent shall be settled by arbitration; the arbitrators, in case they disagreed, to have power to call in a third party, and his decision, with that of one of the

arbitrators, to regulate the rent. The arbitrators disagree, and an umpire is appointed. He, in making his valuations, takes into account an agreement made with himself by the lessee to lay out a considerable sum in repairs, which agreement or obligation the lessor, by the original agreement between the parties, has no power to enforce. The arbitrator for the lessee agrees to the valuation, not as the result of his own judgment, but after consulting the lessee, and at the instigation of the lessee's wife. The House of Lords, reversing a decision of the court below, held, that, under these circumstances, a specific performance ought not to be granted. *Chichester v. McIntire*, 1 Dow & Clark, 460; 4 Bligh, N. S. 78.

Though a parol waiver of a written contract, amounting to a complete abandonment, which is clearly proved, or even parol variations so acted upon, that the original agreement could no longer be enforced without injury to one party, would bar a specific performance: yet variations verbally agreed upon are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining the same. *Price v. Dyer*, 17 Ves. jun. 356.

Treaty and negotiations for a variation of the terms of a contract will not amount to a waiver, unless the circumstances show that it was the intention of the parties that there should be an absolute abandonment and dissolution of the contract. *Robinson v. Page*, 3 Russ. 114.

#### 4. Proceedings.

Specific performance of a contract by a competent party, where its nature and circumstances are unobjectionable, is as much of course as damages at law. *Hall v. Warren*, 9 Ves. jun. 608.

An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight v. Bolland*, 4 Russ. 298.

Where damages in an action at law for a breach of contract to sell a chattel, would be an insufficient remedy for the purchaser, although a sufficient remedy for the vendor; a demurrer to a bill by the vendor for a specific performance was overruled, because the remedy in equity must be mutual for purchaser and vendor. *Witby v. Cottle*, 1 Sim. & Stu. 174.

After a decree for a specific performance against a defendant, he cannot proceed by action at law on the contract for damages. *Reynolds v. Nelson*, 6 Madd. 290.

A bill for the specific performance of an agreement, was dismissed upon the lapse of time, without proceeding in the performance. *Alley v. Deschamps*, 13 Ves. jun. 225.

### CONTRIBUTION.

- I. OF SURETIES—See SURETY.
- II. RECOVERY OF—See ASSUMPSIT.

CONUSANCE—See UNIVERSITY.

CONVEYANCER—See BARRISTER.

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### COPYHOLD.

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#### VIII. OTHER THINGS.

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4. *Copyhold Qualification for Jurors*—See JURY.
5. *Wills of Copyhold*—See WILL.

#### I. NATURE OF TENURE.

##### 1. *Creation and General Incidents.*

A copyhold must have been such time out of mind, and cannot be created within the time of legal memory. *Roe d. Newman v. Newman*, 2 Wils. 125.

After a grant of the soil of wastes to trustees for the use of the copyholders in free socage, the lands when inclosed will be freehold, and not copyhold. *Revel v. Jodrell*, 2 T. R. 415.

A copyhold cannot be created by operation of law, but must have been demised or demiseable by copy time out of mind. *Id.*

Where there is no custom for that purpose, the



lord of a manor cannot make a new grant of copyhold. *Rez v. Hornechurch*, 2 R. & A. 189.

If there be a custom within the manor for a lord to grant parcels of the waste by copy of court roll, the premises granted in that mode are well described as copyhold premises, though the date of the grant be modern. *Northwick (Lord) v. Stanway*, 3 B. & P. 346; S. C. not S. P. 6 East, 56.

A grant of parcel of the waste of a manor to hold to B. and his heirs by way of increase to his copyhold, by such services as the copyhold was subject to, for which B. paid a fine of 10s. was held not to enure as copyhold, there being no custom to warrant such grant, nor as an estate in fee-simple. *Rez v. Wilby*, 2 M. & S. 504.

A lord of the manor cannot grant copyhold lands to his wife; if he does, the grant is void. *Firebrass d. Symes v. Pennant*, 2 Wils. 255.

There is no general custom for all copyholds. *Everest v. Glyn*, 6 Taunt. 425; 2 Marsh. 84; Holt, 1.

Copyhold estates are liable to especial occupancy. *Doe d. Lempriere v. Martin*, 2 W. Black. 1148. And see *Zouch d. Forse v. Forse*, 7 East, 186; 3 Smith, 191.

One may hold the prima tonsura of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. *Stammers v. Dixon*, 7 East, 200; 3 Smith, 261.

An equitable estate tail in a copyhold does not merge by the accession of the legal fee. *Merest v. James*, 6 Madd. 118.

A tenant of a manor having been originally admitted to a copyhold estate, to hold the same for the lives of H. D. the elder, and H. D. the younger, afterwards surrendered the same into the hands of the lord, and took a regrant of the same estate for the lives of J. G. and D. G. his sons, and the life of the longest liver of them successively, according to the custom of the manor, and paid a fine to the lord for his admittance, the grant describing him as sole purchaser. By the custom of the manor, when a copyhold tenement is granted by copy of court-roll to any person, to hold the same to such person for the lives of two or more other persons, and the life of the longest liver of such other persons successively, and the grantee dies during the life or lives of any one or more of such other person or persons, without having devised the copyhold tenement by his will, such one or more of such other person or persons so surviving the grantee shall be entitled, by virtue of such grant, to take and hold the copyhold tenement successively, as they are respectively named in the grant, during his or their life or lives respectively; but if the grantee devises the copyhold tenement by his will, the devisee upon his death shall hold the same during the life or lives of such other person or persons so surviving. The grantee devised his copyhold estate to his eldest son, one of the cestui que vies named in the grant, who, upon his father's death, entered into the possession of the estate:—Held, that the custom was good and valid in law, and not being inconsistent

with the grant, barred the lord's right of entry. *Doe d. Nepean v. Goddard*, 2 D. & R. 773; 1 B. & C. 522.

Under a grant by copy of court-roll of a reversionary estate to A. (who had before a life-estate in the premises) habendum to him for the lives of B. and C. his grandsons, during the life of either of them longest living, successively, accordingly to the custom, &c. reserving a heriot and 6s. rent; A. only takes the legal estate in reversion, and not the cestui que vies, there being no custom to enable them to take, although they were stated to be admitted tenants in reversion. *Right v. Bowden*, 3 East, 260.

And though, in consideration of the fine paid by the grandfather, the lord suffered the first in succession of the cestui que vies to enter as tenant upon the death of his grandfather, and received the 6s. rent from him till his death; yet he not dying seised of the legal estate, his widow could not claim her free-bench according to the custom. *Id.*

Nor did such receipt of rent from the cestui que vie constitute a tenancy from year to year, so as to entitle his widow to notice to quit, the rent not being received as between landlord and tenant, but attributable to another consideration. *Id.*

Quære, whether the surrenderee or devisee of copyhold lands can accept an enfranchisement before admittance? *Wilson v. Allen*, 1 J. & W. 611.

The heir may. *Id.*

The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent; but, in 1649, the parliamentary survey charged the churchwardens with 6d. rent, under the head of "freehold rents;" and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a freehold rent, by the steward of the manor:—Held, that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804; and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it. *Roe d. Johnson v. Ireland*, 11 East, 280.

A single admittance to copyhold is evidence to prove the custom of the manor for lands to descend to the youngest nephew. *Doe d. Mason v. Mason*, 3 Wils. 63.

Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir. *Wasser v. Maule*, 2 Russ. & Mylne, 97.

A. being seised of a copyhold in fee, surrendered it to the use of B. and his heirs, according

notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.*, and interest, for which the surrender was a security, and to pay the overplus to A.; B. was admitted, and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:—Held, that the lord did not become entitled to the tenement by reason of failure of heirs of B.; and that A. had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be readmitted as tenant in fee according to the custom of the manor:—that it was the personal representative of B., and not the lord, who was entitled to receive the mortgage debt. *Id.*

Estates of inheritance in a manor were held at the will of the lord, according to the custom of the manor, subject to fines on the death of the lord or tenant, and on alienation, and to other dues. The tenant might alien by customary bargain and sale, with the license of the lord indorsed. Courts were held twice a year, at which new tenants on death or alienation were bound to appear, and have their names entered on a roll, paying a shilling to the steward. On default made, the lord might seize quousque:—Held, that, in cases of alienation, the estates passed by the conveyance, licensed by the lord; and, where the lands descended, the heir became entitled as in case of freehold; and, consequently, that a person taking as heir was not bound, on enrolment, to receive a stamped admittance from the steward. *Doe d. Carlisle (Earl) v. Towns*, 2 B. & Adol. 585.

The generality and vagueness of descriptions of copyhold property on the court-rolls are so well known, that a vendor is not bound to show how the description on the court-roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years. *Long v. Collier*, 4 Russ. 267.

## 2. Customary Freeholds.

The customary tenements in the north of England, which are parcels of the respective manors in which they are situate, and descendible, from ancestor to heir, by the hereditary right, called tenant right, though held of the lord, according to the custom, differ much from copyhold. *Burrell v. Dudd*, 3 B. & P. 378.

The difference between copyholders and customary tenants explained. *Vaughan d. Atkins v. Atkins*, 5 Burr. 2764.

A copyhold, to which a right of common was annexed, having by the custom of the manor vested in the lord by forfeiture, and been regranted by him as a copyhold tenement with the appurtenances:—Held, that it having always continued demisable, whilst in the hands of the lord, it was a customary tenement, and, as such, was still entitled to the right of common. *Badger v. Ford*, 3 B. & A. 153.

tenant was admitted by the description of a customary tenement, to have to her and her heirs, to hold of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs, and services, is in the lord, and not in the tenant, though not holden at the will of the lord. *Doe d. Cook v. Danvers*, 7 East, 299; 3 Smith, 291.

Where a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. *Bingham v. Wadgate*, 1 Russ. & Mylne, 33.

Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. *Id.*

Where a feme sole, after marriage, was admitted tenant of a manor in the north of England, of certain premises to her and her heirs, as of her own tenant right, according to the custom; and afterwards the lord executed a conveyance of the same premises to the husband in fee, and enfranchised the same from all seigniorial rights to which they were previously liable; it seems that this conveyance, after his death, did not operate by way of grant of the estate in fee, but as an enfranchisement of the tenant-right estate; and that the wife's estate became a tenancy in fee-simple, and descended upon her heirs; and that those who derived title from them had a right to claim as heirs ex parte materna. *Doe d. Newby v. Jackson*, 2 D. & R. 514; 1 B. & C. 448.

Where, in a manor, the copies of admission were anciently "to hold of the lord according to the custom of husbandry of the said manor," but other copies were to "hold at the will of the lord" also, and all the modern copies were so:—Held, that this land was copyhold, and not customary freehold. *Bourn v. Rawlins*, 3 Smith, 405; & C. nom. *Brown v. Rawlins*, 7 East, 509.

Where the tenants of a manor, formerly belonging to a monastery, holding by border service, and the defence of Tynemouth Castle, under copy of court-roll, and whose estates passed by surrender and admittance, showed in evidence by surrenders, as far back as they existed in writings, by admissions from the 17 Eliz. to the 14 Car. I., by Exchequer decrees between the lords and tenants in the times of Eliz. and Jac. I., by an acquiescence of the jury at the court-baron of the lord in Jac. 2, that they were copyholders of inheritance, with fines certain, holding according to the custom of husbandry of the manor, (or according to the custom of the manor generally,) without stating them to hold at the will of the lord: admitting this evidence to outweigh proof of ministers' accounts in the 30 & 31 Hen. 8, a grant of the manor from the crown in 9 Car. I., including these estates under the name of tenements of husbandry, subsequent means conveyances reserving the coal mines, &c. in certain districts.

and admissions from 1663 to 1777, (including admissions of the several tenants to the estate immediately in question :) in all which they were stated to hold at the will of the lord, as well as according to the custom of husbandry of the manor, &c.; yet as there was evidence for more than a century past, that the lord had leased the coal and limestone under the copyhold lands in different parts of the manor, and had received rent for the same: and that the lessees of the lord, and not the tenants, had taken the coal and limestone:—Held, that such acts of ownership explained the nature of the tenure, according to the custom of husbandry of the manor, &c. and showed, in aid of the other evidence, that the freehold was in the lord, and not in the tenants; and, at any rate, the evidence preponderating so much in favour of the lord, the court would not disturb a verdict given for him. *Id.*

If the lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the statute of quia emptores must then hold of the superior lord. *Bradshaw v. Lawson*, 4 T. R. 443.

Where the lord of a customary manor, by his deed, made since the statute of quia emptores, granted to his customary tenant, who then held by the payment of certain customary rents, and other services, that in consideration of a sixty-one penny fine, (or sixty-one years' rent,) he, the lord, ratified and confirmed to the tenant and his heirs, all his customary and tenant-right estate, with the appurtenances, &c., and granted that the tenant and his heirs should be thereof freed, acquitted, exempted, and discharged, from the payment of all rents, fines, heriots, &c., dues, customs, services, and demands, at any time thereafter happening to become due, in respect of the tenancy; except *Id.* yearly rent, and also excepting and reserving suit of court, with the service incident thereto; and saving and reserving all royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the seignory, so as not to prejudice the immunities thereby granted to the tenant; and also granted liberty to cut timber, and to sell or lease, &c. without licence;—Held, that such confirmation to the tenant of his customary and tenant-right estate, freed, &c. from all rents and services except, &c., was tantamount to a release of those rents and services not specifically excepted; and that by virtue thereof, the customary tenement became frank-free, or held in free and common socage; and that the old customary estate, which before was not devisable, was extinguished, and became thereupon devisable by the statute of wills. Such customary estates, which are peculiar to the north of England, are not freehold, but seem to fall under the same general consideration as copyholds; alienable by bargain and sale, and admittance thereon, and not holden at the will of the lord. *Doe d. Reay v. Huntington*, 4 East, 270.

The conventional tenants within the assessable manors of the Duchy of Cornwall, have a perpetual indefeasible right to them and their

customary heirs and surrenderees, to renew their estates from seven years to seven years. *Rouse v. Brenton*, 3 M. & R. 361; 8 B. & C. 758.

### 3. Quasi Tenancy by Curtesy.

A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of England, according to the custom of the manor; though the only evidence of such custom on the rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance, by the general law of copyhold, and the title of a tenant by the curtesy being also by the operation of law. *Doe d. Milner v. Brightwen*, 10 East, 583.

And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to the settlement, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir-at-law of the wife in ejectment brought within 20 years after the husband's death. And though one-third of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted: and the steward of the manor appointed by the heir-at-law and her husband, had, in his accounts after the wife's death (which was evidence of his having done the same in her lifetime) for above 20 years back, debited himself with the receipt of two-thirds of the rent for the husband, on account of his wife, and the remaining one-third for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that one-third, distinct from his possession of the other two-thirds, as tenant by the curtesy after his wife's death, in an answer to a claim by the heir-at-law of the wife against the devisee of the husband, who set up an adverse possession for above 20 years after the wife's death. *Id.*

Nor will any release from the heir-at-law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir-at-law, who might be called upon in equity to discover it, if given; though such release if proved or presumed would bar the copyholder's claim. *Id.*

### 4. Mode of barring Entails.

A custom to bar the entails of copyhold land either by recovery suffered, or by surrender in



surrender, may subeist, concurrently with a custom to bar by a recovery in the lord's court, though the instances are much less frequent. *Doe d. Wightwick v. Truby*, 2 W. Black. 944.

Where, therefore, it was left to the jury to say whether the custom was to bar by recovery or surrender, without stating to them that such customs might be concurrent and consistent with one another, the court granted a new trial. *Doe d. Walkhead v. Ossingbrooke*, 9 Moore, 68; 2 Bing. 70.

Slight evidence suffices to prove a custom to bar by recovery, because it is adverse to the interest of those who make the evidence. *Doe d. Dauncey v. Dauncey*, 7 Taunt. 674.

A single instance of a surrender in fee by tenant in special tail of a copyhold estate, is evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor has not been dead 20 years, and though one instance be proved of a recovery suffered by tenant in tail to bar the entail. *Roe d. Bennett v. Jeffery*, 2 M. & S. 92.

An attorney may be appointed for the purpose of suffering a recovery of copyhold lands, unless there be an express custom to the contrary. *Wymer v. Page*, 1 Stark. 9—Ellenborough.

## II. SURRENDER AND ADMISSION.

### 1. Construction.

By 9 Geo. 1, c. 29, femes covert and infants may be admitted to copyhold estates by attorney or guardian.

By 1 Will. 4, c. 65, s. 3, infants, femes covert, and lunatics may be admitted by their guardian, committee, or attorney.

By s. 4, infants and femes covert may for that purpose appoint attorneys.

In order to effectuate the intention of the parties, the court will construe the word "or" to mean "and," as well in a surrender of copyhold premises as in a will. *Wright v. Kemp*, 3 T. R. 470.

John Lealand surrendered a copyhold in his occupation to the use of Joseph Lealand and John Lealand his son, for their lives and the life of the survivor; remainder to the heirs of the body of the said John Lealand, son of Joseph L.; remainder to the right heirs of the said John Lealand:—Held, that the ultimate remainder was meant for the right heirs of John the surrenderor, as well because John the surrenderee is before described with the addition of the son of Joseph, as of the manifest futility of giving John the surrenderee an estate tail, and afterwards a fee in succession. Though, if the construction had been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe d. Hacknall v. Foster*, 9 East, 405.

A copyholder surrenders "his copyhold cot-

own possession"; and on the same day he advises "all his copyhold cottage and premises then in his own possession." In fact the croft, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time; yet held, that the whole passed under the description of "all this copyhold cottage and premises;" the words, "then in his own possession," being merely a mistaken description, following the mistake of the surrender, which mentions the croft with the rest as then being in his possession. *Goodright d. Lamb v. Peare*, 11 East. 58.

Ancient admissions of the copyholder and those under whom he claims the land, by the description of *tres acras patri*, may be construed only to carry the *prima tonsura*, if, in fact, they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains, though the copyholder may have paid all the rates and taxes, which was in his own wrong. *Stammers v. Dism*, 7 East, 200; 3 Smith, 261.

Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in general terms, there the addition of a particular circumstance will operate by way of restriction and modification of such grant; therefore, where one having customary tenements, compounded and uncompounded, surrendered to the use of his will "all and singular the lands, tenements, &c., whatsoever, in the manor which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of 4l. 10s. 8½d., and compounded for:—Held, that the words and "compounded for," restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words, "being of the yearly rent, &c., of 4l. 10s. 8½d.," which were not referable to any actual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction. *Roe d. Conolly v. Vernon*, 5 East, 51; 1 Smith, 318.

### 2. Operation.

*Relation of Time.*—The title to copyhold lands relates back from the time of the admittance to the surrender, as against all persons but the lord, so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. *Holdfast d. Woodlans v. Clapham*, 1 T. R. 600; 4 Burr. 1952.

An admittance of the surrenderee before trial, will maintain ejectment brought by him before admittance, upon a demise laid between the time

of surrender and admittance. *Doe d. Bennington v. Hall*, 16 East, 208.

The devise of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment; for his admittance has no relation to the last legal surrender, but the legal title remains in the heir of the surrenderor. *Doe d. Vernon v. Vernon*, 7 East, 8; 3 Smith, 6.

A., a copyholder for life, remainder to B., surrenders his own and B.'s estate (over which latter he had no control, and by which he let in B.'s remainder,) and takes a new copy for the lives of himself, C. and B. successive; and on A.'s death, after 20 years had run against B., B. enters on the possession then vacant:—Held, that as against C., who had no possession and no title, B. might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by A. might have barred B.'s possessory right as against him; or might have disabled, B., if he had continued out of possession, from recovering in ejectment. *Doe d. Burrough v. Reade*, 8 East, 353.

One who was admitted tenant, upon a claim as administrator de bonis non to the grantee of a copyhold *pur autre vie*, having no title in such character, cannot recover in ejectment by virtue of such admission, as upon a new and substantive grant of the lord. *Zouche d. Forre v. Forre*, 7 East, 186; 3 Smith, 191.

**What Estate.**—Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe d. Blacksell v. Tomkins*, 11 East, 185. And see *Doe d. Lushington v. Landaff*, 2 N. R. 491.

A surrender of copyhold lands to the use of a will only operates on the estate which the surrenderor has at the time of the surrender. *Doe d. Ibbott v. Couling*, 6 T. R. 63.

And therefore if a copyholder, having an estate *pur autre vie*, surrender all his estate in possession, remainder or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will, the fee will not pass by it. *Id.*

The testator being tenant of copyhold premises, at Crondall, under four several admissions to the use of himself for life and of such person as he should appoint, and in default of appointment, to the use of himself in fee, subject to certain quit-rents, and being seised and possessed of other real estates in Great Britain and Ireland, and of a leasehold estate held under two leases at Blansby, devised his whole real estate in lands, in Great Britain or Ireland, to his wife for life, and after her death to be divided between his two nephews, and their respective issue, and in default of such issue, to be divided between the children of his nieces, &c.; and by a codicil, reciting that he had ordered all his estates in Great Britain and Ireland, after the decease of his ne-

phews without issue, to be divided, &c., he revoked the same; and before that division devised his whole real estate to B. and his heirs male, &c., and devised his two leases with the quit-rents of his lands in Crondall and in Blansby to B., after his wife's decease:—Held, that B. after the wife's death, took a fee in the copyhold premises. *Cuthbert v. Lempriere*, 3 M. & S. 159.

A copyhold was surrendered to the use of husband and wife for their lives, and the life of the longer liver of them, and, from and after the decease of the survivor, to the right heirs of the survivor for ever:—Held, that the husband and wife took a vested estate for their joint lives, as well as for the life of the survivor, with a contingent remainder in fee to such survivor. *Doe d. Dummer v. Wilson*, 4 B. & A. 303.

A surrender of a copyhold "to husband and wife, and the survivor, and after the death of the survivor, to the right heirs of both," vests an immediate fee-simple in the husband and wife by entireties, and the husband cannot alien or devise any part of it, but on his death the whole survives to his wife. *Green d. Crue v. King*, 2 W. Black. 1211.

If the heir apparent of a copyholder in fee surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderor is not estopped by that surrender of his ancestor from claiming against the surrenderee. *Goodtitle d. Faulkner v. Morse*, 3 T. R. 365.

Quere, whether in the case of a freehold estate, if the heir had made a feoffment under such circumstances, his heir would not be estopped? *Id.*

One seised in fee of a copyhold of inheritance by descent *ex parte maternâ* surrendered the same to the use of himself for life, remainder to such persons and for such estates as he should by deed or will, attested by three witnesses, appoint, remainder in default of appointment to himself in fee; after which he made a mortgage, and surrendered to the use of the mortgagee in fee, who, upon repayment of the principal and interest, surrendered again to the mortgagor:—Held, that the line of descent was thereby broken, and that the estate descended to the paternal heir. *Doe d. Harman v. Morgan*, 7 T. R. 103.

A dormant surrender operates as a severance of a joint tenancy, though it is revocable during the lifetime of the surrenderor. *Gale v. Gale*, 2 Cox, 136.

### 3. Mode of Surrender.

A person claiming to be admitted as heir to a copyhold, need not tender himself to be admitted at the lord's court, if the steward, upon application to him out of court, has refused to admit him. *Doe d. Burrell v. Bellamy*, 2 M. & S. 87.

A feme covert who surrenders copyhold lands, ought previously to be examined separately from her husband by the steward of the manor. *Driver d. Berry v. Thompson*, 4 Taunt. 294.

But by special custom she may be separately examined before two customary tenants. *Id.*

A custom for a feme covert to surrender her copyhold lands, without the assent of her husband, is bad. *Stevens d. Wise v. Tyrrell*, 2 Wils. 1.

A feme covert, entitled to a copyhold, surrendered it after secret examination by the steward, to the use of her husband with his assent, testified by his immediate admittance:—Held, that this surrender was valid. *Scamon v. Maw*, 3 Bing. 378; 11 Moore, 243.

Semble, that a custom to surrender for enrolment at a subsequent court, within an indefinite time, is an unreasonable custom. *Doe d. Priestly v. Calloway*, 9 D. & R. 518; 6 B. & C. 493.

#### 4. To the Use of Will.

A copyholder has a right to surrender to the use of his will, though there is no instance of it upon the records of the manor. *Church v. Mundy*, 15 Ves. jun. 403.

A custom in a manor that copyholds shall not be surrendered to the use of a will, is bad. *Pike v. White*, 3 Bro. C. C. 286.

A copyholder in fee having surrendered to the use of his will, and afterwards surrendering to new particular uses, with reversion to himself in fee, is in by the old use, and may devise the reversion, without any admittance, or fresh surrender to the use of his will. *Thrustout d. Gower v. Cunningham*, 2 W. Black. 1046.

Where a copyhold surrendered to the use of a will was devised to six persons, of whom one offered to be admitted, but the lord refused to admit him:—Held, that the lord ought to have admitted him, and could not seize quousque, &c. *Roe d. Ashton v. Hutton*, 2 Wils. 162.

The statute 55 Geo. 3, c. 192, which was passed "to remove certain difficulties in the disposition of copyhold estates by will," extends only to supply surrenders in form, but not surrenders in substance: therefore, where a feme covert omitted to surrender to the use of her will:—Held, that the case was not within that statute. *Doe d. Nethercote v. Barile*, 1 D. & R. 81; 5 B. & A. 492.

If a copyhold be surrendered to such uses as a feme covert shall by will or codicil appoint, a paper, purporting to be a will, though made by her living with her husband, is a good execution. *Driver d. Berry v. Thompson*, 4 Taunt. 294.

Since the statute 55 Geo. 3, c. 192, a copyhold estate will pass under a general devise of all the testator's real estate, although there was no previous surrender to the use of his will. *Doe d. Clarke v. Ludlam*, 5 M. & P. 48; 7 Bing. 275.

A dormant surrender of a copyhold, (that is, a surrender to A. on condition to perform the will of the surrenderor,) will vest an estate in the dormant surrenderer, sufficient to support the contingent remainders of the surrenderor's will, without the interposition of trustees for the purpose. *Gale v. Gale*, 2 Cox, 136.

#### 5. Necessity of Admittance.

A mandamus to the lord to admit to a copy-

hold does not lie. *Williams v. Lonsdale (Lord)*, 3 Ves. jun. 754.

A mandamus to the steward of a manor to admit a copyholder claiming by descent, refused, on the ground of descent giving a complete title without admittance. *Rez v. Rennett*, 2 T. R. 158.

Where a copyholder surrendered to the use of his will, and thereby ordered two persons to sell and apply the money for the purposes in the will:—Held, that they might sell without being admitted; and that the lord was bound to admit the vendee, upon the payment of only one fine. *Holder d. Sulyard v. Preston*, 2 Wils. 400.

A surrender out of court to the use of his will, made by the surrenderer of a copyhold before his admittance, is absolutely void and of no effect, and cannot be made good by his subsequent admittance. *Doe d. Topheld v. Topheld*, 11 East, 246.

Till admittance of the surrenderee of a copyhold upon mortgage, the surrenderor continues the legal tenant, and he cannot devise the equity of redemption, even after the surrender made, without a new surrender to the use of his will; but the legal estate, which, on his death, descends to his heir-at-law, will carry the equity of redemption also to the heir in respect to the mortgage. *Doe d. Sheven v. Wrood*, 5 East, 132; 1 Smith, 363; *S. P. Kenebel v. Scrofton*, 8 Ves. jun. 30; *Floyd v. Aldridge*, 5 East, 137, n.

The devise of a copyhold estate has no title until admittance, and such a right cannot be forfeited to the lord, but will continue in the heirs of the surrenderor. — *d. Jefferies v. —*, 1 Ld. Ken. 110.

Where the lord of a manor, by copy of court roll, granted to A. the reversion of certain premises then in his tenure, to have and to hold to B. for his life, immediately after the death of A.:—Held, that B. might, on the death of A., maintain an ejectment, although he had never been admitted, he having acquired a perfect legal title by the grant, without admittance. *Roe d. Cook v. Loveless*, 2 B. & A. 453.

If a copyhold be granted for a term of years, the executor of the termor is obliged to be admitted, and the lord is entitled to a fine upon such admittance. *Bath (Earl) v. Abney*, 1 Burr. 286; 1 Ld. Ken. 471.

A copyhold may be disclaimed by parol, or by other matters without deed. *Rez v. Wilson*, 5 M. & R. 140; 10 B. & C. 80.

In the case of a devise of copyhold surrendered to the use of the will, the estate descends upon the heir, subject to the contingency of being devised by the admittance of the devisee. *Id.*

No disclaimer by the devisee, therefore, is necessary to vest the estate in the heir. *Id.*

A surrender of chambers in New Inn, to the treasurer and ancients of the society, made with their assent, to the intent that they might grant the said chambers to a purchaser, passes the estate to such purchaser, before admission; admission is not necessary, as in the case of copyholds, to complete the grantee's estate, but is only

for the purpose of signifying the assent of the society that the grantee should become a member of the Inn. *Doe d. Warry v. Miller*, 1 T. R. 393.

The admittance of the particular tenant of a copyhold is an admittance of the remainderman. *Church v. Mundy*, 12 Ves. jun. 422.

Where a person claiming as heir-at-law, of the tenant last seised of a copyhold, was refused admission by the lord, and a mandamus issued, but the lord in his return thereto did not deny the heirship, except argumentatively, the court ordered a peremptory mandamus. *Rez v. Brewers' Company*, 4 D. & R. 492; 3 B. & C. 172.

A mandamus lies against a steward of a manor for not admitting a devisee, under the pretence that the testator was insane. *Anon. Loft*, 390.

The admittance to a copyhold enures according to the title, though not correctly expressed. *Church v. Mundy*, 12 Ves. jun. 422.

### 6. Proof.

A surrender of, and admittance to a copyhold may be proved by the original entries on the court-rolls, without showing a copy stamped, as required by stat. 48 Geo. 3, c. 149. *Doe d. Benington v. Hall*, 16 East, 208.

Where a surrender of copyhold lands is made out of court by a deed of surrender, the copy of court-roll is still evidence of the surrender, although the act of 48 Geo. 3, c. 149, requires that in such cases the deed of surrender, or a memorandum thereof, shall be stamped, and not the copy of the court-roll, as in all other cases. *Doe d. Hawthorn v. Mee*, 1 Nev. & M. 424.

A draft of the entry on the court-rolls of the surrender and presentment of a copyhold, is good evidence of the surrender and presentment, though it appears that the entry was never made on the rolls. *Doe d. Priestley v. Calloway*, 6 B. & C. 484; 9 D. & R. 518.

Parol evidence of holding a manor court, and the proceedings at it, is admissible. *Id.*

After long enjoyment under an admittance to a copyhold, semble, that a previous surrender (not entered on the rolls) may be presumed. *Wilson v. Allen*, 1 J. & W. 611.

### III. FINES.

Tenants in coparcenery of a copyhold estate are in law but one heir; and it seems that they are entitled to admittance upon the payment of one fine to the lord. *Rez v. Bonsall*, 4 D. & R. 825; 3 B. & C. 173.

Therefore a mandamus was granted to admit coparceners on payment of one set of fees. *Id.*

One fine cannot be assessed on the admission to several copyhold tenements. *Grant v. Astle*, 2 Dougl. 722.

A mandamus lies to the lord and steward of a manor, to admit one to a copyhold tenement who has a *prima facie* legal title, in order to enable him to try his right; though equity had before refused to compel the lord to admit him for want

of his showing an equitable right to the property. But if there be a claim of a previous fine due to the lord in respect of the ancestor from whom the party claims, the rule will only be granted on payment of such fine or fines as shall be due. *Rez v. Coggan*, 6 East, 431; 2 Smith, 417.

A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance. *Graham v. Sime*, 1 East, 632.

A covenant made by a copyholder with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homage, does not give the lord any right to a fine. *Rez v. Hendon*, 2 T. R. 484. *And see Garland v. Jekyll*, 2 Bing. 273; 9 Moore, 502.

A., a copyholder, covenants to assign and surrender to B., which covenant is presented by the homage, but before any surrender, B. assigns his interests to C., to whom A. surrenders; C. has a right to be admitted, on payment of a fine for his own admittance only. *Id.*

If the lord of a manor refuse to admit a person to whom a copyhold is surrendered, on account of a disagreement respecting the fine to be paid, the court will grant a mandamus to compel the lord to admit, without examining the right to the fine; for no right to the fine can arise till admittance. *Id.*

Where a copyholder in fee, who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over; on which surrender and re-admittance no new fine was paid, and by the custom a remainderman coming into possession on the death of tenant for life, must be admitted and pay a fine:—Held, that such a custom is good. *Doe d. Whitbread v. Jenney*, 5 East, 522; 2 Smith, 116.

A custom to renew copyholds for lives can only be on payment of certain fines. *Wharton v. King*, 3 Anst. 659; *S. P. Abergavenny (Lord) v. Thomas*, 3 Anst. 668, n.

The lord of a manor having taken a full fine on the admittance of a tenant for life, is not entitled to another full fine upon the admittance of the remainderman as tenant in fee, unless the imposition of such latter fine is authorized by a special custom of the manor. *Ely (Dean) v. Caldecott*, 1 M. & Scott, 633; 8 Bing. 439.

The lord admitting a tenant for life may apportion the fine, but cannot remit it to the tenant for life, and charge the whole upon the remainderman. *Kensington (Lord) v. Mansell*, 13 Ves. jun. 246.

The admission of a tenant for life to a copyhold, is the admission of all in the remainder, and the lord may assess the whole fine. *Id.*

The lord of a manor is bound to admit the customary heir of a copyholder in fee, although there be a surrender to the use of the will, and a

devise by the surrenderor, there being no claim of admittance on the part of the devisee. *Rez v. Wilson*, 5 M. & R. 140; 10 B. & C. 80.

So, although it appear (upon the return to a mandamus) that the non-claim of admittance on the part of the devisee, is the result of a contrivance between him and the customary heir, to deprive the lord of the fine which would be payable upon the admittance of the devisee. *Id.*

Where by the custom of a manor, persons not being previously customary tenants, or not dwelling in the manor, purchasing by surrender customary lands within the manor, were liable to pay a larger fine to the lord than tenants or inhabitants; and a person not being a tenant or inhabitant, had purchased the equity of redemption in a customary estate, and in order to save the larger fine due in respect thereof, had subsequently become the purchaser of a smaller estate; the court granted a mandamus to the lord and steward to admit him to the latter; and as the return thereto did not allege any act of fraud in the transaction, the mandamus was made peremptory, although the effect of admittance to the smaller estate would be to defeat the lord's claim to the fine due upon the larger estate first purchased. *Rez v. Meer and Forton*, 2 D. & R. 824; S. C. nom. *Rez v. Boughey*, 1 B. & C. 565.

Indebitatus assumpsit lies for copyhold tolls and fines. *Whitefield v. Hunt*, 2 Dougl. 727.

The declaration may state generally, that the defendant was indebted to the plaintiff in such a sum, (viz. the amount of the fines, &c.) for reasonable fines due and payable to him. *Id.*

If an assessment of a copyhold fine be entered in the court-rolls, as of 100*l.*, but that out of especial favour the lord remitted 40*l.*, and thereby reduced it to 60*l.*, and the lord sued for the fine, and the jury finding the annual value of the premises 30*l.*, gave a verdict for 60*l.*, the lord cannot retain the verdict for the sum actually due, but must make a new assessment; the old assessment, notwithstanding the remitter, being in law an assessment as of 100*l.* *Northwick (Lord) v. Stanway*, 3 B. & P. 346; 6 East, 56.

The lord may recover from a copyholder the fine assessed, by him on admittance, not exceeding two years' value of the tenement, although there be no entry of the assessment of such fine on the court-rolls, but only a demand of such a sum for a fine after the value of the tenement had been found by the homage. *Id.*

The lord of a manor can never be entitled to more than two years' intrinsic value of the estate, as a fine upon admission; therefore a custom to take 10 per cent. on the purchase money, be it of ever so long continuance, cannot bind. *Leake v. Pigot (Lord)*, 1 Selw. N. P. 87—Yates.

And assumpsit will lie to recover back the overplus above the two years' value, if it was paid upon compulsion. *Id.*

The rent reserved in a lease of copyhold premises, is not conclusive as to the amount of a fine payable to the lord, for the tenant may show that the actual value of the premises demised is less

than the rent reserved; and the fine must be estimated according to the improved value. *Verulam (Earl) v. Howard*, 5 M. & P. 148; 1 Bing. 327.

A copyhold estate was vested in fourteen trustees, and by a decree of the court of Chancery, made in a suit to which the lord of the manor, and the trustees for the time were parties, it was ordered, that when at any time the number of the trustees should be reduced to five, the lord should, with the approbation of the master in Chancery, nominate nine others to be added to the five, to whose use a new surrender should be made, and that the lord should admit them on paying a reasonable fine. The annual value of the estate was 1000*l.*:—Held, that 565*l.* 1*9s.* was an unreasonable fine, on the admission of fourteen trustees; and that the proper mode of assessing the fine was to take, for the first life, two years' improved value; for the second life, one half of the sum taken for the first; and for the third life, one half of the sum taken for the second; and so on. *Wilson v. Hoare*, 2 B. & Adol. 350.

#### IV. HERIOTS, SERVICES, AND QUIT-RENTS.

Where a copyhold estate, in the possession of one owner, paid but one heriot, but several, if divided among several owners; if it afterwards becomes united in the person of a single owner, one heriot only is payable. *Garland v. Jekyll*, 1 Bing. 273; 9 Moore, 502.

It had been before held, that devisees of a copyhold, holding as tenants in common, had several estates to which they must be severally admitted, and for which several services were due to the lord, and several heriots on the death of each tenant, and the multiplication of heriots and fees on admission still continued, notwithstanding the reunion of the same land afterwards in one person; the estates or interests in the land, once divided into severality, continuing several. *Attree v. Scutt*, 6 East, 476; 1 Smith, 449.

Where a copyhold tenement holden by joint custom becomes the property of several as tenants in common, the lord is entitled to a heriot from each of them; but if the several portions are reunited in one person, one heriot only is payable. *Holloway v. Berkeley*, 6 B. & C. 2; 3 D. & R. 83.

It seems that a custom for the homage to assess a compensation in lieu of a heriot, to be paid by an incoming copyholder on surrender or alienation, is not good. *Parkin v. Redcliff*, 1 B. & P. 262.

Evidence that the homage have been accustomed to assess a certain sum of money "as a heriot" upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for "a heriot in kind" upon alienation. *Id.*

Where a plea of justification in trespass for taking two horses, as heriots, stated a custom in the manor, that the lord from time immemorial

until the division of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised: and since the division the lord had taken and been accustomed to take, on the death of every tenant dying seised of either of the moieties, a heriot for each moiety; this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division of it; and being laid to be an immemorial custom, it is disproved by evidence that the division was made within memory. *Kingmill v. Bull*, 9 East, 185.

Where the lord of a manor justified under a custom to have the best beast on the tenant's death, and the custom proved was, that the lord should have the best beast or good:—Held, that the variance was fatal. *Adderley v. Hart*, 1 B. & P. 394, n.

Where a custom to take heriots was set out as a general one, and on evidence given it appeared that there was an exception of mesne seignories and manor lands holden in ancient buruage:—Held, a fatal variance. *Aron. Loftt*, 523.

Payment of an unvaried rent for a long series of years to the lord of a manor is evidence of a title to the rent only, and not to the land in respect of which the rent is paid. *Doe d. Whittick v. Johnson*, Gow, 173—Holroyd.

The presumption is, that the rent is a quit-rent. *Id.*

Mere length of time short of the period fixed by the statute of limitations, and unaccompanied with any circumstances, is not of itself a sufficient ground to presume a release, or extinguishment of a quit-rent. *Eldridge v. Knott*, Cowp. 214.

#### V. LEASES OF COPYHOLDS.

A copyholder demised for one year, and from thence from year to year for the term of thirteen years more, if the lord would license, and so as the same should not be liable to forfeiture:—Held, that the license of the lord, &c. was a condition precedent to the lease of the further term of thirteen years; and the lord having given notice that he would not give such license, the assignee of the lessor, to whom the premises were surrendered, was holden entitled to recover in ejectment against the tenant after six months' notice to quit; although it appeared that such surrenderee was a trustee for the lord (the real purchaser,) who had notice of the terms of the demise when he purchased, with an exception in the contract of purchase of all subsisting leases, and afterwards accepted of quit-rent from the tenant, the consideration of these latter circumstances belonging to a court of equity. *Doe d. Nunn v. Lufkin*, 4 East, 221; 1 Smith, 90. *And see Lufkin v. Nunn*, 1 N. R. 168.

A lease for years by a copyholder, with the license of the lord, where the widow, by custom, would be entitled to her free-bench, if the copyholder had died seised, defeats the widow of her

free-bench. *Salisbury d. Cooke v. Hard*, Cowp. 481.

#### VI. FORFEITURE.

A lord of a manor cannot seize a copyhold estate, as forfeited pro defectu tenentis, without a custom: therefore, where, on the death of a copyholder of inheritance, the lord, after three proclamations for the heir to come in and be admitted, seized the estate into his hands, and afterwards granted it in fee to another, the court considered it as an absolute seizure, and consequently irregular, there being no custom to warrant it: and being irregular as an absolute seizure, it could not afterwards be set up by the lord as a seizure quousque. *Doe d. Tarrant v. Hellier*, 3 T. R. 162.

If one of several co-heirs of a copyholder be a feme covert at the time of the ancestor's death, and the lord seize the whole estate (in default of the heir's not coming in to be admitted after three proclamations,) without first appointing an attorney or guardian for the feme covert, according to the requisites of the 9 G. 1, c. 29, a seizure of the whole estate is irregular, though it be not known to the lord that one of the heirs is a feme covert. *Id.*

A forfeiture by a copyholder's levying a fine may be waived by the lord. *Id.*

A forfeiture of a copyhold estate can only be taken advantage of by him who is lord at the time of the forfeiture, except in those cases where the act of forfeiture destroys the estate. *Id.*

Quære, whether the lord's right of entry for a forfeiture is not barred after twenty years by the statute of limitations? *Id.*

The lord may seize copyhold land quousque, in virtue of a right which accrued to the preceding lord, on default of the heir's coming in to be admitted; and that although he be the devisee, and not the heir of the preceding lord: but to entitle the lord to make such seizure, there must be three proclamations made, at three consecutive courts. *Doe d. Bover v. Truman*, 1 B. & Adol. 736.

The lord may enter for wastes committed by a copyholder for life, though there be an intermediate estate in remainder between the estate of copyholder for life and the lord's reversion. *Doe d. Folkes v. Clements*, 2 M. & S. 68.

There cannot be a forfeiture of copyhold by a conviction of felony before attainder, unless there be a special custom in the manor to the contrary. *Rex v. Willes*, 3 B. & A. 510.

Where there is a remainder to the use of one who is convicted of felony and hanged before admittance, the lands are not forfeited to the lord, but descend to the heir of the surrenderor. *Rex d. Jefferys v. Hicks*, 2 Wils. 13.

Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards securing the copyhold:—Held, that, at the expiration of the two years, the copy-

estate would not vest in the lord without any act done by him. *Doe d. Evans v. Evans*, 5 B. & C. 584; 8 D. & R. 399.

A copyholder who has been admitted to a tenement, and done fealty to the lord of the manor, is estopped, in an action by the latter for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Doe d. Nepean v. Budden*, 1 D. & R. 243; 5 B. & A. 626.

A lord of a manor is entitled to an injunction and account in respect to waste committed by a copyholder. *Richards v. Noble*, 3 Mer. 673.

## VII. STEWARD.

### 1. Fees and Duty.

Where a person is admitted to several distinct copyhold tenements, the steward of the manor is not entitled, as a matter of general right, to the full fees on each admission separately; and therefore, where no custom prevails in the manor to that effect, he must stand on his quantum meruit. *Everest v. Glyn*, 2 Marsh. 84; 6 Taunt. 425; Holt, 1.

The question whether the steward of a manor is entitled to receive a separate fee on the admission of a party to distinct tenements, is a mere matter of usage or custom within the manor, and must be governed by it. *Searle v. Marsh*, 1 Marsh. 86, n.

Seemingly, that co-parceners are entitled to be admitted to copyhold tenements as one heir, and upon the payment of one set of fees. *Rex v. Bonsall*, 4 D. & R. 825; 3 B. & C. 173.

It is a good custom in a manor that the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor. *Rex v. Rigge*, 2 B. & A. 550.

In an action for an amercement in a court-leet, if the declaration state the court to have been holden before the "steward" of the manor, and the evidence proves it to have been holden before the "deputy steward," it is a material variance. *Wyeill v. Shepherd*, 1 H. Black. 162.

So, where the declaration stated that the defendant was summoned to serve on the jury of the court-leet and court-baron, but the summons was to serve on the jury of the court-leet only. *Gery v. Wheatly*, 1 H. Black. 163, n.

## COPYRIGHT.

### I. Books.

1. *Statutory Enactments*, 634.
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3. *Entry at Stationers' Hall*, 636.
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5. *Rights of Author and Publisher*, 637.
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### I. Books.

#### 1. Statutory Enactments.

The 8 Anne, c. 19, s. 1, gave a copyright in books then printed for twenty-one years, and gave to authors and their assignees the exclusive copyright four fourteen years.

And by s. 9, after the expiration of the fourteen years, another similar period, if the author was living. This act was extended to the United Kingdom by 41 Geo. 3, c. 107.

By 54 Geo. 3, c. 156, s. 4, authors and their assignees have the exclusive copyright for twenty-eight years from the day of publication; and if the authors be living at the end of that time, for the residue of their lives. And see *Anon.* 1 Ch. 24.

Ss. 8 & 9 give the same extension of copyright to the authors of books published at the time of the passing of the act.

The property of an author in an unpublished work exists independently of the statute. *Saunders v. Sherwood*, 2 Mer. 435; *S. P. Tomson v. Collins*, 1 W. Black. 301.

Authors have not, by common law, the sole and exclusive copyright in themselves, or their assigns, in perpetuity, after having printed and published their compositions; but by statute it is secured to them for fourteen years, from the day of publishing: and after that term the right returns to them (if living) for another term of fourteen years. *Miller v. Taylor*, 4 Burr. 2262.

An author whose works had been published more than twenty-eight years before the passing of that statute, is not entitled to the copyright for life. *Brooke v. Clarke*, 1 B. & A. 396.

That statute does not impose upon authors, as a condition precedent to their deriving any benefit under it, that the composition should be first printed; and therefore an author does not lose his copy-right by selling his work in manuscript before it is printed. *White v. Gericke*, 2 B. & A. 298; 1 Chit. 24.

The statute of Anne was held not to extend either to the Universities of Oxford or Cambridge, or to the Colleges of Eton, Westminster, or Winchester, who have a perpetuity in all copies belonging to them. *Donaldson v. Becket* (in error,) 2 Bro. P. C. 129.

Quære, whether the patents granted to the king's printer vest the copyright, or are merely authorities? *Oxford and Cambridge Universities v. Richardson*, 6 Ves. jun. 713.

Upon a bill brought by the king's printer to restrain the defendant from the publication of certain acts of parliament, &c., to which the patentees for printing law books were also defendants, the court refused to interfere between the

contending patents, and therefore only restrained the defendant from printing at any other than a patent press. *Baskett v. Cunningham*, 2 Eden, 173.

## 2. What may be the Subject of Copyright.

**Generally.**—Copyright may be either in respect of the matter or the arrangement, but no property can be acquired in any article copied from a prior work. *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

Where a person simply makes corrections and additions to a work in which he had originally no interest, he acquires a copyright in them, and may bring an action if they are pirated. *Cary v. Longman*, 1 East, 358; 3 Esp. 273.

The plaintiff published a book of roads of Great Britain, comprising Patterson's book (to the copyright of which he was not entitled,) with improvements and additions, obtained by actual survey and otherwise; an injunction to restrain a publication of an edition of Patterson, comprising the plaintiff's improvements and additions, was refused. *Cary v. Fadin*, 5 Ves. jun. 24.

An injunction was granted till hearing, to restrain the publication of Milton's poems, with Doctor Newton's notes, notwithstanding a small addition of original commentary. *Tonson v. Walker*, 3 Swans. 672.

There may be a copyright in a translation, whether produced by personal application and expense, or by gift; and it will be protected by injunction. *Wyatt v. Barnard*, 3 Ves. & B. 77.

The court will interfere to protect copyright from piracy, at the suit of plaintiffs who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete. *Mawman v. Tegg*, 2 Russ. 365.

**Public and general Works.**—There is no copyright in a general subject, though from its nature the consequence may be close resemblance and considerable interference, as in the case of maps and road-books. *Wilkins v. Aikin*, 17 Ves. jun. 427.

Though copyright cannot, as such, subsist, in an East India calendar, as a general subject, any more than in a map, chart, or series of chronology, it may in the individual work: and where it can be traced that another work upon the same subject is not an original compilation, but a mere copy with colourable variations, it will be protected by injunction, which in some instances will be continued until the hearing, without a trial at law. *Matthewson v. Stockdale*, 12 Ves. jun. 270.

An injunction was granted against pirating a court calendar, the individual work creating a copyright, though the general subject was common. *Longman v. Winchester*, 16 Ves. jun. 269.

There is no copyright in specifications of patents. *Wyatt v. Barnard*, 3 Ves. & B. 77. *But see Newton v. Cowie*, 12 Moore, 457; 4 Bing. 234.

A voyage of discovery having been executed, and a narrative of it prepared under the orders of

the Crown, the narrative is the property of the Crown; but on a bill by a publisher, authorized by the secretary of the Board of Admiralty to publish such a narrative, the profits remaining at their disposition, an injunction restraining publication by a stranger was dissolved. *Nicol v. Stockdale*, 3 Swans. 687.

Seemingly, that it is illegal to publish part of a depending cause. *Deacon v. Deacon*, 2 Russ. 607.

**Letters.**—A copyright in private letters remains in the writer after transmission, and it will be protected by injunction against the publication. *Perceval (Lord) v. Phipps*, 2 Ves. & B. 19.

Letters written by the plaintiff to the defendant, having been returned by him, with a declaration that he did not consider himself entitled to retain them, the publication of copies taken before the return, without the knowledge of the plaintiff, was restrained by injunction, though represented by the defendant as necessary for the vindication of his character. The jurisdiction to restrain the publication of letters is founded on a right of property in the writer. *Gee v. Pritchard*, 2 Swans. 402.

An injunction was granted to restrain the executor of the person to whom private letters were written from publishing them, without leave of the executors of the person who wrote them. *Thompson v. Stanhope*, Amb. 737.

**Music.**—A musical composition is a work within the statute of Anne, which vested the copyright of printed books in the authors or their assignees, during the times therein mentioned. *Bach v. Longman*, Cowp. 623; S. P. 1 Chit. 26; *Platt v. Buiton*, 19 Ves. jun. 447; Coop. C. C. 303.

Though published on a single sheet of paper. *Clementi v. Goulding*, 11 East, 244; 2 Camp. 25; S. P. *Storace v. Longman*, and *Hime v. Dale*, 11 East, 244, n; 2 Camp. 27, n.

In declaration for pirating a book, an allegation that plaintiff was the author of a book, being a musical composition called A., is well supported by showing him to be the author of a musical composition of that name, comprised in, and occupying only one page of a work with a different title, which contained several other musical compositions. *White v. Geroch*, 2 B. & A. 298; 1 Chit. 24.

**Continuations of Works.**—An injunction was granted to restrain the publication of a magazine as a continuation of the plaintiff's magazine, in numbers, and as to communications from correspondents received by the defendant while publishing for the plaintiff, not preventing the publication of an original work of the same nature, and under a similar title. *Hogg v. Kirby*, 8 Ves. jun. 215.

An author having sold the copyright of a work published under his own name, and covenanted with the purchaser not to publish any other work



published by him from the same author, and published under his name, on the same subject but under a different title, and though there be no piracy of the first work. *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

**Contrary to Morality and Religion.**—The author or publisher of a work of a libellous or immoral tendency can have no legal property in it. *Stockdale v. Onwhyn*, 7 D. & R. 625; 5 B. & C. 173; 2 C. & P. 163.

No action can be maintained for pirating a work which professes to be the amours of a courtesan, and it is no answer to the objection that the defendant is also a wrong-doer in publishing them, and that he therefore ought not to set up their immorality. *Id.*

An injunction to restrain the infringement of copyright in a work, as to which it appeared doubtful whether it did not tend to impugn the doctrines of the scriptures, refused. *Lawrence v. Smith*, Jacob, 471.

The court of Chancery will not act, either by giving an injunction or an account, even upon a submission in an answer, upon a publication of such a nature, that an action could not be maintained. *Walcot v. Walker*, 7 Ves. jun. 1.

The court will not interfere by injunction, upon the author's application, to restrain the publication of a work which is of such a nature as that an action could not be maintained upon it for damages. *Southey v. Sherwood*, 2 Mer. 435.

**Foreign Publications.**—The court will not protect a foreigner's copyright. *Delondre v. Shaw*, 2 Sim. 237.

The privileges conferred by the stat. 54 Geo. 3, c. 150, for the protection of copyrights in this country, do not extend to books printed abroad; therefore, where the author of a musical composition sold the right of publishing it to a music-seller in Paris, in 1814, reserving to himself the right of publishing it in this country, and in the same year he sold the work to A., an English music-seller, by parol, who immediately published it; and in 1818, B., another English music-seller, bought a French copy of the composition, in the fair way of his trade, at Paris, and republished it here on his own account; and in 1822, the author executed a valid assignment of the copyright to A. in writing:—Held, that A. could not maintain an action against B. for piracy, on the grounds, that by the parol consent given by the author, in 1814, A. did not acquire the exclusive right of publishing the work in England, and that it therefore could not be deemed a publication by the author, not being made on his account, or for his benefit; that the publication by B. in 1818, was lawful; and that the author could not afterwards, in 1822, by making a valid assignment to A., enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed. *Oleменти v. Walker*, 4 D. & R. 598; 2 B. & C. 861.

generally written and published here, and afterwards reprinted in any other country, and imported into this, if the acts of sale be distinct. *Brooke v. Milliken*, 3 T. R. 509.

### 3. Entry at Stationers' Hall.

By 54 Geo. 3, c. 156, eleven printed copies of every book complete, are to be delivered on demand, within twelve months after publication, for the use of the public libraries, viz. British Museum, Sion College, Bodleian Library at Oxford, public library at Cambridge, Faculty of Advocates at Edinburgh, four Universities of Scotland, and Trinity College and King's Inns libraries at Dublin.

By s. 5, books demandable are to be entered at Stationers' Hall within one month, if published within the bills of mortality, or within three months if published elsewhere.

A single part of a work published at uncertain intervals, of which thirty copies only are printed, twenty-six of which are subscribed for, the principal costs of publication being defrayed by funds devised by a testator for that purpose, is not a periodical publication, or book, which need be entered at Stationers' Hall; nor is it demandable by the public libraries under the 54 Geo. 3, c. 156. *British Museum v. Payne* (in error), 3 Y. & J. 166; 1 M. & P. 415; 4 Bing 549.

Quære, if a part of a volume published separately, and which is not required to be entered at Stationers' Hall, be not entered there, whether the author has any copyright in it? *Id.*

The 8 Anne, c. 19, s. 5, made it necessary for the printer of a book composed after the passing of the act, and published for the first time after the composition, which book was printed and published with the consent of the proprietor of the copyright to deliver a copy upon the best paper to the warehouse-keeper of the Company of Stationers, for the use of the library of the University of Cambridge, notwithstanding the title to the copy of such book, and the consent of the proprietor to the publication, was not entered in the register book of the said Company. *Cambridge (University) v. Bryer*, 16 East, 317.

An author, whose work is pirated before the expiration of 28 years (under stat. 54 Geo. 3, c. 156) from the first publication of it, may maintain an action on the case for damages against the offending party, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed. *Beckford v. Hood*, 7 T. R. 630.

### 4. Assignment of Copyright.

An assignment of copyright of a song must be in writing, in order to entitle the assignee to maintain an action on the case for pirating it. *Power v. Walker*, 3 M. & S. 7; 4 Camp. 8.

And an agreement for consideration, that one shall have the exclusive publication and sale in England, does not entitle him to bring an action for pirating the work. *Id.*

But in an action by an author, where the witness had heard him declare that he had parted with all his copyright, a valid assignment was presumed, and the plaintiff was nonsuited. *Moore v. Walker*, 4 Camp. 3, n.

In an action for pirating a work, evidence that the plaintiff acquiesced in the defendant's publication six years ago is no proof of an assignment of the copyright. *Latour v. Bland*, 2 Stark. 382.—Abbott.

Nor a receipt given by the author for money received by him as the price of his copyright. *Id.*

Where an author who has sold his copyright, by living more than fourteen years, obtained the resulting right for fourteen years more, under the stat. of Anne, it was held to belong to his assignee, and not to himself. *Cernan v. Bowles*, 2 Bro. C. C. 80; 1 Cox, 283.

An author having given a work to a publisher, who, by the sale of it, reimbursed his expenses and made considerable profit, cannot, at the end of the first fourteen years, restrain him by injunction from continuing the publication. *Rundell v. Murray*, Jacob, 311.

Quere, whether on an assignment, the name of the inventor or the assignee should appear? *Thompson v. Symmonds*, 5 T. R. 41.

### 5. Rights of Author and Publisher.

Seemle, where an author agrees with a bookseller to publish his work, and to allow him interest for the money he shall advance, and also a share of the profits, the bookseller has a lien on the copyright for his disbursements. *Brook v. Wentworth*, 3 Anst. 881.

An author may maintain an action for an injury to his reputation, against the publisher of an inaccurate edition of his work, falsely purporting to be executed by him, though the publisher be the owner of the copyright. *Archbold v. Sweet*, 1 M. & Rob. 62; 5 C. & P. 219—Tenterden.

If A., being the author of a law book, sell the copyright to B., and B. publish a third edition of the work edited by another, but not stated to be so, and which purchasers were likely to suppose was edited by A., such edition having errors and mistakes in it calculated to injure the reputation of A. as an author:—Held, at Nisi Prius, that, for this, an action lies by A., against B. The question, whether an edition purports to have been edited by A., is a question for the jury; but the question whether the alleged errors and mistakes be so or not, and whether they are such as are calculated to injure the reputation of A. as an author, are questions for the court. *Id.*

A. having printed a work, sold 300 copies to B., a bookseller, at 40s. a copy, binding himself not to sell to others, in quires, under 48s., and in single copies under 50s. a copy, until B.'s 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to B. "I do not expect you to sell under 48s. and 50s., but do as you like." When B. had sold a part of the 300 copies, he went into partnership with C., and transferred all his stock at the cost price. He also sold some copies at 45s. and

46s. A. in contravention of his agreement, sold under the stipulated prices, but, on being threatened with proceedings by B., persuaded D. who had purchased the principal part, to consent to give them back, if it would satisfy B. D. had an interview with B., and told him this. D. said that he understood the arrangement was a settlement of the difference, and that B. went away from the interview perfectly satisfied:—Held in an action by B. against A., for a breach of the agreement, that neither the underselling by B., nor the transfer of the stock to the partnership, were grounds of nonsuit; but that the arrangement with D. was an answer to the action, if the jury thought that it made an end of the dispute between the parties. Held, also, that, on the question of damage, it might be considered whether B.'s own underselling had or had not contributed to affect the price of the work in the market. *Benning v. Dove*, 5 C. & P. 427—Den.

### 6. Piracy.

What amounts to.—An action will lie if parts of a book of chronology be servilely imitated, though other parts of the book be different. *Trusler v. Murray*, 1 East, 363, n.

But not for publishing sea-charts on an improved and more useful principle, with material corrections, though many of the lines were copied from old charts. *Sayre v. Moore*, 1 East, 361, n.

A count for pirating generally, is not supported by evidence that there are in the original work particular errors and mistakes, with which the pirated edition corresponds verbatim. *Cary v. Kearsley*, 4 Esp. 168—Ellenborough.

But such evidence would support a count for transcribing particular matter, without the plaintiff's consent. *Id.*

It is lawful to incorporate part of the works of a contemporary writer in a new work, provided it be not a pretext for stealing the original copyright. *Id.*

But it is otherwise, if so much be copied as to form a substitute for the original work. *Roworth v. Wilkes*, 1 Camp. 94—Ellenborough.

A fair abridgment is no infringement of copyright. *Anon. Lofft*, 775: *S. P. Bell v. Walker*, 1 Bro. C. C. 451.

Quere, what difference between two books will be sufficient to resist an application for an injunction to restrain the publishing of the latter work? *Gernan v. Bowles*, 1 Cox, 283; 2 Bro. C. C. 80.

An abstract published in an annual register or magazine is not piracy, especially if the author himself has published extracts in a periodical paper. *Dodsley v. Kinnersley*, Amb. 403.

Upon an action by several plaintiffs for piracy of copyright, it appeared that the defendant had published the work in question, pursuant to the conditions of a cognovit given by him to one of the plaintiffs and one P., in an action for not performing an agreement to write the work in question:—Held, a sufficient defence. *Sweet v. Archbold*, 10 Bing. 133; 3 M. & Scott, 299.

The defendant had previously contracted to prepare for S. (one of the plaintiffs,) and one P., an edition of a work on the practice of the Common Pleas; and in pursuance of that contract, a small portion of this latter work was sent to the press by the defendant on account of S. & R., containing extracts from the King's Bench practice, in some of the instances wherein the practice of the two courts was similar. S. and P. being dissatisfied with the progress made by the defendant in the Common Pleas practice, it was agreed between them that the latter should be released from his engagement, and should refund the purchase money which had already been paid him. The defendant accordingly gave S. and P. a cognovit for the amount, containing a clause "that nothing therein should extend to license or permit the defendant to publish or sell any copy or copies of the said intended work," until he should have fully paid the damages and costs therein mentioned. The defendant, in completing the C. P. practice on his own account, embodied therein a large portion of the plaintiff's work on the practice of the court of K. B. Upon a motion to dissolve an injunction that had been granted to restrain the sale of the C. P. practice on the ground of piracy, the Lord Chancellor directed an action to be brought to try the question of piracy:—Held, that the above clause in the cognovit given in the action between S. & P. and the defendant, amounted to an implied consent on the part of the plaintiffs, that the defendant should use their copyright of the K. B. practice. *Id.*

*Proceeding by Action.*—Semble, that the first publisher of a book may sue a stranger who pirates it, although he has improperly obtained the copy in the first instance. *Cary v. Kearsley*, 4 Esp. 168—Ellenborough.

Semble, that a person having been seen correcting the MS. is not sufficient evidence that the copyright of a work is his. *Stockdale v. Onwhyn*, 7 D. & R. 625; 5 B. & C. 173; 2 C. & P. 163.

*Proceeding by Injunction.*—An injunction against an invasion of copyright, depending upon the effect of an agreement, was refused till there was a recovery in an action. *Walcot v. Walker*, 7 Ves. jun. 1.

A copyright not asserted against violations by several persons for fifteen years, will not be protected by injunction until established at law. *Platt v. Button*, 19 Ves. jun. 447; Coop. C. C. 303.

If the proprietor of a work gives permission to several to publish it, and then others copy it, he must bring his action before he can have an injunction to restrain the pirating his copyright. *Id.*

An injunction obtained by the assignee of an author after the expiration of the two terms of years allowed by the statute of Anne was dissolved, the common law right of the author

will leave the plaintiff to seek his legal remedy, where the matter, which is the subject of the alleged piracy, is but a very inconsiderable part of the plaintiff's work, and contains merely calculations; and when the work complained of has been published some years. *Bailey v. Taylor*, 1 Russ. & Mylne, 73; 1 Tam. 295.

Injunction refused to restrain publication of a work which had been left for twenty-three years, by the author, in the hands of a bookseller, to whom it was originally sent with an intention of its being published; that intention being afterwards relinquished, and the work having passed into the hands of the defendants, who published it without the consent or privity of the author. *Southey v. Sherwood*, 2 Mer. 435.

An injunction was granted to restrain the printing of an unpublished MS. which had been, by the representative of the author, given to a person under whom defendant claimed, but not with the intention that he should publish it. *Queensbury (Duke) v. Shebbeare*, 2 Edw. 329.

An injunction was granted until answer or further order, to restrain the publication of a work, as the plaintiff's, upon affidavit by the plaintiff's agents (the plaintiff himself being abroad) of circumstances making it highly probable that it was not the plaintiff's work; and defendant refusing to swear as to his belief that it was so. *Byron (Lord) v. Johnson*, 2 Mer. 23.

The court does not give an account of the sale of a pirated copy of a work, unless it grants an injunction. *Bailey v. Taylor*, 1 Tam. 295; 1 Russ. & Mylne, 73.

The injunction is the ground of the account and the account is consequential. *Id.*

## II. DRAMATIC PRODUCTIONS.

By 3 & 4 Will. 4, c. 15, the author, or his assignee, of any tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment, shall have, as his own property, the sole liberty of representing the same for twenty-eight years; and if the author shall be living at the end of that time, for the rest of his life.

Before the statute, the proprietor of the copyright of a tragedy, which had been printed and published for sale, could not maintain an action against the manager of a theatre for publicly acting and representing such tragedy in an abridged form for profit. *Murray v. Elliston*, 1 D. & R. 299; 5 B. & A. 657.

An injunction, however, had been granted to restrain the publication in a magazine of a farce occasionally suffered by the author to be acted, but never printed or published. *Macklin v. Richardson*, Amb. 694.

Evidence that the defendant had acted a piece on the stage, of which the plaintiff had bought the copyright, is not evidence of a publication

within the meaning of stat. 8 Anne, c. 19. *Coleman v. Watten*, 5 T. R. 245.

An injunction was granted to restrain the performance of a comedy, the copyright of which had been afterwards assigned by writing to the plaintiffs, although it did not appear whether the original assignment was in writing. *Morris v. Kelly*, 1 J. & W. 481.

The defendant having, in two numbers of a periodical work of theatrical criticism, inserted detached extracts to the extent of six or seven pages from a farce, the property of the plaintiff, containing forty pages interspersed with criticism, a bill for a perpetual injunction and account of the profits of the numbers, which did not amount to 3*l.*, was dismissed with costs. *Whittingham v. Wooler*, 2 Swans. 428.

### III. PRINTS AND ENGRAVINGS.

By 8 Geo. 2, c. 13, the property in prints and engravings is vested in the proprietor for fourteen years, if the proprietor's name and the date of the publication be affixed on each print.

By 7 Geo. 3, c. 38, the time is extended to twenty-eight years.

By 17 Geo. 3, c. 57, persons who pirate prints are liable to damages and double costs.

An engraving on a reduced scale of a specification of a new invention, inrolled at the patent office, may be the subject of copyright. *Newton v. Cowie*, 12 Moore, 457; 4 Bing. 234. *But see Wyatt v. Barnard*, 3 Ves. & B. 77.

In order to sustain an action for pirating prints, the proprietor's name, and the date of the publication, must appear on the original print, pursuant to 8 Geo. 2, c. 13; but it is not necessary that the designation "proprietor" should be added to the name. *Id.* Overruling, *Roworth v. Wilkes*, 1 Camp. 94, contra. *And see Sayer q. t. v. Dicey*, 3 Wils. 63.

The assignee of a print may maintain an action on stat. 17 Geo. 3, c. 57, against any person who pirates it. *Thompson v. Symonds*, 5 T. R. 41.

In such an action, it is not necessary to produce the plate itself in evidence; one of the prints taken from the original plate is good evidence. *Id.*

The date must always appear on the print. *Id.*

It is no piracy of one engraving, to make another from the original picture. *Berenger v. Wheble*, 2 Stark. 548—Abbott.

The mere seller or publisher of a pirated copy of a print, is liable to an action under the 17 Geo. 3, c. 57, although it be not an exact copy of the original, and though the seller did not know it to be a copy. *West v. Francis*, 1 D. & R. 400; 5 B. & A. 737.

A. being employed by B. to engrave plates from drawings belonging to B., took off from the plates so engraved by him a number of proof impressions, which he retained for his own use. A. afterwards became bankrupt, and the proofs of which he had so possessed himself, were adver-

tised by his assignees for sale:—Held, that neither he nor his assignees were liable by 17 Geo. 3, c. 57, to an action for having disposed of pirated prints without the consent of the proprietor, inasmuch as that statute applied to impressions of engravings pirated from other engravings, and not prints taken from a lawful plate. *Murray v. Heath*, 1 B. & Adol. 804.

### IV. BUSTS.

By 38 Geo. 3, c. 71, s. 1, the sole property of models or casts is vested in the original proprietor for fourteen years.

And by ss. 2 & 4, persons making copies of any model or cast without the written consent of the proprietor, are liable for damages in an action of case, to be brought within six calendar months after the discovery of the offence.

By 54 Geo. 3, c. 56, s. 1, the inefficiency of the former act was attempted to be remedied, and the sole right and property of all new and original sculptures, models, copies, and casts, is vested in the proprietor for fourteen years: provided that the name of the proprietor, with the date of publication, be put on each article.

S. 6 gives the original proprietor an additional term of fourteen years, if he is living at the expiration of the first.

The selling of a pirated cast of a bust was no offence under stat. 38 Geo. 3, c. 71, before the passing of 54 Geo. 3, c. 56, if the piracy had any addition to or diminution from the original; and, semble, that it was no offence to make a pirated bust if it was a perfect fac-simile of the original. *Gahagan v. Cooper*, 3 Camp. 111—Ellenb.

### V. LINENS AND CALICOES.

By 27 Geo. 3, c. 38, (continued by 29 Geo. 3, c. 19,) the proprietor of original patterns for printing linen, cotton, calico, or muslin, is to have the sole right of printing them for two months from the first publication; and whoever shall, within that period, print the same, is to be liable to an action for damages.

The 34 Geo. 3, c. 23, extends the time to three months, so that the name of the proprietor and the date of publication be printed at each end of the piece of goods: the statute also gives a remedy by action.

Equitable jurisdiction upon the 34 Geo. 3, c. 23, is not excluded by the special remedy thereby provided. Independent of that remedy, the statute vests in the inventor a right of property which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established. *Sheriff v. Coates*, 1 Russ. & Mylne, 159.

In one case the evidence as to the title not being conclusive, the injunction was dissolved, and an issue directed, the defendants keeping an account. *Id.*

The court will, itself, compare and decide

upon alleged piracies by inspection, where that can be easily and safely done. *Id.*

In an action on the 34 Geo. 3, c. 23, for pirating a pattern for printing calico, the omission of an averment in the declaration, "that the day of first publishing the pattern was printed at each end of the piece of calico," (which, together with the name of the proprietor, is required by that statute, the monopoly being limited for three months from the first day of publishing the pattern,) was holden to be aided by verdict; it being stated in the declaration, that the defendants pirated the pattern within the term of three months from the day of the first publishing thereof, and while the plaintiffs were entitled to have the sole right of printing the same, &c. *Mackmurdo v. Smith*, 7 T. R. 518.

### CORN.

The act at present in force, by which the importation of foreign corn is regulated, is the 9 Geo. 4, c. 60.

That act, authorizing the importation of foreign corn upon payment of duties in proportion to the price of British corn, recites, in s. 8, that it is necessary for regulating the amount of duties, that provision should be made for ascertaining from time to time the average prices of British corn; and then enacts, that weekly returns of the purchases and sales be made in the manner thereinafter directed; s. 25 enacts, that every person who shall deal in British corn within the cities and towns therein mentioned, &c., shall, before he shall so deal in or purchase any British corn, make a declaration that the returns made by him of the quantities and prices which shall be bought by or for him, shall contain the whole quantity, and no more, of the British corn, *bonâ fide* bought within the periods mentioned; and s. 27 enacts, that all persons who are thereinbefore required to make, and who shall have made such declarations, shall, on the first market-day which shall be holden in every week within every city or town, or within which they shall respectively deal in or purchase corn, return to the inspector of corn returns for such city or town, an account in writing of each and every parcel of each sort of British corn, so by them respectively bought during the week ending on the day next preceding such first market-day as aforesaid, with the price thereof, &c. &c.; and by s. 42, a penalty is imposed upon corn-dealers not making such returns:—Held, that the principal object of the statute being to ascertain the average price of British corn weekly, the words "purchase and bought," in the twenty-seventh section, imported bargains actually *bonâ fide* made, and not only contracts made according to the provisions of the statute of frauds; and, therefore, that the above-mentioned return was to be made on the first market-day after a bargain was actually and *bonâ fide* made; and where A., on the 22d day of September, at the town of N. (the next market-day being Wednesday, the 23d,) bought twenty quarters of oats at 26s. per quarter, being part of a larger parcel

lying in the warehouse of the seller, and part were delivered on the 24th, the remainder on the 28th; but there was no note or memorandum in writing of the bargain, nor any acceptance of part by the buyer before the 24th, nor earnest given or part payment, and no return of the bargain was made to the inspector on Wednesday the 23d:—Held, that A. was liable to conviction under the 42d section. *Re v. Thurston*, 1 B. & Adol. 465.

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### CORPORATION.

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# I. CORPORATE NAME AND LIVORY.

Where it manifestly appeared from the different clauses of several local acts of parliament, that conservators of a river navigation should take land by succession, and not by inheritance, although they were not created a corporation by express words, they were so by implication, and that being so, they were entitled to sue in their corporate name for an injury done to their real property. *Tone Conservators v. Ash*, 10 B. & C. 349.

Semble, that the conservators of the river Tone were a corporation not merely for the purpose of holding lands, but for the purpose of receiving the tolls. *Bridgewater Canal Co. v. Bluet*, 10 B. & C. 393.

To prove the existence of an aggregate corporation, consisting of different trades, entries of admission into the separate trades, as "into the company of carpenters, into the company of plasterers," &c., are evidence to be left to the jury. *Carpenters' Company v. Hayward*, 1 Dougl. 374.

A misdescription of a corporation, in omitting the name of the founder, in a conveyance of part of their estates for the redemption of the land tax, is immaterial; and if it had been material, it would have been cured by stat. 54 Geo. 3, c. 173, s. 12. *Croydon Hospital v. Farley*, 2 Marsh. 174; 6 Taunt. 467.

The mayor, jurats, and commonalty of the ancient town of Rye, were held to take lands by a devise to the right worshipful the mayor, jurats, and town council of the ancient town of Rye. *Att. Gen. v. Rye*, 7 Taunt. 546; 1 Moore, 267.

The "mayor, aldermen, and commons, in common council assembled," are not sufficiently described in the proceedings under a private act of parliament, by "the mayor and commonalty, and citizens," though in fact the latter include the former. *Rez v. Croke*, Cowp. 29.

A company by prescription may have more than one corporate name. *Shrewsbury v. Hart*, 1 C. & P. 113—Hullock.

Where a corporation, declaring in covenant by their modern name, stated that the citizens, &c., were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by A. B., declared on, were known by a certain other name, by which name A. B. granted to them a certain watercourse, and covenanted for quiet enjoyment:—Held, that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact. *Carlisle v. Blamire*, 8 East, 487.

Plaintiffs were incorporated by the name of "the mayor and burgesses of the borough of Stafford, in the county of Stafford," and sued by the name of "the mayor and burgesses of the borough of Stafford:—This is in abatement, and not in bar. *Stafford v. Bolton*, 1 B. & P. 40.

In ejectment, the demise was laid to be by the mayor, burgesses, &c., of the borough town of M., VOL. I.

and, on the trial, it turned out from the charter, that the name of the corporation was "the mayor, &c., of M.:—Held, that this was no variance, it appearing from the charter which was in evidence that M. was a borough town. *Doe d. Malden v. Miller*, 1 B. & A. 699.

A company's right to have a livory must be founded on charter or custom: the court cannot presume they have it; and if the declaration in debt upon a by-law fails to show it, it is a fault defendant may take advantage of, upon general demurrer. *Vintners' Company v. Passey*, 1 Burr. 235; 1 Ld. Ken. 500.

## II. ACTS OF CORPORATIONS.

### 1. Corporate Seal.

Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company v. Wilmot*, 9 East, 360.

By statute 1 & 2 Geo. 4, c. 117, incorporating a gas-light company, it was enacted, that the directors should have the custody of the common seal, and power to use it for the affairs of the company, who were themselves by another clause empowered to make orders under seal at their meetings, for the government of the company, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special meeting of the company, a committee, previously appointed for certain purposes, reported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company; that such proposal had been made to him and that he had accepted it. The meeting moved that the report should be received and entered on the minutes, and that the directors should carry into effect the committee's recommendation. No order to this effect was made under seal. The directors by deed, in the name of the company, granted an annuity to the clerk on his retirement, subject to conditions of the nature above stated, and they put the corporate seal to it:—Held, that the seal was properly affixed by the directors; that the granting of such annuity was warranted by the statute; that it was a concern of the company, within the first-mentioned clause; and that no order of the company under seal was necessary to authorize it. *Clarke v. Imperial Gas Company*, 4 B. & Adol. 315; 1 Nev. & M. 206.

The act prescribed that nothing should be done at any special general meeting, but the business for which it was called; and certain forms were required for calling it. On a special case stated, which set out entries of the proceedings whereby the grant was authorized, it did not

appear that those forms had been gone through, and the company, who were sued on the above deed, alleged this irregularity in answer:—Held, that it lay on them to give strict proof of the default; and this not being done, but a possibility appearing that the forms might have been complied with, the court of K. B. would not presume the contrary. *Id.*

By the statute, the orders and proceedings entered in the company's books were to be considered as originals, and read in all courts, &c. Quære, whether this rendered them admissible evidence as between the company and a stranger? *Id.*

If a regular corporate resolution has been passed for granting an interest in the corporate property, and upon the faith of it expenditure has been incurred, the court will compel the corporation to make a legal grant in pursuance of the resolution, although it is not under the corporate seal, *semble.* *Marshall v. Queenborough*, 1 Sim. & Stu. 580.

If the mayor of a town order weights and measures, and when supplied, they be examined at a full meeting of the corporation: this is such a recognition of the contract as will make the corporation liable to pay for them, although the order for them was not under the common seal of the corporation; and the fact that the mayor was afterwards ousted from his office by a judgment of the court of K. B. makes no difference. *De Grave v. Monmouth*, 4 C. & P. 111—Tenter.

## 2. Power to delegate.

Whether the power of making voluntary elections be incidental to the corporation at large, or exist in them by prescription, it is competent for them to delegate it to a select part of themselves, but they cannot delegate such power to any stranger; and the recorder of the town must be taken to be such, if he be not stated to be a burgess. *Rez v. Bird*, 13 East, 367.

As such select body is the creature of the corporation, its constitution and mode of acting may, it seems, be modelled (with the exception before stated) according to the pleasure of its maker. *Id.*

Where a power of doing corporate acts is not specially delegated to particular members, the general mode is for the members to meet on the charter days, and the major part who are present to do the act. *Rez v. Varlo*, Cowp. 248.

The crown, by letters patent, granted full power to the master and wardens of the corporation of bakers, (there being four wardens,) by themselves and their deputy or deputies, to overlook and correct the trade of baking:—Held, that the master and one warden could not justify entering the house of a baker to overlook bread; for, if they acted as principals, they did not amount to a majority of persons to whom the power was given; and, if they acted as deputies, they were bound to show that they were appointed by the majority. *Cook v. Loveland*, 2 B. & C. 31.

Where a power of creating freemen is shown to have been once vested in the body at large of

a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by charters, under other names of incorporation; there being no express grant of such a power to the select body by any such charters, nor even any by-law to that effect, even supposing such a power could be transferred by a by-law from the whole to a part of the same corporation; although it be stated in the plea and admitted by the demurrer, that the same power which was immemorially exercised by the whole body down to the period of the granting and acceptance of charters of James I. and Charles 2, had been since those charters, &c., continually exercised by the select body in question; and although such charters contained a confirmation of all formal privileges, &c., under whatever names of incorporation theretofore enjoyed. *Rez v. Holland*, 2 East, 70.

## 3. Suing by Action.

A corporation cannot sue in assumpsit on an executory contract unless empowered by the act of incorporation. *East London Waterworks Company v. Bailey*, 4 Bing. 283; 12 Moore, 533.

But a corporation may maintain assumpsit on an executed contract; therefore they may sue in assumpsit for use and occupation, where the tenant has held premises under them and paid rent. *Stafford v. Till*, 4 Bing. 75.

Quære, whether a company incorporated for the purpose of manufacturing, can contract otherwise than under seal, for service, work, and the supply of goods for carrying on the business? *Dunston v. Imperial Gas Co.*, 3 B. & Adol. 135.

The master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens, to the use of the master, wardens, and company. The first count in a declaration in debt for a penalty under a by-law set forth the charter empowering the company to make by-laws, the by-law made, and the breach of it; the second count, omitting the above particulars, stated the penalty as being forfeited "under and by virtue of a certain by-law of the company before that time duly made," &c., and this count was on special demurrer held bad. *Feltmakers' Company v. Davis*, 1 B. & P. 96.

A suit by a corporation does not become defective on the death of some of the members; otherwise of a suit by the members in their individual character. *Blackburn v. Jepson*, 3 Swans 138.

A penalty of 20s. having been imposed by one of the by-laws of the butchers' company on all persons selling meat on a Sunday, within their jurisdiction, it was declared by a subsequent clause, that if any offender should deny, refuse, or neglect to pay the penalty, he should be liable to an action of debt:—Held, that it was not necessary to prove a previous demand in order to maintain such action, although averred in the declaration. *Butchers' Company v. Bullock*, 3 B. & P. 434.

Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of Winchester

had, besides other estates in common, four vicarial houses, with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and by ancient custom, upon every vacancy, the vicars, according to seniority, made their option of taking in severally any one of such vicarial houses, with the appurtenances; of which option an entry was made in the corporation act book, and signed by the vicars:—Held, that a new vicar having made an option, which was entered in the act book, and signed by all, to take one of the vicarial houses with certain appurtenances, then in the possession of J. S., which were not all the appurtenances formerly annexed to, and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment: for supposing him entitled to make an option of the entire premises, and to have entered it in the act book, as against the corporation; yet no such option having been made and entered in the act book, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment. *Goodtitle v. Miller v. Wilson*, 11 East, 334.

A corporation in a foreign country may sue as such in the courts of this country, but they must prove that they are incorporated in that country; and it will be left to the jury to say, whether the body so incorporated is the same which sues. *St. Charles (Bank) v. De Bernales*, 1 C. & P. 569; R. & M. 190—Abbott.

The plaintiffs sued by the name of "The National Bank of St. Charles," the name given by the charter of the King of Spain was "The Bank of St. Charles:—Held, no variance, the bank being in fact a national one. *Id.*

A corporation must prosecute criminally in their corporate name; and the addition of such name as a description of the persons of which the corporation is composed, is not sufficient in an indictment. *Rex v. Patrick*, 1 Leach, C. C. 253; 2 East, P. C. 1059.

#### 4. Being sued.

Assumpsit will lie on a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognised by statute. *Murray v. E. I. Comp.* 5 B. & A. 294. And see *Broughton v. Manchester Waterworks*, 3 B. & A. 1.

Quære, whether a local act, enabling a corporation to issue promissory notes under their seal, enables them to make a promise, and subjects them to an action of assumpsit as incident to the making of promissory notes. *Slark v. Highgate Archway Comp.* 5 Taunt. 792.

Trover lies against a corporation, and if it be essential to their conversion of the property (i. e. in this instance the detainer of bank-notes by the Governor and Company of the Bank of England) that they should have authorized it under their seal, such authority will be presumed after ver-

dict; but it does not seem necessary that the act of detention, done by their servants within the scope of their employment, should be authorized under their seal. *Yarborough v. England (Bank)*, 16 East, 6.

It seems that an incorporated company may be guilty of a conversion by the act of their agent, acting under the direction of a committee appointed for managing the affairs of the company under an act of parliament. *Duncan v. Surrey Canal Proprietors*, 3 Stark. 50—Abbott.

An ejectment against the bailiffs pro tempore of a corporation, cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation: but, at any rate, such tenancy may be determined by a notice to the corporation to quit, served on its officers; after which, the owner of the premises may distrain the cattle of any person trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises. *Doe d. Carlisle (Earl) v. Woodman*, 8 East, 228.

By indenture between A., B., and C., bailiffs, and D., E., and F., aldermen, with the assent of the burgesses of the borough of M., of the one part, and J. S., of the other part, the said bailiffs, aldermen, and burgesses, demised lands to J. S. for years, to be holden of the said bailiffs, aldermen, and burgesses; and the deed was executed by A., B., and C.; D., E., and F.; but not sealed with the corporation seal; J. S. having paid rent to the bailiffs as chief officers of the borough:—Held, that their servant might make cognizance for taking a distress under a demise by the corporation, notwithstanding a notice had been given by the aldermen (one of whom was a party to the indenture) to pay the rent to them; for the payment of rent to the bailiffs admitted a tenancy from year to year under the corporation. *Wood v. Tate*, 2 N. R. 247.

Where a corporation are defendants, they are not entitled to any essoin. *Argent v. St. Paul's (Dean)*, 2 T. R. 16; 16 East, 8, n.

#### 5. Other Matters.

The corporation of the Royal Exchange Assurance Company in London, are liable to be assessed to the land tax, in their corporate capacity as a corporation. *Exchange Assurance Company v. Vaughan*, 1 Burr. 155; 1 Ld. Ken. 320.

By letters patent, the king granted to the mayor and burgesses of Lyme Regis, the borough or town so called, and also the pier, quay, or cob, with all liberties and profits, &c., belonging to the same, and remitted also twenty-seven marks of their ancient rent, payable to the king; and he willed, that the mayor and burgesses and their successors, all and singular the buildings, banks, sea shores, &c., within the said borough, or



thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever, should repair, maintain, and support, as often as it should be necessary:—Held, first, that the mayor and burgesses of Lyme having accepted the charter, became legally bound to repair the buildings, banks, sea shores, and mounds: secondly, that this obligation being one which concerned the public, an indictment would lie, in case of non-repair, against the mayor and burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an individual. *Lyme Regis v. Henley*, 3 B. & Adol. 77; 5 Bing. 91; 3 M. & P. 278.

Case lies against a corporation for not repairing a creek into which the tide of the sea flowed and reflowed, (but not saying it was a navigable river,) as from time immemorial they had been used; the action lies, though no special damage be stated; and saying "as from time immemorial they had been used," is well enough, without alleging that they were bound, &c., *ratione terminum*, or other special cause. *Lynn v. Turner*, Cowp. 86.

A corporation may be liable to repair the banks, &c., of a river, by prescription. *Anon.* Lofft, 556.

Corporations have a general right at law to alienate their lands, held in fee, subject as to ecclesiastical corporations to the restraining statutes; and there is no instance of a trust attached upon the ground of misapplication, as not to corporate purposes, except the case of corporations holding to charitable uses. *Colchester v. Louten*, 1 Ves. & B. 226.

### III. CORPORATE CHARTERS.

#### 1. Explanation by Usage.

Contemporaneous documents, proceedings in causes relating to a charter, and parol testimony, may be resorted to in order to explain and give to the charter a construction, but not to contradict it. *Lucton School v. Scarlett*, 2 Y. & J. 330.

Where the words of a charter are doubtful, they may be explained by long usage. *Blankley v. Winstanley*, 3 T. R. 279; *S. P. Gape v. Handley*, 3 T. R. 288, n.; *Rex v. Osbourne*, 4 East, 327; *Rex v. Johns*, Lofft, 76; *Rex v. Varro*, Cowp. 250. And see *Rex v. Tate*, 4 East, 337.

Quære, whether evidence of usage may be given to assist the court in the construction of a doubtful charter? *Rex v. Miller*, 6 T. R. 268. And see *Rex v. Bellringer*, 4 T. R. 810.

The words of a grant from the crown, by contemporaneous exposition and constant usage, may be extended beyond their natural import, so as to confer a right to exercise an office within a city and the liberties thereof, granted only to be exercised within the city. *London v. Long*, 1 Camp. 22—Ellenborough.

A grant of immunity to burgesses, their heirs and successors, was expounded by the usage to be a grant to burgesses, corporators only, and not

to the burgrave tenants and their heirs. *Tuckerbury v. Bricknell*, 2 Taunt. 120.

Prescription presumes a charter. *Anon.* Lofft, 556.

A by-law cannot explain a doubtful charter; if there be any ambiguity on the face of the charter, it is in the province of the court to expound it. *Rex v. Tucker*, 2 Selw. N. P. 1144.

#### 2. Construction generally.

If there are words of permission in a charter, to do an act which is clearly for the public benefit, they are obligatory; therefore, where a charter declared that the mayor and jurats of an ancient town might hold a court of record for the holding of pleas, but which had been long disused, the court of K. B. granted a mandamus to compel such court to be held, at the instance of an inhabitant of the town, though he was not a corporator. *Rex v. Hastings*, 1 D. & R. 148; 5 B. & A. 692, n.

Words in a charter in restraint of trade are very unfavourably received, and, if doubtful, that meaning will be taken which is least inimical to commerce; and even where they are clear, a renunciation of the privileges will be presumed unless there is evidence of usage to support them. *Berwick v. Johnson*, Lofft, 334.

A charter granting jurisdiction to borough magistrates over a district not within the borough does not exclude the county justices without express words. *Blankley v. Winstanley*, 3 T. R. 279.

And though such charter contain words of reference to former charters, in which exclusive jurisdiction is given to the borough justices within the borough, and add that they shall have jurisdiction within the new district in tam amplio modo et forma, &c., yet if there be in the latter charter a saving clause of the rights of the crown, and of all other persons, the borough magistrates have only a concurrent jurisdiction with the county justices. *Id.*

Although the charter of the tobacco-pipe makers' company may be inadequate to bind all the tobacco-pipe makers in the kingdom, it is sufficient to bind such of them as become members of the corporate company. *Tobacco-Pipe Makers' Company v. Woodroffe*, 7 B. & C. 686; 5 D. & R. 530.

And this charter, by fixing the place of meetings to London or Westminster, or within three miles thereof, sufficiently establishes local limits for the corporation. *Id.*

The nomination of a corporation officer in a modern charter, by necessary intendment makes him a free burgess of the borough, if he were not so before. *Rex v. Downes*, 7 D. & R. 777; 5 B. & C. 182.

So, where the modern charter of a corporation, after directing that the corporate officers should for ever thereafter be nominated and chosen out of the free burgesses, proceeded to nominate the common councilmen, and amongst them one who was not at the time of his nomi-

nation, a free burgess:—Held, that he was entitled, by virtue of his nomination, to all the privileges, and to exercise the office of a free burgess of the borough. *Rez v. Perkins*, 4 D. & R. 427.

Under the words of a charter of incorporation of the dean and chapter of the cathedral church of H. T. Dublin, ordaining that "the archdeacon &c., can and may enjoy a stall in the choir, and a voice and place in the chapter in all chapter acts," &c.; he has a voice in all its corporate acts, and not merely in the acts of that chapter considered as the archbishop's council; and it seems he may vote by proxy: *Kildare (Bishop) v. Smith*, 5 Dow, 225.

A clause in a charter, which directed that the aldermen should be chosen annually, was held to be only directory, and not to determine the office at the end of the year after election; but that the person legally elected and sworn into the office should continue until his death or removal, in the same manner as a person elected into the office of mayor. *Prosser v. Foot (in error)*, 2 Bro. P. C. 289; *S. P. Pender v. Rez (in error)*, 2 Bro. P. C. 294.

Where a charter directs that the mayor shall continue in office until another is duly elected and sworn, the successor although duly elected, cannot act until sworn, and, if he does, judgment of ouster may be given against him. *Id.*

Where a charter granted to the mayor and commonalty that "any alderman being wanted, the rest of the aldermen might nominate two burgesses, for the choosing of one of them as alderman by the commonalty (per communiatum):"—Held, that "commonalty" included the whole corporation, and that an alderman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected. *Rez v. Osbourne*, 4 East, 327.

Where the charter of a borough directed, that when any of the capital burgesses should happen to die, or dwell out of the borough, or be removed, it should be lawful for the remainder to elect others in the place of those so happening to die or be removed, omitting the intermediate circumstance of dwelling out of the borough:—Held, that these words were not so unambiguous as to warrant the court to interfere, by granting a mandamus calling on the mayor and burgesses to elect and swear in two capital burgesses in the room of two non-resident capital burgesses, who had not been previously removed by the corporation from their offices, for the purpose of taking this matter into consideration. *Rez v. Truro*, 3 B. & A. 590; 2 Chit. 257.

Where a charter of incorporation authorized the election of a mayor on the charter day, with power to the mayor to hold over, and on the mayor's death within the year after his election and swearing in, and in the mean time, the alderman next in order to officiate as mayor:—Held, that in the case of a mayor's holding over and dying more than a year after his election and swearing in, the charter did not authorize a new election of mayor, nor the alderman next in order

to officiate as mayor; but it was *casus omisus* *Rez v. Smith*, 2 M. & S. 583.

By a charter of the 31st Eliz., her majesty granted to the inhabitants of T. to be incorporated by the name of "the mayor and burgesses of the borough of T.," and also granted and confirmed to the said mayor and burgesses, and the successors, "all messuages, lands, tenement customs, privileges, immunities, advantages, &c. within the said borough, which the said mayor and burgesses or inhabitants, by whatever name or name, corporate or incorporate, by reason of colour of any prescription, &c., for fifty years past had held; and that the burgesses and inhabitants of the said borough, and their successors, from thenceforth for ever should be free from toll, passage, pontage, murage, &c., anchor age, coynage, wharfage, crannage, keyage, &c., for all goods, &c., which were their own, throughout the whole kingdom of England, except the city of London:—Held, that this exemption from tolls and dues did not extend to tolls and duties arising and due by prescription to the corporation of T. within that borough. *Truro v. Reynolds*, 1 M. & Scott, 272.

### 3. Construction as to Appointment of Deputies.

The borough of St. Alban's having first received a recorder by a charter of Car. 1, a subsequent charter of Car. 2, after nominating J. S. to be the first and modern recorder under that charter declared that it should be lawful for the aforesaid J. S., the modern recorder to nominate a sufficient person to be his deputy in the office, and to have the same powers:—Held, that this did not extend the power of appointing a deputy to the successors of J. S. in the office of recorder. *Rez v. St. Alban's*, 12 East, 559.

By charter the corporation of Gravesend were to have a capital seneschal, or high steward, and a sub-seneschal, or under steward, by the latter of whom the judicial ministerial functions of a recorder were to be performed, but no authority was given him to appoint a deputy; and although a by-law of the corporation required that the under-steward, or his sufficient deputy, should be attendant at every court, to discharge the duties of his office:—Held, that the under-steward could not appoint a deputy generally to discharge all his ministerial duties. *Rez v. Gravesend*, 4 D. & R. 117; 2 B. C. 602.

Semble, that he might appoint a deputy to do some particular ministerial act, with the assent of the corporation. *Id.*

A charter provided that there should be two aldermen in the borough of D. who should act for one year, by themselves, or their deputies; that on their death or removal, other aldermen should be elected, who should act for the rest of the year, by themselves, or their deputies; that in the absence of the aldermen, new aldermen, might be elected in their room; and that the aldermen for the time being should be justices of the peace for the borough.—Held, that the deputy of an alderman was not a justice of the peace for the borough. *Jones v. Williams*, 5 D. & R. 654; 3 B. & C. 762; 1 C. P. 459, 669.

A. *Renewed Charter.*

A new charter granted where there is a prior subsisting one, is void ab initio; because two corporations, for the same purposes of government, cannot legally exist within the same place, and at the same time. *Rez v. Amery* (in error,) 2 Bro. P. C. 336.

But a new charter of incorporation, granted after a judgment of seizure quousque, &c., to a new body in the same place, is good, notwithstanding a charter of restitution be afterwards granted to the old corporation; and such charter of restitution is absolutely void. *Rez v. Amery*, and *Rez v. Monk*, 2 T. R. 515; 1 T. R. 575. But see S. C. 4 T. R. 122.

A corporation being disabled to act, accepting a new charter, is not dissolved, but dormant; and after such acceptance the new corporation is the same as the old one. *Colchester v. Seaber*, 3 Burr. 1866; 1 W. Black. 591.

By an ancient parliament roll, it appeared that the commons, by their petition exhibited in parliament, prayed King Edward III. that the charter made to his liege subjects, burgesses of the town of Bristol and the Franchises by him granted to his said burgesses, should be ratified and confirmed in that parliament. The answer to the petition was, that it was assented to and agreed in parliament that the franchises whereof the petition made mention, should be ratified and confirmed under the king's great seal. The charter was ratified by King Edward III. accordingly:—Held, that the crown was not prevented by this proceeding in parliament from granting a new charter to the burgesses of Bristol, varying the mode of electing the mayor from that provided for in the charter recited in the petition to the king in parliament. *Rez v. Haythorne*, 5 B. & C. 410; 8 D. & R. 228.

Queen Anne, by charter granted to the burgesses of Bristol that they should be a body corporate, &c. &c., and released to the corporation that power of removing its members which had been reserved by a former charter of King Charles II., and released any just cause of complaint which might be against the corporation for having acted in opposition to it;—Held, that it did not thereby appear that the queen granted this charter in consideration of the former charter granted by King Charles II., and that the queen's charter was not therefore void, although the supposed charter of Charles II. did not exist. *Id.*

5. *Acceptance of Charter.*

The acceptance of a charter, whereby the election of burgesses is directed in a manner different from what had obtained by ancient usage, which is inconsistent with the charter, abrogates the usage, which is determined by the acceptance of the charter; and that must afterwards be the only measure by which the election of burgesses is to be governed. *Powell v. Rez* (in error,) 2 Bro. P. C. 298.

The constitution of a corporation as settled by act of parliament, cannot be varied by the accept-

ance of any charter inconsistent with it. *Rez v. Miller*, 6 T. R. 368.

A charter granted by the crown to a corporation cannot be partially accepted, whether it be a charter of creation, or granted to a pre-existing corporation. *Rez v. Westwood*, 2 Dow & Cl. 21; 4 Bligh, N. S. 213; 7 Bing. 1; 7 D. & R. 267; 4 B. & C. 781.

Unless it should appear to be the intention of the crown that the grantee should have the option to accept in part and reject in part. *Id.*

By a new charter, an old corporation, consisting of a mayor and burgesses, was made to consist of a mayor, aldermen, chief burgesses, and burgesses; the three former to constitute the common council. The common council and a majority of the burgesses expressed their assent to the new charter, some by voting at an election held under it, and others by a written declaration:—Held, that this was a sufficient acceptance of the new charter. *Rez v. Hughes*, 1 M. & R. 625; 7 B. & C. 708.

Quere, whether a majority of the burgesses need have concurred in such acceptance? *Id.*

The proclamation of James II., in the 4th year of his reign, for restoring corporations to their ancient charters, &c., operates (when accepted) as a grant of revival to such of the old corporations as had surrendered their corporate franchises to Charles II., (but which surrenders were not inrolled,) who had granted new charters; and overturns such new charters. *Nesling v. Francis*, 3 T. R. 189.

The corporation of Cambridge did accept and act under the proclamation. *Id.*

Where a person has been admitted a member of a corporate company, and has acted as such, it is not competent to him, in an action for infringing by-laws, to dispute the acceptance of the charter by a majority of those whom it is incorporated. *Tobacco-Pipe Makers' Company v. Woodroffe*, 5 D. & R. 530; 7 B. & C. 838.

The surrender of a charter is void for want of inrolment. *Rez v. Osbourne*, 4 East, 321.

## IV. WHO ENTITLED TO BELONG TO CORPORATIONS

An inhabitant of a borough is not merely by force of his inhabitancy, without any inchoate right, entitled to be a corporator. *Rez v. Wat Loe*, 5 D. & R. 590; 3 B. & C. 677; 2 D. & R. 178.

An infant cannot be elected a burgess of a corporation, nor can a person so elected act as a burgess on being sworn in on obtaining his full age of twenty-one. *Rez v. Carter*, Loft, 516; Cowp. 58, 220.

A custom to exclude foreigners in a corporation, and a by-law made to support it, are good, but the penalty given by a by-law cannot be to a stranger. *Bodvic v. Fennell* (in error,) 1 W. 233.

The title of a person, having an inchoate right to be admitted a free burgess of a borough, ac-

not be impeached on the ground of a defect of title in the officer by whom he was admitted. *Rez v. Slythe*, 9 D. & R. 226.

#### V. WHO COMPELLABLE TO BELONG TO CORPORATIONS.

A company by prescription and by custom may compel all of their trade to become members. *Shrewsbury v. Hart*, 1 C. & P. 113—Hullock.

Under a charter of 7 W. 3, by which the mayor of Liverpool is appointed to be elected out of the forty-one common councilmen, and every mayor is appointed an alderman:—Held, that the defendant, who was a common councilman, and had once served the office of mayor, and acted as justice for the town, but had since quitted the town, and resided four miles distant, having only a bank there, and was an acting magistrate for the county, was not entitled to refuse to stand at a subsequent election of mayor, though the serving that office would compel him to remove his residence to the town, and prevent his acting as magistrate for the county; and therefore the court granted a mandamus to take upon himself the office, he having been elected at such subsequent meeting. *Rez v. Leyland*, 3 M. & S. 184.

An attorney is privileged from serving corporation offices, although resident within the corporation town. *Norwich v. Berry*, 1 W. Black. 636; 4 Burr. 2109.

#### VI. QUALIFICATION OF CANDIDATES.

##### 1. Residence and Estate.

When the defendant having prior connexions with a borough-town previous to his election to the office of bailiff, for which residence is a necessary qualification, took a house at first for four years, but afterwards at his landlord's request, for one, and slept there one night before the election, and did not return again for near a month afterwards, when he stayed two days, but retained possession of his house under his lease the whole time; the taking of the house appearing to the court to be bona fide, that was held a sufficient legal residence to satisfy the qualification required. *Rez v. Sargent*, 5 T. R. 466.

A charter which requires that the mayor should be an inhabitant resident within the borough, on pain of forfeiting such sum as should be imposed by the mayor, recorder, and major part of the common council, not exceeding 100*l.*, does not require residency as a qualification for holding the office, but only under a penalty. *Rez v. Williams*, 2 M. & S. 141.

Residence is not a precedent qualification for a Burgess of Portsmouth, to entitle him to be elected an alderman. *Rez v. Monday*, Cowp. 539.

Where a charter of incorporation directs that certain officers shall be elected out of the burgesses and inhabitants, an usage to elect non-inhabitant burgesses is void: nor is such usage rendered valid by a charter of restoration, grant-

ing "all elections and rights of election previously enjoyed by virtue or pretence (virtute vel pre-textu) of any charter, or by any other lawful manner or title." *Rez v. Salway*, 4 M. & R. 314; 9 B. & C. 424.

A new trial was refused, because a jury had found a customary right for persons born in a place to be admitted freemen, upon paying 5*l.* *Baxter v. Shrewsbury*, Lofft, 27.

Where by charter it was granted that the mayor, bailiffs, and burgesses should thereafter be a body corporate by the name of mayor, jurats, bailiffs, and burgesses," that there should be one of the more honest and discreet burgesses or inhabitants, called "mayor," to be elected as therein-mentioned; and four honest and discreet burgesses or inhabitants called "jurats," and two other honest and discreet burgesses or inhabitants called "bailiffs; that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and when it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed, or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them, (of whom the mayor should be one,) within convenient time, to nominate another or others of the burgesses or inhabitants of the borough for the time being to be jurat or jurats, bailiff or bailiffs, of the borough:—Held, that according to the true construction of the charter, it was competent to the corporation to elect the jurats from the inhabitants of the borough, or from the burgesses. *Rez v. Greet*, 8 B. & C. 363; 2 M. & R. 391.

A charter ordained that no person should be admitted a Burgess, except he had for three years before been seised and possessed of an estate of freehold for the term of his life, or some greater estate in land of a certain value, with an exception of such as should be seised of such estate of such yearly value, which had come to him by descent or marriage:—Held, that one who by virtue of his marriage became seised of an estate in right of his wife for her life, was not within the exception, and therefore not qualified. *Rez v. Powell*, 8 T. R. 639.

##### 2. Apprenticeship.

By the constitution of the corporation of Haddon, a person having served a seven years' apprenticeship to a freeman residing in the town, is entitled to his freedom; and by a by-law, the indentures must be inrolled by the town-clerk within four months from the date; an apprentice who is bound to a freeman, resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures inrolled; nor will the court grant a mandamus to the town-clerk for that purpose. *Rez v. Murehal*, 2 T. R. 2.

A by-law, which directed that a sum of money should be paid for the use of a corporation, on inrolling indentures of apprenticeship to one

of its members, is bad. *Nevesby v. Webster*, 1 Ld. Ken. 243.

A by-law of a corporation, by which indentures of apprenticeship to freemen must be inrolled within four months from the date, was not objected to on an application for a mandamus. *Rex v. Marshall*, 2 T. R. 2.

Though a by-law of the corporation of Cambridge requires an indenture of apprenticeship to be inrolled; yet, if it has been exhibited to the town-clerk, who marked it as being inrolled, it is sufficient, notwithstanding it is not inrolled in the corporation books. *Rex v. Cambridge*, 2 Chit. 144.

But, under another by-law, service at another place is not sufficient, unless the trade there was subservient to the trade at Cambridge. *Id.*

A by-law, made by a company in a corporation to restrain the number of apprentices to be taken by any of the members, is void. *Rex v. Coopers' Comp. of Newcastle-upon-Tyne*, 7 T. R. 543.

A by-law, altering the qualification of persons to be taken as apprentices by the members of a corporation, in order to acquire their freedom by a certain servitude, is not warranted by a custom in such body, which claimed by prescription to make by-laws regulating the number of persons to be taken as apprentices. *Rex v. Tuppenden*, 3 East, 186.

By custom in a corporate town, all persons having served an apprenticeship for seven years to a free burgess, carrying on trade there, were entitled to be admitted to the office of a free burgess:—Held, that a person who had served under articles of clerkship to an attorney, a free burgess of the borough, and residing within the same, was not entitled to be admitted to his freedom. *Rex v. Doncaster*, 7 B. & C. 630; 1 M. & R. 545.

A prescriptive right in the eldest son of every burgess born in N., and in the younger sons of every burgess born in N., and having served a seven years' apprenticeship to any trade; and in every person having served a seven years' apprenticeship in N. to any burgess of N., to be admitted a burgess of N. on his attaining twenty-one, was held by the court not to exclude the incidental power arising by implication of law to the corporation at large, to secure their perpetual succession, by voluntary elections of burgesses ad libitum; and this, though it was averred that N. had always been and is a populous town, containing numerous resident and trading burgesses; and that, by the prescriptive modes of supply by birth and servitude, the succession of a sufficient and large number of burgesses is fully secured: for non constat that these sources had at all times been sufficient during the existence of the corporation, without occasional supplies of burgesses by election, or even that they were so at the time of the defendant's election, and they could not have operated at all for some years after the creation of the corporation; and, therefore, no presumption can be raised from thence, that the crown meant to exclude the in-

cidental power of the corporation, to make voluntary election of burgesses in aid of such prescriptive modes of supply. *Rex v. Bird*, 13 East, 367.

What binding and service is sufficient to entitle an apprentice to be admitted a free burgess of Colchester, under a particular custom of that corporation, respecting apprentices being sworn burgesses, see *Rex v. Rowe*, 4 Burr. 2287.

### 3. Incompatible Offices.

A jurat of the corporation of Hastings may be elected town-clerk of the said corporation. *Mayor v. Thatcher*, 2 T. R. 81.

But the two offices are incompatible, and the acceptance of the latter, though an inferior office, will vacate the former. *Id.*

Where the town-clerk's accounts are allowed by the aldermen, or where a town-clerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible, and the appointment of an alderman to be the town-clerk vacates his former office. *Rex v. Pateman*, 2 T. R. 777.

And, if the person so appointed continues to exercise the office of alderman, the court of K.B. will grant an information in the nature of a *quo warranto* against him. *Id.*

A justification in trespass stated, that by custom a court of record had, from time immemorial, been holden before the steward and portreeve of a borough, or their sufficient deputy or deputies; and that a court was holden according to such custom before A., then being the deputy of B., who was then steward and portreeve of the borough:—Held, that upon this plea the two offices must be taken to have been compatible, and that the steward and portreeve might be united in the same person; and that the appointment of the deputy by the person holding both offices was sufficient. *Green v. Davies*, 3 R. & A. 60.

In the borough of C., by charter, the mayor, burgesses, and commonalty were to elect a town-clerk, who was also to be clerk of the peace, clerk of assizes, and prothonotary; and the mayor, recorder, and town-clerk were to hold pleas of certain actions. The mayor, recorder, and common-council (twenty in number) were to enact by-laws for the good order and government of the borough. None of the common council held any judicial office in any court where the town-clerk officiated. His accounts were audited by a committee, named by the mayor and burgesses in common hall. No fixed salary was allowed by the corporation; but he was remunerated by certain fees of right payable to him:—Held, that the offices of common-councilman and town-clerk were not incompatible. *Rex v. Jones*, 1 B. & Adol. 677.

A corporator, accepting a new office incompatible with the old one, thereby absolutely vacates and surrenders the latter; and if he is ousted of his new appointment by *quo warranto*, he is not re-admitted to his original character; nor can a vote given at a corporate meeting,

whilst he filled the higher office *de facto*, be referred to his original office of an inferior degree. *Rex v. Hughes*, 8 D. & R. 708.

By the governing charter of a borough, there were to be ten aldermen, and ten capital burgesses; and vacancies in the body of aldermen were to be filled up out of the capital burgesses:—Held, that the acceptance of the office of alderman by a capital burgess, even under a void election, operated as a surrender of the latter office; and that a person so elected, and afterwards ousted on *quo warranto*, was not thereby restored to the office of capital burgess: and therefore, where a capital burgess became an alderman *de facto*, by means of a void election, and in the character of alderman attended and voted at an election of a mayor, but was afterwards ousted on *quo warranto*:—Held, that he could not be considered as having attended and voted as a capital burgess. *Rex v. Hughes*, 6 D. & R. 443; 5 B. & C. 886. *And see* 4 B. & C. 360.

*Quo warranto* information for usurping the office of justice within the borough of S. Plea, that defendant was elected at a corporate meeting, where a majority of the aldermen and capital burgesses were present: replication, that at the supposed election five capital burgesses (naming them) and no others were present, and that they were not the major part of the capital burgesses: rejoinder, that at the election, besides the five capital burgesses named in the replication, there were present K. and T., being then capital burgesses; and that the five capital burgesses named in the replication, together with K. and T., were the major part of the capital burgesses: sur-rejoinder, that K. and T., before the election of the defendant, had been elected, admitted into, and exercised the office of aldermen, and at the election of the defendant were present as aldermen: and that, before the defendant's election, two other persons were elected, and admitted as capital burgesses, in the room and stead of K. and T.: rebutter, that at the election of K. and T., as aldermen of the borough, the major part of the aldermen were not assembled; and that after the election of K. and T., and before the election of the defendant as justice, and whilst K. and T. exercised the office of aldermen, *quo warranto* informations were filed against them, and judgment of ouster given, with a denial that K. and T. ever were aldermen:—Held, on demurrer, that K. and T. were not good capital burgesses, though they had been ousted from the office of alderman, and judgment for the crown. *Rex v. Hubbard*, 9 D. & R. 143; 6 B. & C. 139.

The common clerk of a borough is appointed by the mayor, aldermen, and bailiffs, removable at their pleasure, and with a salary variable at their pleasure; and it is his duty to attend the corporate meetings, and take minutes of the proceedings. The office of such common clerk, and that of alderman, are incompatible; and the acceptance of the former vacates the latter. *Rex v. Tissard*, 4 M. & R. 400; 9 B. & C. 418.

Where a rule is obtained for a *quo warranto*,  
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upon the ground that a party has vacated a corporate office, by having accepted a second incompatible office, the affidavits must show a valid appointment to the second office, the acceptance of which is made the ground of amotion. *Rex v. Day*, 9 B. & C. 702; 4 M. & R. 541.

The acceptance by a person holding a corporate office of another incompatible office, does not operate as an absolute avoidance of the corporate office, though it might be ground of amotion; and acceptance of an incompatible office does not operate as an absolute avoidance of a former office, in any case where the party could divest himself of that office by his own act, and without the concurrence of another authority to his resignation or amotion, unless such authority be privy and consenting to the second appointment:—Held, also, that the defendant, as long as he was an alderman and justice of peace of the city of N., was not a person capable of being appointed county treasurer. *Rex v. Patteson*, 4 B. & Adol. 9.

#### 4. Exercising Trades.

Where a charter of incorporation ordained that the mayor, &c., should yearly be chosen justices within the borough, and that the said justices should not permit any one to retail ale or beer within the borough, without a license under the hands of two of the said justices, whereof the mayor to be one:—Held, that the defendant, who was a dealer in spirituous liquors, and by that means disqualified by 26 Geo. 3, c. 13, from concurring in granting licenses, was not disqualified from being elected mayor. *Rex v. Smith*, 2 M. & S. 583.

A retail baker is not ineligible as mayor, although the officers of the borough for which he is appointed settle the assize of bread there. *Rex v. Deane*, 2 Chit. 370.

#### 5. Taking Sacrament.

As to when it is, and when it is not, incumbent upon a corporate officer to prove that he has taken the sacrament within a year before his election, see *Crawford v. Powell*, 2 Burr. 1013; 1 W. Black. 229.

One who has not taken the sacrament according to the rites of the church of England, within a year before his election in fact to a corporate office, is disqualified by the Corporation Act, 13 Car. 2, st. 2, c. 1, s. 12, from being elected; and if such disqualification be notified to the electors at the time of election, votes afterwards given to such person are then thrown away; and any candidate having the most legal votes, though in fact inferior in number to the first, is duly elected and entitled to be sworn in; but until he be sworn in, the office is not legally filled up and enjoyed by him, within the exception of the Annual Indemnity Act; and therefore, if the disqualified person who had the greatest number of votes be sworn into the office, and afterwards qualify himself by taking the sacrament, &c., within the time allowed by the Indemnity Act, he is thereby incapacitated and freed from all disability, and his

title to the office thereby protected, such office not having been then already vacated by judgment, or legally filled up and enjoyed by another person. *Res v. Parry*, 14 East, 550. And see *Res v. Bridge*, 1 M. & S. 76.

At a meeting duly held for the election of an alderman for the borough of Saltash, A. and B. were candidates. Two votes were given for each, when they were interrogated whether they had qualified by taking the sacrament within the year before the election, pursuant to 13 Car. 2, stat. 2, c. 1, s. 12. A. admitted he had not, B. answered that he had. Public notice was then given of A.'s disqualification; but the poll proceeded, and after the notice twenty voted for A. and sixteen for B.: the mayor swore in A.; two of the aldermen (as they might by the constitution of the borough) swore in B.; A. took the sacrament within the time limited by the Annual Indemnity Act:—Held, by the court below, first, that though notice of the disqualification of A. was not given till after the commencement of the election, all the votes for him after such notice were thrown away; secondly, that B. having the greatest number of legal votes, was duly elected, and having been sworn in by the proper officers, the office was legally filled up by him, so as to exclude the operation of the Annual Indemnity Act in favour of A.; thirdly, that B. must be presumed to have been qualified according to his own declaration, there being no evidence to the contrary. And the court below appeared to have considered it of great weight that the majority (thirty-six out of forty) were unpollled at the time of the notice, though not prepared to say that it would have made any difference, though the notice had not been given till a more advanced period of the poll, if the votes for B. had exceeded the number given for A. before notice. And this judgment was affirmed by the House of Lords, the Lord Chancellor thinking that those who had voted for a disqualified person without notice, might, if they chose to demand permission, vote again for another person, but that no one was bound to call upon them to do so. *Hawkins v. Rex*, 2 Dow, 124; 10 East, 211. And see *Res v. Bridge*, 1 M. & S. 76.

A freeman of the city of London is elected one of the sheriffs, but refusing to take the office, on account of his being a dissenter, and as such not having received the sacrament according to the rites of the church of England within a year before his election, an action is brought against him for the penalty incurred by such refusal, and a judgment recovered. The action being brought in the Sheriff's court, a writ of error was brought in the court of Hustings, where the judgment was affirmed. But the defendant having obtained a special commission of errors, the judges delegated reversed both the judgments; and on a writ of error in parliament, the judgment of reversal was affirmed. *Harrison v. Evans* (in error), 3 Bro. P. C. 465.

The Annual Indemnity Act is prospective as well as retrospective, and extends to persons who may be in default during the time for which it is made, and is not limited to those who had incur-

red penalties or disabilities before it was passed; it being the intention of the legislature to extend the time for taking the oaths and performing the other acts required of persons filling certain offices. *In re Stevenson*, 2 B. & C. 34.

## VII. ELECTION OF MEMBERS AND OFFICERS.

### 1. Day of Election.

By 11 Geo. 1, c. 4, where the election for mayors or other chief officers shall not be made on the days appointed by charter or usage, the corporation are not disabled from electing.

No elections in corporations made by surprise on a by-day can be valid. *Res v. May*, and *Res v. Little*, 5 Burr. 2681.

Where by custom or charter a particular day is fixed for the election of burgesses of a corporation, it is the duty of the burgesses to take notice that the election will take place on such particular day, and attend to exercise their elective franchises, if they be so minded; but where no specific day is fixed by custom or charter, and the business of electing burgesses, as well as other business, may be many days in the year, notice must be given to the resident burgesses of a corporate meeting for such purpose, and in such reasonable time as to give them all an opportunity of attending and voting at the election. Notice, therefore, by ringing a bell fixed at the top of the guildhall of a corporation, the liberties of which extend three miles, and in which there is an indefinite number of burgesses, is not a sufficient notice of a corporate meeting for the election of burgesses, nor can either a custom or a by-law render such a notice binding, unless it appears that all the burgesses have attended for the purpose of electing burgesses. *Res v. Hill*, 6 D. & R. 593; 4 B. & C. 426.

On the appointed charter day for the special purpose of the election of lord mayor of the city of London, the business of such election must have precedence of all other business; therefore, it was held illegal, after the lord mayor and aldermen had retired from the hustings, (having assembled for that purpose,) to propose any other business inconsistent with such election, the discussion of which might have the effect of preventing the election altogether. *Res v. Fulkyns*, 3 B. & A. 668. And see *Macell v. Binson*, 11 East, 84, n.

It is not a general proposition of law, that there cannot be any lawful assembly for the purpose of election, without previous notice of the purpose of the meeting having been given to every member of a select definite body, who are the electors; for if all such members were present at, and concurred in any particular election, such notice would be unnecessary. *Res v. Chiswold*, 7 B. & C. 695; 1 M. & K. 534.

Therefore, where, to a quo warranto information, defendant pleaded that he was elected by the major part of the common council duly assembled, a replication, stating that notice of the purpose for which the assembly was to be held

had not been given, was held bad on demurrer. *Id.*

Where certain powers are vested in a select body, appointed to be aiding and assisting the mayor of a city, touching matters concerning the same, a notice by the mayor to the members of that body to attend a corporate meeting, need not specify the purpose for which the meeting is convened; and an election at such meeting is valid. *Res v. Puleford*, 2 M. & R. 384; 8 B. & C. 350.

## 2. What a Majority.

Where a charter directs an election to be by a majority of the whole number of subsisting burgesses, an election by a minor part of them is void. *Res v. Grimes*, 5 Burr. 2598.

If a majority dissent from an election, but vote for nobody else, the election by the minority is good. *Oldknow v. Wainwright*, or *Res v. Foxcroft*, 2 Burr. 1017; 1 W. Black. 229.

Where an integral part of a corporation, composed of a definite number, is required to vote at an election of a corporate officer, a majority of such integral definite part must attend, otherwise there can be no elective assembly, although other parts of the corporation also join in such election, and a majority of the whole existing body actually attend; but a majority of those present, when legally assembled, will bind the rest. *Res v. Miller*, 6 T. R. 268.

A charter, directing an election to be made by the remaining members of a definite body of a corporation, is good in law. *Res v. Hoyte*, 6 T. R. 430.

In a prescriptive corporation, an usage to this effect is evidence of such a charter. *Id.*

Consequently, in either case, a person is well elected by a majority of the subsisting members, as distinguished from a majority of the full body. *Id.*

A charter of incorporation empowered the mayor and aldermen for the time being, or the greater part of them, to choose and name four of the burgesses or inhabitants, "out of which four so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough, for the time being, (they being also for that purpose upon the same day congregated and assembled together), or the greater part of them as should be so congregated and assembled, might have power and authority, by the greater part of the voices of them so assembled together, to choose and make one to be the mayor:"—Held, that the election of a mayor by a majority of the whole elective body taken collectively was invalid, it appearing that there was not a majority of each definite body of principal burgesses present at the time of the election. *Res v. Bower*, 2 D. & R. 761; 1 B. & C. 492.

So, where the charter of a corporation, consisting of a mayor and twenty-four capital burgesses, granted that when and so often as it should happen that any one or more of the offices of these capital burgesses should be vacant, it should

be lawful to the other capital burgesses, "at that time surviving or remaining, or the greater part of the same, of whom the mayor for the time being should be one, to elect another or others of the burgesses of the said borough into the place or places of the capital burgesses or burgesses so happening," &c.; and a burgess having been elected to fill up a vacancy by twelve capital burgesses only, who were alleged to be the capital burgesses at that time surviving and remaining:—Held, that the election was void, it not being made by a majority of the whole definite body of capital burgesses, to which the words, "or the greater part of the same," were referable. *Res v. Wylliams*, 3 D. & R. 75; 8 P. *Res v. Devonshire*, 3 D. & R. 83; 1 B. & C. 609.

Where a notice of a meeting for corporate purposes is regularly given, a majority of those present have power to do any corporate act; but if the meeting be accidental, they can only proceed to business if they are unanimous; for if one member only dissents, he has an absolute negative. *Res v. Kynaston*, 2 Selw. N. P. 1143.

Where the whole corporation are summoned for a particular purpose, (e. g. to receive the resignation of a common councilman), a select body, who are all present and consenting, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common councilman, in the place of the other resigned; the power of election being in such select body, and the charter not requiring any previous summons. *Res v. Theodorick*, 8 East, 543.

A charter directed that a borough should consist of a mayor, four jurats, and two bailiffs; and that when any bailiff or jurat should die, &c., the remaining jurats and bailiffs, or the greater part of them, of whom the mayor should be one, should elect another or others of the burgesses or inhabitants to be a jurat, &c.; one vacancy occurred in the office of jurat, and an inhabitant was elected a jurat, by a meeting at which the mayor, two jurats, and two bailiffs were present:—Held, a good election; the rule requiring the presence of a majority of each definite part of the elective body not applying, where in case of one vacancy, viz. in the office of bailiff, it would be impossible for a majority of the bailiffs to be present. *Res v. Greet*, 2 M. & R. 391; 8 B. & C. 363.

Upon the nomination of two aldermen of a borough, in order that one of them might be afterwards elected mayor, pursuant to charter:—Held, that votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the sacrament within one year, were not thrown away, so as to authorize the returning officer to return another candidate, who was in a minority. *Res v. Bridge*, 1 M. & R. 76. And see *Res v. Parry*, 14 East, 549; *Hawkins v. Res*, 2 Dow, 124; 10 East, 211.

Where a charter required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect, and the common



council was a definite body consisting of thirty-six:—Held, that a majority of the whole number must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election could be had at all. *Rex v. Bellringer*, 4 T. R. 810.

Where, at a corporation meeting, for the purpose of electing honorary freemen, a list of names was proposed, upon the whole of whom the vote was taken collectively, instead of individually:—Held, that such election was void, even where the corporation consisted of an indefinite number. *Rex v. Player*, 2 B. & A. 707.

Where a charter provided for the election of fifteen chief burgesses, and supplying the vacancies from time to time by the votes of a majority, a return to a mandamus that there was not a sufficient number of such as had been themselves legally elected, to form a majority, was held bad, for there might be a competent number of burgesses whose titles, though not originally legal, might yet be unimpeachable by lapse of time. *Rex v. Monmouth*, 4 B. & A. 496.

A corporation, by prescription, consisted of a mayor, recorder, and thirty-six chief burgesses, of whom twelve were also called counsellors. A charter, recognizing that constitution, directed that "the mayor, recorder, and chief burgesses, (of which chief burgesses some were called chief burgesses counsellors,) or the greatest part of them, should have power to elect one of such chief burgesses and counsellors to be mayor," and also to elect other officers and burgesses. The charter also gave powers to the mayor, recorder, and twelve chief burgesses alone:—Held, in the absence of evidence of any other usage, that, by these charters, the twelve burgesses counsellors did not form an integral part of this corporation for the purpose of election, and that therefore, to make a good election, it was sufficient that there were present the mayor, recorder, and a majority of the whole thirty-six chief burgesses. *Rex v. Headley*, 7 B. & C. 496; 1 M. & R. 345.

To an information for usurping the office of justice within a borough, defendant pleaded that he was elected at a corporate meeting, where a majority of the aldermen and capital burgesses were present. Replication, that at the supposed election, five capital burgesses (described by their names), and no others, were present; and that they were not the major part of the capital burgesses. Rejoinder, that at the election, besides the five capital burgesses named in the replication, there were present K. and T., being then capital burgesses, and that the five capital burgesses named in the replication, together with K. and T., were the major part of the capital burgesses. Sur-rejoinder, that K. and T., before the election of the defendant, had been elected, admitted into, and exercised the office of aldermen, and at the election of the defendant were present as aldermen, and that before the defendant's election, two other persons were elected, and admitted as capital burgesses, in the room and stead of K. and T. Rebutter, that at the election of K. and T. as aldermen of the borough, the major part of the aldermen were not as-

sembled and that after the election of K. and T., and before the election of the defendant as justice, and whilst K. and T. exercised the office of aldermen, informations in quo warrantum were filed against them, and judgment of ouster given, with a traverse that K. and T. were aldermen. Demurrer:—Held, that notwithstanding the judgment of ouster, K. and T. could not be considered as having attended at the election of the defendant as capital burgesses, and the judgment must be for the crown. *Rex v. Hubball*, 6 B. & C. 139; 9 D. & R. 143; *S. P. Rex v. Hughes*, 6 D. & R. 443; 5 B. & C. 886.

The majority of the mayor and aldermen in the time being is sufficient to constitute the corporate assembly of Portsmouth. *Rex v. Mosley*, Cowp. 530.

When duly met, corporate acts may be done by the majority of those constituting the meeting. *Id.*

Where a person is proposed for election, as an alderman, the corporation may vote against him without voting for another. *Id.*

A corporation has no power to exclude an integral part of the body, where a charter gives them a right of election. *Rex v. Head*, 4 Bur. 2513.

### 3. Who to preside at Meeting.

It is necessary that a presiding officer, who by the charter of a borough forms an integral part of an elective assembly, should be present up to the time when the election is completed; and the election cannot be proceeded in during his absence, although he should improperly absent himself. *Rex v. Williams*, 2 M. & S. 141.

If a presiding officer, who, by the constitution of the borough, forms an integral part of an elective assembly, depart from it after the meeting has been regularly formed, and the election entered upon, but before it is completed, an election made after his departure is void. *Rex v. Bule*, 8 East, 369.

Assuming that under the stat. 11 Geo. 1, c. 4 an election began at a corporate meeting, whence the mayor presided, may be completed, in case of his absenting himself pending the proceedings, under the presidency of the next in place and order to him; yet, where a question arose upon the right of a voter, on which the mayor, as presiding officer, decided by rejecting the vote: and thereupon, the remaining votes being equal, he declared the same, and that no election could be made; and thereupon ordered the meeting to be dissolved, and no objection was made at the time, nor any notice given to the electors present, that any of them intended to proceed in the election, notwithstanding the decision (which turned out to be erroneous); but after suffering the mayor and many of the freemen to depart, without notice, the rest who remained together proceeded to complete the election: it was held by the Court of K. B. that such election was void even under the statute, as a surprise and fraud.

other electors. *Rex v. Gubiorin*, 11/pleas was proved, but it appeared, in addition to the custom there set out, that it had been usual for the elect jury to present in writing the candidate who had the majority of votes at the morning court, to be sworn in by the steward at the evening court, and that the jury had done so in the present instance.—Held, that this was a mere ministerial act, on the part of the jury, and that such presentment was no essential part of the appointment, and need not be alleged in the plea; and consequently that there was no variance between the statement in the plea, and the proof adduced at the trial. *Rex v. Rowland*, 3 B. & A. 130.

The charter of Saltash empowers the mayor, justice of the peace, and the rest of the aldermen, or the major part of them, of whom the mayor and justice to be two, when it shall seem to them convenient and necessary, to elect as many free burgesses as shall please them, and to the same free burgesses, so elected, to administer an oath, &c. The defendant was elected a free burgess in October, 1804, and in December, 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor said was held for that sole purpose, the defendant tendered himself to be sworn in; against which three aldermen protested, one of whom immediately left the assembly; but before the other two protestors withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant.—Held, first, that the swearing in of the burgess might well be at a time subsequent to the election, he having had a present legal capacity to be sworn in at the time of election, and therefore not like the case of an elector. Secondly, that the act of swearing, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of a majority of the mayor and aldermen, by which act was required to be done, whensoever assembled, and without any summons for this purpose; there being a majority at the time when the defendant was sworn in, and he tendered himself to take the oath; the protestors having withdrawn, it was a majority who remained to give the vote having been come first assembled to preclude the defendant from acting at the meeting. *Rex v. Ellis*, And see *Rex v. Ellis*,

under a mandamus  
officer presiding at  
4 Burr. 2130.

an office for a  
twenty years after  
and a waiver or  
party elected;  
11. *Rex v.*

mayor, he

may be compelled to take the office, either by mandamus or indictment; but when it is admitted that the election has been merely a pretence and contrivance, the court will grant a mandamus, under 11 Geo. 1, to proceed to another election. *Rex v. Colchester*, 4 Dougl. 14.

#### 5. *By-laws to regulate.*

Where the mode of electing officers is not regulated by charter or prescription, the corporation may make by-laws to regulate the election. *Newling v. Francis*, 3 T. R. 189.

The general body of a corporation may lawfully delegate the power to elect burgesses to a select body of the corporation. *Rex v. Westwood*, 2 Dow & Clark, 21; 4 Bligh, N. S. 213; 7 Bing. 1; 7 D. & R. 267; 4 B. & C. 781.

A charter vests the right to elect burgesses in the general body of an ancient corporation, and gives a power to make by-laws to a select body. The general body makes a by-law delegating the power to elect burgesses to the select body:—Held, that this is a good by-law; for the power given by the charter to the select body to make by-laws, does not divest the general body of the right to make such laws, which is incident to it at common law. *Id.*

Where, by charter, a select body in a corporation had power to make by-laws for the good rule and government of the borough, letting of its lands and other matters and causes whatsoever concerning the borough; and by the charter it was also directed, that the mayor, bailiffs, and burgesses should from time to time elect other burgesses:—Held, that the general body of mayor, bailiffs, and burgesses, might make a by-law that the burgesses should be elected by the select body. *Id.*

A by-law, that any person should be admitted to the freedom of the corporation, upon payment of money, together with the fees, is bad. *Rex v. Northampton*, 4 Burr. 2260.

The number of electors may be narrowed by a by-law, but not the number of the eligible. *Rex v. Spencer*, 3 Burr. 1827; *S. P. Rex v. Tunwell*, 3 Dougl. 207.

Nor can the number and description of persons declared eligible to an office by the royal charter of a corporation be changed by a by-law; nor the sale of a distress directed. *Lee v. Wallis*, 1 Ld. Kan. 292.

Where a charter directed the mayor to be annually chosen out of four of the burgesses or inhabitants, and a by-law ordained that all these four should be aldermen:—Held, that it was void, as being repugnant to the charter; and judgment of ouster was given against a mayor elected in consequence of such by-law. *Tucker v. Rex* (in error), 2 Bro. P. C. 304.

Where a charter expressly gave the power of election to the mayor and commonality, together with the aldermen, a subsequent by-law which gave it to the mayor and aldermen only, was held illegal and void. *Hoblyn v. Rex* (in error), 2 Bro. P. C. 339.

Where a charter gave the right of electing an alderman to the mayor and burgesses at large from themselves; a by-law, stated to be made in 1577, by the then mayor and burgesses, but not now extant in writing, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town, viz. the recorder, aldermen, coroners, common councilmen, and such of the burgesses of the said town as had served or did serve the office of chamberlain or sheriff of the said town, and called the livery or clothing burgesses for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor to be one, or the major part of them, was held to be a reasonable and valid by-law; and the office of chamberlain of the town, as stated in such by-law, was taken to be a corporate office as well as the other offices, the serving of which was made the qualification of the electing burgesses. *Rex v. Ashwell*, 12 East, 22.

Where a charter directed the election of a select body to be made by a majority of a select body, held that a by-law giving a casting voice to the presiding officer in case of an equality of votes was bad. *Rex v. Ginever*, 6 T. R. 732.

Where the corporation (consisting primarily of the mayor and burgesses, who were directed by charter to elect aldermen from among themselves) transferred the right of electing burgesses to a select body, consisting of the mayor and aldermen, of whom the major part must attend, eighteen livery or clothing burgesses, of whom nine were sufficient to attend; together with the recorder, if a burgess, and if choosing to attend, and six of the burgesses at large, if they came to attend; but the select body might proceed without either the six burgesses or the recorder, if they did not attend:—Held that this was a reasonable and valid by-law. *Rex v. Bird*, 13 East, 367.

By charter the capital burgesses and common council of a borough were authorized every year, on Monday next before Michaelmas, to elect and nominate one of the capital burgesses to be mayor for one whole year thence next ensuing; and he, before he was admitted to execute that office, or in any way to intermeddle in the same office, was on Friday next after the feast of St. Michael next ensuing such nomination and election, not only to take his corporal oath well and faithfully to execute the office, but also all the oaths appointed to be taken by a mayor; and after such oath so taken, he might execute the office of mayor of the borough for one whole year then and next ensuing. It was then provided, that none who should have borne the office of mayor should be again elected and preferred to be mayor within the space of three years next ensuing the end and determination of his office of mayoralty:—Held, that the words "three years," mentioned in the prohibitory clause, imported years of office, and not calendar years, and therefore a person who had once served the office of mayor might be again promoted to the same office as soon as three mayoralties had intervened:—Held, also, that a party become

mayor, not when he was elected, but when he was sworn in; and that it was sufficient if three mayoralties intervened between the time when he ceased to be mayor, and the time when he was sworn into office a second time. *Rex v. Stayer*, 10 B. C. C. 486.

Where a charter of incorporation authorizes the corporation to elect a master de seipais, a by-law narrowing the body of electors is valid. *Rex v. Attwood*, 1 Nev. & M. 286.

The existence of such a by-law may, without the intervention of a jury, be judicially inferred from an ancient usage for the election to be so conducted. *Id.*

Though the by-law would be void if it also lessened the number of persons eligible to the office, such a view in the presumed by-law will not be inferred from the circumstance of the election by the limited body having almost uniformly fallen upon members of the limited body. *Id.*

Nor will the court on that ground give leave to file an information in the nature of a quo warranto for the purpose of investigating the title of a master elected agreeably to such usage. *Id.*

A by-law to prevent any person from being made free of a company, until he shall have been called at three several meetings of the mayor, and certain aldermen of the city, and the wardens and stewards of the several companies in it, before his admittance, and to be approved of by them, or a majority of them, is good. *Rex v. Durham*, 1 Burr. 127; 1 Ld. Ken. 512.

The words "shall be lawful," when found in the by-law of a corporation, are not to be construed as obligatory. Therefore, where a by-law of a corporation ordained that under certain circumstances "it should be lawful" for the bailiffs to admit to the freedom of the town certain persons—Held, that this by-law was only optional, and that the admission of such persons to the freedom of the borough could not be enforced by mandamus. *Rex v. Eye*, 2 D. & R. 172; 1 B. & C. 85; 4 B. & A. 271.

By-laws for compelling, by means of pecuniary penalties, the attendance of members of a corporation, at corporate meetings, and the acceptance of corporate offices, are reasonable, and may be enforced by action at law. *Tobacco-Pipe Makers' Company v. Woodroffe*, 7 B. & C. 838; 5 D. & R. 530.

But a by-law, imposing a tax on the members of a corporation by the name of a quarterage of money, cannot be supported, unless it is shown that the necessities of the company require such contributions, and that the latter are commensurate with the former. *Id.*

By charter, the company of patten-makers were made a corporation, having a master, two wardens, and twelve assistants, and the company were to elect yearly one of the two wardens to be master. By a by-law afterwards made and agreed to by the whole company, the master was thenceforth to be elected by the master, wardens, and assistants for the time being, in a particular mode, (not prescribed by the charter),

out of two or three meet and sufficient persons, being of the number of the master, wardens, and assistants, and selected by the master and wardens. In case of an equality of voices, the master was to have a double vote:—Held, that the by-law was bad, because it extended the number of persons eligible by the charter to the office of master; and (per Parke, J.) semble that it was also bad because the election was required to be in a particular mode not prescribed or sanctioned by the charter. *Rex v. Bumstead*, 2 B. & Adol. 699.

#### 6. Other Matters as to Election.

Quære, whether, if a mayor de facto intervenes, the mayor of a former year, who is returning officer, and is entitled to hold over by the charter till a legal successor is chosen, can be chosen the third year under 9 Anne, c. 20, s. 8? *Rex v. Godwin*, 1 Dougl. 397.

The king is not bound by 9 Anne, c. 20, s. 8, and therefore, in granting a new charter to an old corporation, he may appoint a person as the officer who presides at the election of members of parliament, though he had previously held that situation. *Rex v. Hughes*, 7 B. & C. 708; 1 M. & R. 625.

A charter granted to the mayor, bailiffs, and burgesses, or the greater part of them, to choose one of themselves to be mayor; but the same charter appointed the first mayor to continue for a year, and until some other Burgess should be elected and sworn, and the two first bailiffs to continue until two other burgesses should be elected and sworn; and it also directed the new mayor to be sworn in before the last mayor, his predecessor, and the bailiffs for the time being, and the burgesses present; and in like manner the new bailiffs to be sworn in before the mayor and the last bailiffs and the burgesses present. These latter provisions explain the first, and show that the mayor must be chosen out of the burgesses at large, and not out of the bailiffs; and this avoids any question as to the validity of a swearing in an officer before himself, by his name of office. *Rex v. Harper*, 5 East, 208.

An election of A. to a corporate office, in place of a supposed vacancy, created by B., cannot be referred to an existing vacancy created by C. *Rex v. Smith*, 2 M. & S. 406.

Where a recent charter of an ancient borough contained a clause expressly disqualifying certain persons from voting for corporate offices, but at the same time ratified and confirmed the ancient usages of the borough, by which certain other and different persons were also disqualified from voting at any nomination or election of corporate officers, and a person was elected to a corporate office in pursuance of the words of the charter, but not conformably to the ancient custom:—Held, that such election was void. *Rex v. Abell*, 3 D. & R. 390.

By several charters, the sheriffs of Norwich were to be chosen by the citizens and commonalty "from themselves;" a subsequent charter confirming former privileges, and regulating the

time and mode of electing sheriffs, omitted the words "from themselves." The usage, however, both before and since had been to elect from among the freemen:—Held, that the last charter was not meant to vary the qualification; and that the restriction in the former charter could not be dispensed with; and that the election of a person not free was irregular. *Rez v. Groul*, 1 B. & Adol. 104.

The common council of London have not any jurisdiction to inquire concerning the election of any person to be one of the common councilmen of the city, for, by the immemorial custom of the city, the cognizance and examination of such elections belong to the king's court of record, held before the lord mayor and aldermen. *Bolton v. Jeffes (in error)*, 2 Bro. P. C. 463.

To a mandamus to the lord mayor and aldermen of London, to admit and swear in A. B. to the office of alderman, they returned that the court of mayor and aldermen had, from time immemorial, the authority of examining and determining whether or not any person returned to them by the court of wardmote as an alderman, was, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned had been brought into question by the petition of any person interested therein; and that it was a necessary qualification of the person to be admitted to the office of alderman, that he should be a fit and proper person to support the dignity and discharge the duties of the office: that A. B. having been returned to them by the court of wardmote as duly elected, a petition by persons interested in the election was presented to them, charging circumstances which rendered A. B. an unfit person to be admitted to the office of alderman; and that they took the petition into consideration, and having heard witnesses, did adjudge according to their discretion and sound consciences, that A. B. was not a person fit and proper to support the dignity and discharge the duties of the office:—Held, that the custom set out in the return was good and valid in the law: held, secondly, that, as the fitness of the person to be admitted was to be determined according to the discretion of the mayor and aldermen, it was sufficient for them to state in the return that they had exercised their discretion, and adjudged that A. B. was unfit, without giving particular reasons. *Rez v. London*, 3 B. & Adol. 255; 2 Nev. & M. 126: S. C. contra, 9 B. & C. 1; 4 M. & R. 36.

Where the right of election of an alderman is by custom in the citizens, but the court has the power of rejecting the party returned to them as elected, it is not inconsistent to return to a mandamus to admit to the office of alderman, that the prosecutor was elected by the citizens according to custom, but was rejected by the court of aldermen, and so was not duly elected. *Id.*

Where at an election of aldermen in London, three poll clerks were first appointed, and two of them afterwards dismissed, and it appeared that, upon a scrutiny being demanded, the wardmote

was adjourned to meet again on a fresh summons; that the mayor then went out of office, and the new mayor assembled a wardmote by a fresh summons, took the scrutiny, and declared A. B. duly elected, and that upon a return thereof being made to the court of mayor and aldermen, they upon petition declared the election void; it was held that the dismissal of the poll clerks, and the change of the mayor, were no objections to the validity of the election; and that the mode of adjourning the wardmote was not a dissolution, and did not affect the proceedings at the scrutiny. *Id.*

#### VIII. DUTIES OF CORPORATORS.

Payment of a fine, imposed by the by-laws of a corporation, for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled to do so by mandamus. *Rez v. Bower*, 3 D. & R. 661: S. C. not S. P. 1 B. & C. 492.

If a corporation choose only one bailiff, when the charter directs two, the one alone cannot act. *Rez v. Smart*, 4 Burr. 2241.

An alderman is not bound to reside within the borough, unless that is necessary to the discharge of the duties of his office, or he is so required by the charter. *Rez v. Portsmouth*, 4 D. & R. 761: 3 B. & C. 153.

Quære, if on the Corporation Act the onus probandi lies on the person elected? *Crawford v. Powell*, 1 W. Black. 229; 2 Burr. 1613.

The words, "other offices," in stat. 9 Anne, c. 20, means offices ejusdem generis with those before mentioned, which are confined to corporate offices; and, therefore, the office of registrar and clerk of the court of requests, though in a corporate town, is not a corporate office. *Rez v. Hall*, 2 D. & R. 341; 1 B. & C. 237.

A corporation having a customary duty on them imported, it is a good custom that factors, free of the corporation, shall receive to their own use that part of the duty which arises from corn assigned to them as factors. *Cockedge v. Fauslan*, 1 Dougl. 119.

An undertaking in the court of aldermen to become a freeman of the city of London, within a certain time, was held to be equivalent to a covenant in writing for the same purpose. *Frederick v. Frederick*, 1 Bro. P. C. 257.

A proxy made by a canon to act for him in his absence, in all corporate business, is not revealed by the canon making the proxy having, in an intermediate period, appeared and acted for himself. *Eyre v. Lovell*, 3 Dougl. 67.

#### IX. RIGHTS AND LIABILITIES OF CORPORATORS.

Corporators are not individually answerable for acts done in their corporate capacity, from which detriment happens; at least not without proof of malice. *Harman v. Tappenden*, 1 East, 555; 3 Esp. 278: S. P. *Rez v. Wadham College*, 1 East, 560, n.

The court of K. B. will not grant a criminal information against the members of a corporation

for the misapplication of the corporation money. *Rex v. Watson*, 2 T. R. 199.

The highest bidder for certain lands sold by auction, and the mayor of a corporation on behalf of himself and the rest of the burgesses and commonalty of the borough, the vendors of the lands, signed a contract, in which they mutually promised to fulfil the conditions of sale on their respective parts; the conditions stated the title of the corporation to the premises, and stipulated that they should convey and might resell on default: the only act therein mentioned to be done by the plaintiff was the receiving the deposit:—Held, that the plaintiff could not maintain an action in his individual capacity against the purchaser for breach of this contract. *Bowen v. Morris (in error)*, 2 Taunt. 374.

By an act, 42 Geo. 3, c. 56, for enlarging the poor-house of the parish of Chatham, certain persons therein named, and their successors, were appointed guardians of the poor in C., and trustees for putting the act in execution; and in order that there might be an impartial succession of guardians, and to keep the specified number, it was provided that eight should go out of office yearly, and that the parishioners should re-elect the same persons, or other inhabitants of the parish in their stead. By other sections, the guardians were empowered to raise money by mortgage or grant of annuity, to purchase land, and to take a conveyance to themselves and their successors: and they were to sue and be sued in the name of their treasurer for the time being, who was to be reimbursed by the guardians all costs and damages to which he should be put as plaintiff or defendant in such action. A. was treasurer to the said guardians under the provisions of the act from 1805 till 1811, and from 1811 to 1828. By a decree of the court of Chancery in 1808, the parish of C. was adjudged to be entitled, in respect of such part of it as was within the city of Rochester, to two thirty-second parts of certain revenues bequeathed for the use of the poor of that city, and a sum of 1115*l.* was paid over to A. as such treasurer on that account. That sum he, by order of the then guardians, paid over to them in 1822, and then applied it to the use of the poor of the whole parish. On the petition of the inhabitants of that part of the parish which was within the city of Rochester, the plaintiff, after he ceased to be treasurer, was ordered by the court of Chancery to pay the above-mentioned sum, which he had received as treasurer, into court, in order that it might be applied to the exclusive use of Chatham intra. He accordingly paid the amount, and brought an action against the guardians to recover it:—Held, that the guardians were, for the purposes of suing or being sued, in the nature of a corporation, and that A. was entitled to recover in an action, against the now treasurer, the sum paid by him into the court of Chancery, as money paid to the use of the guardians. *Jeffreys v. Gurr*, 2 B. & Adol. 833.

incorporation to amove, by order of council, one or more of the corporators, which declared that all or any of them so amoved should actually, and without further process be amoved, and which also provided, at the same time, that upon such amotion the remaining corporators might proceed to fill up the vacancies, cannot be exercised to such an extent as not to leave a sufficient number to make a re-election; and therefore an amoval of all is illegal and void. *Rex v. Amery*, 2 T. R. 515; 1 T. R. 575. *But see* 4 T. R. 122.

Where the charter of a corporation declared that "it should be lawful for the mayor and capital burgesses to remove any of their body for non-residence within the borough:"—Held, that this gave them a discretionary and not a compulsory power of amotion. *Rex v. Wentloose*, 5 D. & R. 414.

Where non-residence is a ground for removing a corporator, it is unnecessary to summon him previously to come and reside. *Rex v. Lyme Regis*, 1 Dougl. 149.

A mandamus was refused to compel a corporation to meet for the purpose of considering the propriety of removing non-resident members, where the charter in terms required residence. *Rex v. Totness*, 5 D. & R. 481.

If a corporation amove a member upon a non-charter or prescription day, it is as necessary that each member should be summoned, and have notice of the particular business intended to be proceeded upon, as in the case of a select number. *Rex v. Doncaster*, 2 Burr. 738; 2 Ld. Ken. 391.

A particular summons of a corporation assembly is requisite to amove a member. *Rex v. Liverpool*, 2 Burr. 723; 2 Ld. Ken. 424.

Bankruptcy is no cause for the amotion of a common councilman of Liverpool. *Id.*

When amotion out of a corporation is returned, the return must set forth the particular facts precisely. *Id.*

An alderman of London in custody in execution, and under an escape warrant without probability of discharge, may be amoved. *Rex v. London*, 4 Dougl. 361.

A., having the office of town clerk of a borough, to hold and exercise for life by himself or his sufficient deputy, appointed a deputy in 1823. A bill of indictment having been found against A. for forgery, he, in April, 1829, quitted the country. The deputy died on the 23d of April, 1830. At a meeting of the corporation held on the 31st of May, 1830, by adjournment from the 27th of April, one of the grand common days, it was resolved to remove A. from office, on the ground that he had neglected to attend, by himself or deputy, at that adjourned meeting, and at other meetings of the corporation:—Held, 1st, that the want of summons to A. was no objection to the removal, he not being within reach; 2dly, that no previous notice to the members of the corporation of the purposes of the meeting was necessary, inasmuch as it was held by adjournment from one of the grand common days, when every member of the corporation is supposed to be present; 3dly, that A. was properly removed

#### X. AMOTION OF CORPORATORS.

A power reserved to the crown in a charter of  
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from his office, inasmuch as under the circumstances he must be presumed to have left the country without any intention to return, and therefore, on the death of his deputy, there was no person capable of executing the office. *Rez v. Harris*, 1 B. & Adol. 936.

A by-law to give power of amotion for just cause is a good by-law, though the corporation that made it had no power of amotion expressly given by charter, or claimed by prescription. *Rez v. Richardson*, 1 Burr. 519; 2 Ed. Ken. 85.

## XI. BY-LAWS.

### 1. Power of making.

A corporation by charter cannot make by-laws inconsistent with the intention, or counteracting the directions of their charter. *Rez v. Cutbush*, 4 Burr. 2204.

All by-laws made by corporations must be consistent with, and subordinate to, their constitution by charter. *Hoblyn v. Rez* (in error), 2 Bro. P. C. 329.

Upon the principle of variation from a charter:—Held, that a by-law directing that no person shall be elected mayor a second time within six years, was void. *Rez v. Cambridge*, 2 Selw. N. P. 1144.

A corporation created by letters patent, with a power of making by-laws, cannot make any laws to incur a forfeiture. *Kirk v. Nowill*, 1 T. R. 118.

Neither can a corporation, created by act of parliament, unless such a power is expressly given. *Id.*

In a company constituted by letters-patent, with power to make reasonable by-laws, a by-law for the steward to provide a dinner for certain members of the company on Lord Mayor's day, with an allowance for so doing, or to pay a fine of 20*l.*, or excuse himself by swearing he is not worth 300*l.*, is a bad by-law. *Carter v. Sander-son*, 5 Bing. 79; 2 M. & P. 164. And see *Frame-work Knitters v. Green*, 1 Ld. Raym. 113.

At all events, the allowance is a condition precedent, and ought to be averred in an action of debt for the penalty. *Id.*

The power to make by-laws is incident to the whole body of every corporation; and, therefore, if a charter give to a select body a power to make by-laws touching certain matters therein specified, that does not take away from the body at large their incidental power to make by-laws touching other matters not specified in the charter. *Rez v. Westwood*, 2 Dow & Clark, 21; 4 Bligh, N. S. 213; 7 Bing. 1; 7 D. & R. 267; 4 B. & C. 781.

Every by-law may be repealed by the same body which made it. *Rez v. Ashwell*, 12 East, 22.

In the absence of any precedent, the court refused a rule nisi for a mandamus calling on the mayor of a town to propose a resolution to

the burgesses, in guild assembled, for repealing certain by-laws, though it was alleged that by-laws and ordinances might by charter be made, and had formerly been made at such guilds. *Garrett v. Newcastle*, 3 B. & Adol. 252.

In the city of York, which was incorporated before the time of memory, there had been a court from very ancient times, held first before the mayor and bailiffs, and, after a charter of Richard II., before the mayor and sheriffs. By a by-law made in the 3 & 4 Philip and Mary, by a select body of the corporation who had immemorably made rules and regulations as to the practice of the court, and who had at their discretion selected the persons admitted to practise as attorneys there, it was ordered, that thenceforth there should be no more than four persons admitted to be attorneys of the sheriff's court; and from that time it did not appear that any more than that number had ever been allowed to practise:—Held, that the by-law was reasonable, and that the usage limiting the number of attorneys to four was sufficiently ancient to satisfy the statute 2 Geo. 2, c. 23, s. 11. *Rez v. York*, 3 B. & Adol. 770.

### 2. In Restraint of Trade.

A by-law in restraint of trade is bad, unless there be a custom to support it. *Heaketh v. Bred-dock*, 3 Burr. 1847.

Where there is a custom to exclude foreigners from exercising a trade within a corporation, a by-law to support the custom, which gives a penalty to any but the corporation, is bad. *Tuttorid v. Glasby*, 2 Wils. 266.

A power granted by charter to a company exercising a particular trade in a certain place, to make by-laws for the government of all persons exercising that trade in that place, enables it to make by-laws binding on persons so exercising the trade who are not members of the company, as well as on those who are. *Butcher's Company v. Morey*, 1 H. Black. 370.

A by-law founded on a custom that no stranger person of right ought to use the craft of a trade within a city, except he be free thereof, is a good by-law. *Woolley v. Idle*, 4 Burr. 1951.

A custom that none but a freeman, or the widow or partner of a freeman, shall sell by retail in a city, or the suburbs thereof, is valid. *Yak v. Welbank*, 4 B. & A. 438.

A by-law, that no person not being free of the Pewterer's Company shall exercise the trade of a pewterer within the city of London, is a by-law in restraint of trade, and is void, without proof of a special custom to support it. *London v. Compton*, 7 D. & R. 597.

And a by-law to oblige a person who has a right to be free of the city, to take up his freedom in some particular company, is in restraint of trade, and bad. *Harrison v. Godman*, 1 Burr. 12.

But a by-law that a butcher in London shall be free of the butchers' company, is good. *Rez v. Harrison*, 3 Burr. 1322.

A by-law in a corporation that no person should slaughter animals within the walls of a city under certain penalties:—Held good, because merely a regulation of trade, and not a restraint, and other inhabitants bound, as well as the members of the corporation. *Pierce v. Bartrum*, Cowp. 269.

Semble, that a by-law made by a company carrying on trade in partnership, to prevent any one of the members carrying on a separate trade on his own account, is good. *Rex v. Faversham*, 8 T. R. 352.

A by-law made by the freemen of a company of oyster fishermen, prohibiting any freeman from being engaged in the trade of sending oysters to market from any other ground on the Kentish shore than the oyster ground of the company, under a penalty of 10*l*. and in case of refusal to pay the same, that such freeman shall thenceforth, and until the fine be paid, be excluded from all share of the profits to be made thereafter by the joint trade of the company, is void by law; there being no usage stated to that extent, but only a usage for the freemen to make orders for regulating the company and fishery, with fines and penalties for the breach of such orders, and for prohibiting the freemen from being engaged on other oyster grounds, under penalties to be stopped out of the money arising by the sale of the stint of oysters of such freemen. *Adley v. Reeves*, 2 M. & S. 53: S. C. nom. *Adley v. Whitstable Company*, 17 Ves. jun. 304.

The common council of the city of London have by custom a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they should be licensed. A by-law was made in common council, that 420 of such carts, and no more, should, by the president and governors of Christ's Hospital, be allowed or licensed to work for hire within the city:—Held, that such by-law was supported by the custom; and that the discretionary power of licensing was rightly and ex necessitate delegated by the common council to a smaller body; and (on motion for a procedendo, after a return to a habeas corpus, obtained by a party sued on the by-law,) the court refused to inquire whether or not the number of 420 was reasonable. *Shaw v. Pope*, 2 B. & Adol. 465.

A custom of the city of London, that no person not being free may sell or put to sale any wares within the city or liberties by retail, or keep any shop or other place for show, sale or putting to sale, of wares by retail, or for use of any art, trade, &c., within the city, liberties, or suburbs, is sufficient ground for a by-law forbidding any non-freeman to show, sell, or put to sale, wares by retail within the city, liberties, or suburbs, or to use any art, trade, &c., within the same. To use an art, trade, &c., signifies here, to use as a master or principal. *Clark v. Denton*, 1 B. & Adol. 92.

A by-law that no person shall exercise the art of a painter in the city of London, not being free of the Company of Painters, is a by-law in restraint of trade, and void, unless there be a spe-

cial custom to warrant it. *Clark v. Le Cren*, 9 B. & C. 52.

The Beer Act (1 Will. 4, c. 64,) does not abrogate a custom in a borough, that no one shall sell beer within the borough, except a freeman licensed by the mayor and aldermen. *Leicester v. Burgess*, 2 Nev. & M. 131.

A by-law of a corporation founded on a custom to exclude foreigners, and authorizing a distress for a penalty in case of a breach of the by-law, without a previous demand or refusal of such penalty, is bad. *Davis v. Morgan*, 1 C. & J. 587; 1 Tyr. 457; 1 Price's P. C. 77.

A defendant, justifying the taking of goods as a distress for a penalty incurred by breach of a by-law of a corporate company, must aver a previous demand and refusal of payment, and he must prove that averment, although the by-laws do not exact any such preliminary. *Id*.

A recital of demand, and refusal of penalties incurred by a breach of a by-law, in the warrant of distress put in evidence by plaintiff to prove the fact of the distress, and the persons by whom it was ordered, is not evidence of the facts therein recited, although put in as part of the plaintiff's evidence to support his action. *Id*.

Semble, that the declarations of deceased corporators are evidence by reputation of a custom to exclude strangers from trading in a particular town. *Id*.

Corporators are not competent witnesses to prove a custom of excluding strangers from exercising trades within a town, where a moiety of the penalty imposed by a by-law for breach of that custom goes to the corporation. *Id*.

So, semble, though the moiety be granted away by them, by by-law, to a company. *Id*.

Sixty years' usage has been considered as evidence of a by-law. *Perkin v. Cutlers' Company*, 1 Selw. N. P. 1145—Mansfield.

### 3. Other Things.

A by-law may be good in part and bad in part, if the two parts be distinct from each other and separately entire. *Rex v. Faversham*, 8 T. R. 352.

A by-law shall not be objected to in a summary way, upon motion, on the return to a habeas corpus, except in cases from London. *Balard v. Bennett*, 2 Burr. 775.

Where a by-law made at the feet, in an action for a penalty for acting contrary to that by-law and all former by-laws, is relied on, they must all be set forth. *Gerrish v. Rodman*, 3 Wils. 155, 164.

An averment, in an information for contemptuous behaviour to a court, that the court consists of A. B. and C., is made out by a by-law enacting that A. B. and C. are sufficient to hold the court, although others may be present, and act as members of it. *Rex v. Campbell*, 1 Camp. 91—Ellenborough.

A gas-light company was incorporated by act of parliament, which provided that eighteen share-



holders should be directors, and, as such, should use the common seal, manage the affairs of the company, lay out money, purchase lands, &c., and make contracts for lighting, and for the sale of materials. The company was empowered to make by-laws under seal for its government, and for regulating the proceedings of the directors, officers, servants, &c. At a meeting of the company, a resolution was passed, not under seal, that a remuneration should be allowed to every director for his attendance on courts, committees, &c., viz. one guinea for each time:—Held, that a director who had attended courts, &c., could not maintain an action for payments according to the above resolution; for that it was not a by-law within the statute, nor a contract (if such could have been available) to pay the directors, or any of them, for their attendances, and the directors could not be considered as servants to the company, and, as such, entitled to remuneration for their labour, according to its value. *Dunston v. Imperial Gas Company*, 3 B. & Adol. 125.

### XII. DISSOLUTION OF CORPORATIONS.

The king may, at his discretion, seize the franchise of a corporation guilty of an offence amounting to a forfeiture. *Res v. Ponsonby*, 1 Ves. jun. 8.

But he cannot by his prerogative destroy a corporation. *Res v. Amery*, 2 T. R. 515; 1 T. R. 575; 2 Bro. P. C. 336. *But see S. C. 4 T. R. 122.*

A judgment of seizure quousque, &c., against a corporation, in default of appearance, operates as a final judgment to dissolve the corporation, if they do not appear in the same term, or the next at farthest. *Id.*

When an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved that the crown may grant a new charter. *Res v. Pasmore*, 3 T. R. 199.

The major part of an integral part of the corporation whose attendance is required at the election of officers being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies, and continuing itself. *Res v. Morris*, 3 East, 213; 4 East, 17.

Therefore, where the election of mayor was to be made by the majority of an assembly, composed of several integral definite parts of a corporation, and other burgesses and inhabitants for the time being:—Held, that one of such definite integral parts, being reduced below a majority of its proper number, could no longer be represented in such corporate assembly, and the whole corporation was thereby dissolved, being no longer capable of continuing itself. *Id.*

In an action for tolls due to a corporation, the defendant, who had acquired the character of a corporator after the cause of action arose, but

before trial, has no right to inspect the corporation books, and must still be considered as a foreigner quoad this action. *Bristol v. Vierge*, 6 D. & R. 434.

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#### I. GENERALLY.

By 6 *Edw. 1, c. 1*, (statute of Gloucester); in all cases where a party recovers damages he shall recover costs also.

By 23 *Hen. 8, c. 15*, where the plaintiff, after appearance of the defendant, shall be nonsuited, or have a verdict pass against him, the defendant shall be entitled to his costs.

The 24 *Hen. 8, c. 8*, excepts actions to the king's use.

The 8 *Eliz. c. 2*, gives costs to the defendant on discontinuance and nonsuit.

The 4 *Jac. 1, c. 3*, extends the provisions of the 23 *Hen. 8*, so as to include actions of trespass, ejectione firmæ, and all other actions whatsoever; and applies to other courts as well as to the superior courts at Westminster.

The 13 *Car. 2, st. 2, c. 2, s. 3*, gives the defendant costs in the same manner, if the plaintiff is nonprossed for want of a declaration.

The 8 & 9 *Will. 3, c. 11, s. 3*, gives costs to the plaintiff in actions of waste, debt for not setting out tithes, where the single value or damage

found does not exceed twenty nobles, writs of *scire facias*, and suits upon prohibitions on judgment for him either on plea or demurrer; and to the defendant on verdict for him, or on non-suit or discontinuance.

By 58 Geo. 3, c. 30, in actions for assault and battery in inferior courts, if the damages given are under 40s., the plaintiff is to receive only so much costs as the damages given.

By s. 2, in courts not holding plea to the amount of 40s., if the jury, in actions for assault and battery, or for slanderous words, assess damages under 30s. the plaintiff is to recover costs to the amount only of the damages given.

The statute of Gloucester gives costs where damages are given by any statute made after that parliament. *Jackson v. Calesworth*, 1 T. R. 71; *S. P. Creswell v. Houghton*, 6 T. R. 355. *And see Tyte v. Glode*, 7 T. R. 268.

Wherever a plaintiff would be entitled to costs, the defendant is so reciprocally. *Greetham v. Theale*, 3 Burr. 1723.

Costs accruing upon process partake of the nature of the original debt. *Anon. Loft*, 617.

"Costs out of pocket" is a term for the largest costs. *Id.*

The court knows no distinction between costs generally, and full costs. *Irwin v. Reddish*, 1 D. & R. 413; 7 B. & A. 796.

By 10 Hen. 8, it is enacted, that no person shall practise the faculty of physic within the city of London, or seven miles thereof, unless licensed by the president, college, and commonalty of the faculty of physic, under the penalty of 5*l.* for every month he shall exercise the same faculty, without being so licensed:—Held, in an action of debt, brought to recover penalties incurred under this act, that the plaintiffs would be entitled to costs if they succeeded, because where a right is vested in an individual or corporation, the withholding that right, and thereby compelling a party to sue for it, is an injury for which damages may be recovered, and consequently, that, under the 4th of Jac. 1, c. 3, the defendant having succeeded was entitled to costs. *College of Physicians v. Harrison*, 9 B. & C. 524.

A plaintiff who has obtained a verdict against a defendant is entitled to his full costs, although the person who conducted his cause was not an attorney. *Reader v. Bloom*, 10 Moore, 261; 3 Bing. 9.

## II. INTERLOCUTORY.

### 1. Motions and Rules.

Costs cannot be given on the refusal of a rule to show cause. *Weldron v. Norris*, 2 W. Black. 760.

Costs of showing cause against a rule in the first instance are never given. *Rex v. Long*, 1 M. & R. 139.

Though notice of motion was given. *Gerrard v. Gaskill*, 2 Chit. 401.

Where a party gives notice of an intended motion, and no one appears on the appointed day to make it, the court of Exchequer have no rule enabling them to give the other party, who has attended the court during the day for the purpose of opposing it, the costs of such attendance, where there has been only one notice given. *Wara v. Bickford*, 9 Price, 14.

Where a rule is not moved with costs, and nothing is said about them at the time of discharging it, they are not payable to the successful party. *Anon.* 1 Chit. 398.

If a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged, without special directions as to costs, it is discharged with costs, and the latter rule must be drawn up accordingly. *Reg. Gen., K. B., M. T.* 37 Geo. 3, 7 T. R. 82.

A plaintiff who arrests a defendant improperly, and contrary to the practice of the court, must pay the costs of a motion to cancel the bail-bond. *Lear v. Heath*, 1 Marsh. 19; 5 Taunt. 201.

The court discharged a rule which had been obtained for showing cause against delivering up a bail-bond, on entering a common appearance, in the case of a guarantee for the payment of goods sent to a third person, with costs, without ordering those of the motion to be paid by the defendant. *Cope v. Jones*, 9 Price, 155.

Where a rule to set aside proceedings is moved without costs, and the affidavits are answered, it must be discharged with costs. *Tilley v. Henly*, 1 Chit. 136.

Where a rule prays for several things, to some of which the party is entitled, and to others not, but cause is shown against all, no costs are given on either side; though, if cause had been shown against the bad part only, the party showing cause would have had costs. *Alison v. Purman*, 2 Dowl. P. C. 49.

Costs of rules for enlarging the returns to writs in the Exchequer and the King's Bench, refused to the sheriff, the enlargement being made on his application, and for his benefit. *Rex v. Cate*, M'Clel. & Y. 196.

Where an affidavit answered a rule nisi for setting aside proceedings for irregularity, with costs, but was written in a cramped and slovenly hand, the court on that ground refused to grant the costs of the application. *Bane v. Jones*, 8 D. & R. 114.

The crown may receive costs on the refusal of a motion. *Rex v. Hassel*, M'Clel. 105.

On a motion for costs upon affidavit, a rule nisi only is granted. *Rex v. Smith*, 1 Ld. Ke. 378.

### 2. Summons and Orders.

Before the 3 & 4 Will. 4, c. 42, it was considered doubtful whether a judge had power to give costs at chambers: thus, in one case, it was held that a judge cannot grant costs at chambers. *Anon.* 1 Dowl. P. C. 52; 2 C. & J.

165; 2 Tyr. 172; *S. P. Spicer v. Todd*, 2 C. & J. 165.

And, accordingly, the costs of a summons at a judge's chambers were not allowed by the court. *Read v. Lee*, 2 B. & Adol. 415.

In another case it was considered that a judge at chambers had power to make an order for payment of costs upon a summons. *Doe d. Prescott v. Roe*, 2 M. & Scott, 119; 9 Bing. 104; 1 Dowl. P. C. 274.

Now, however, it would seem that a judge at chambers has power to order costs to be paid by either party according to his discretion. *Hughes v. Brand*, 2 Dowl. P. C. 131.

### 3. Setting aside and staying Proceedings.

It is a general rule that costs are allowed on setting aside proceedings for irregularity, but under very particular circumstances the court will make the rule absolute without costs. *Anon.* 1 Chit. 398, n.

Irregularities in practice are not excused from liability to costs on the ground of the party having been misled by Impey's Practice, or other unauthorized works. *Crew v. Attwood*, 7 Taunt. 70; 2 Marsh. 337.

Where, on moving to set aside proceedings for irregularity, the rule does not pray for costs, the court cannot give them. *Rez v. Middlesex (Sheriff)*, 2 Dowl. P. C. 5.

Where a rule for setting aside proceedings, on the ground of the defendant's Christian name being omitted, was moved without costs, and the defendant had received the writ without objection, the court of K. B. set aside the proceedings without costs. *Tomlin v. Preston*, 1 Chit. 397.

Semble, where proceedings have been set aside for irregularity, the plaintiff is not bound to pay the costs thereof, before he is at liberty to commence a fresh action. *Anon.* 2 Chit. 146.

Semble, that, upon setting aside a plea in abatement for irregularity, no costs are allowed. *Poole v. Pembrey*, 1 Dowl. P. C. 693.

On setting aside a verdict for a misdirection of the sheriff, the defendant will not be allowed costs. *Anon.* 1 Chit. 645, n.

Where an inquisition of damages before the sheriff was excessive, and the court granted a rule for setting it aside, leaving it to an arbitrator to say for what sum the verdict should stand, (nothing being said at the time as to costs), and the arbitrator reduced the damages considerably:—Held, that the plaintiff was not entitled to the costs of setting aside the inquisition. *Lewis v. Harris*, 4 D. & R. 129; 2 B. & C. 620.

If, after rule obtained to set aside proceedings for irregularity, the other party offer to waive proceedings and pay the costs of the rule nisi, costs subsequent to the offer must fall on the side which does not accept it. *Hulton v. Stocking*, 2 Tyr. 165; 2 C. & J. 60; 1 Dowl. P. C. 296; *S. P. Ex parte Ardens*, 1 Price's P. C. 149.

Where a party moves to set aside proceedings for a mere irregularity in process, which is

amendable as of course, he is not entitled to costs. *Popkins v. Amory*, 5 M. & P. 319.

The costs of setting aside an interlocutory judgment, obtained in breach of good faith, ordered to abide the event of the suit. *Anon.* 3 Price, 489.

Costs of the application to set aside an interlocutory judgment signed for want of a plea, where the defendant pleaded non assumpsit, instead of nil debet, were, under the circumstances, ordered to be costs in the cause. *Gray v. Swing*, 1 Price's P. C. 35.

### 4. Payment of money into Court.

*Where Plaintiff proceeds.*—If defendant pay money into court, and plaintiff nevertheless proceed to trial, where a verdict is given against him, he is not entitled to the costs up to the time when the money was paid into court. *Stevenson v. Yorke*, 4 T. R. 10.

Nor when a juror is withdrawn. *Stodhart v. Johnson*, 3 T. R. 657.

Nor when the defendant has obtained judgment as in case of nonsuit. *Crosby v. Olorenshaw*, 2 M. & S. 335. *But see contra, Seamour v. Bridge*, 8 T. R. 408.

Nor in C. P. where the plaintiff proceeds, and suffers the defendant to sign judgment of non-pros against him. *Postle v. Beckington*, 1 Marsh. 510; 6 Taunt. 158.

But in C. P., if plaintiff proceed to trial after money paid into court, and the verdict is against him; he is, notwithstanding entitled to costs up to the time of the money paid in. *Wilton v. Place*, 2 B. & P. 56; *S. P. Muller v. Hartshorne*, 3 B. & P. 556; and *Edwards v. Harrison*, 11 Price, 533.

So, it was formerly held in K. B. that a plaintiff was entitled to all costs till the time of the defendant's paying money into court, notwithstanding he afterwards proceeded in the action. *Hartley v. Bateson*, 1 T. R. 529. *And see Griffiths v. Williams*, 1 T. R. 710.

The plaintiff is entitled to costs up to the time of the defendant's paying money into court, though the plaintiff entered the record for trial, and withdrew it. *Lorck v. Wright*, 8 T. R. 486.

If a defendant pays money into court, which the plaintiff does not take out, but proceeds, and the defendant obtains a verdict, the defendant is entitled to full costs of the whole action. *Jeffs v. Smith*, 4 Taunt. 196.

Where a defendant took out a summons, calling on plaintiff to show cause why proceedings should not be stayed on payment of a sum certain and costs, and plaintiff stated he proceeded for a larger sum, but afterwards, on payment of that sum into court, took it out, and obtained an order for taxation of costs, and the defendant obtained a rule to show cause why the master should not tax him his costs subsequent to the issuing the summons, but which, under the particular circumstances of the case, was discharged with costs. In a proper case, however, the court con-

sidered that they might interfere in the manner required. *Edwards v. Harrison*, 11 Price, 533.

The plaintiff is entitled to costs up to the time of paying money into court by the defendant, even after a double default to try the cause and peremptory undertaking given. *Foulstone v. Blackmore*, 1 Y. & J. 213.

Where the defendant had, before declaration delivered, tendered a sum of money in discharge of debt and costs, but the plaintiffs declined to accept it, the court refused to grant a rule, that upon payment of such debt and costs by the defendant into court, and upon the same being taken out by the plaintiffs, the subsequent costs should be paid by them, as their conduct did not appear vexatious or oppressive. *Hatchard v. Hague*, 12 Moore, 66.

**In Policy Cases.**—Where money is paid into court in several actions, which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court. *Reg. Gen. K. B., C. P., and Exchequer*, H. T. 2 W. 4, 1 Dowl. P. C. 197; 8 Bing. 404; 1 M. & Scott, 430; 3 B. & Adol. 389; 2 C. & J. 197; 2 Tyr. 350; 4 Bligh, N. S. 605.

Generally, if money be paid into court, and the plaintiff does not take it out, but proceeds to trial, and recovers nothing, he is not entitled to costs up to the time of paying the money into court; but in policy cases, where there is a consolidation rule, and money paid into court, although the cause be tried, and the case follows the general practice, giving the defendant, if he succeeds, the whole costs of that action, yet the plaintiff is entitled to the entire costs of the short causes up to the time of paying the money into court. *Twemlow v. Brock*, 2 Taunt. 361.

If in an action on a policy, which is not included in any consolidation-rule, the defendant pays the premium into court, and the plaintiff takes it out, though the plaintiff had failed in the special counts in another action on the same ship and policy, he cannot therefore be restricted from his costs of the special counts in the principal case. *Redman v. Woodman*, 5 Taunt. 607.

In a special count on a policy, the risk was stated to continue until the ship was unloaded, and there were common counts:—Held, that the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs, and the plaintiff thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial. *Andrews v. Palegrave*, 9 East, 325.

The defendants in several actions on a policy of insurance paid money into court, which the plaintiff took out, without taxing the costs at that time: afterwards they entered into the common consolidation rule, and the plaintiff was nonsuited in the action which was tried:—Held, that the latter was not entitled to the costs in any of the actions up to the time of paying

money into court. *Burstell v. Horner*, 7 T. L. 372.

The defendants in several actions on a policy of insurance paid money into court, and (the plaintiff refusing to consent to a consolidation rule) obtained a rule for staying proceedings in the others, until after the trial of one, upon the terms of their admitting their subscription to the policy, the interest of plaintiffs, &c.: and afterwards judgment passed for defendant in the case tried:—Held, that the plaintiffs were entitled in the other actions to costs, to the time of paying money into court. *Powell v. Parkinson*, 6 M. & S. 107.

**Where Plaintiff takes Money out and stops.**—If a defendant offers to pay part of a debt which the plaintiff refuses to accept, and the defendant then pays the money into court, and the plaintiff takes it out, the defendant is entitled to costs from the time of the offer. *Marryott v. Clapp*, 1 Dowl. P. C. 701.

Where a defendant took out a summons to stay proceedings on payment of a certain sum with costs, and the plaintiff refused to accept it, but afterwards, when the money was paid in under a rule of court, took it out and discontinued:—Held, that the plaintiff was only entitled to costs up to the time of the first offer, though he stated as a reason for not proceeding that he could not find a material witness. *Hale v. Baker*, 2 Dowl. P. C. 125.

Where in a country cause the defendant, before declaration took out a summons to stay proceedings, upon payment of a sum less than the plaintiff's demand and costs, upon which an order was made; and the defendant afterwards paid that sum into court, which the plaintiff's agent, having in the mean time consulted his principal in the country, took out of court:—Held, that the plaintiff, not having been guilty of fraud or vexation, was entitled to costs up to the time at which he took the money out of court. *Haworth v. Holgate*, 2 Y. & J. 257.

Where money is paid into court upon the common rule, the court of C. P. will not discharge that part of it which directs the payment of costs, unless the defendant have been prevented from making a legal tender, by the fraud or vexatious conduct of the plaintiff. *Last v. Benton*, 3 Marsh. 478.

In an action for work and labour, the defendants, having offered by letter to pay a certain sum for the debt, with the costs up to that time, which was refused by the plaintiff, obtained a rule to show cause why the sum of 5*l.* and the costs should not be paid into court, and further proceedings be stayed, and why the plaintiff should not pay the costs incurred since the tender; and why, if the plaintiff refused to accept it, the 5*l.* should not be paid into court, and struck out of the declaration. The court discharged the rule, it appearing that there was nothing oppressive in the plaintiff's conduct. *Gibson v. Copman*, 1 Marsh. 392; 5 Taunt. 840.

Where the plaintiff, an attorney, claimed 2*l.* from the defendant, as his moiety of the expenses

for preparing a lease, and five years afterwards sued him for the recovery of that sum; and the defendant, before the delivery of the declaration, took out a summons to stay proceedings on payment of 15*l*. and the costs then incurred, which the plaintiff refused to accept, but proceeded in the action by delivering a declaration; and the defendant pleaded the general issue, and paid 15*l*. into court, which the plaintiff afterwards took out in full satisfaction of his demand: the court of C. P. refused to deprive him of the costs incurred between the obtaining the rule and the taking the money out of court, there being nothing oppressive or vexatious in the plaintiff's conduct. *Carr v. Smithies*, 6 Moore, 430; 3 B. & B. 168. *And see Draper v. Neill*, *Jones v. Johnson*, and *Aspinall v. Smith*, 6 Moore, 431, 436, n.; and *Porter v. Pittman*, 2 D. & R. 266.

Where the defendant paid 1*l*. 1*l*s. into court, which the plaintiff accepted:—Held, that he was not therefore liable to pay costs as suing for a sum under forty shillings. *Cadwallader v. Batley*, 3 Anst. 637.

**What costs.**—If a defendant pay money into court upon some of the counts only, and the plaintiff take it out; the latter is only entitled to the costs of those counts. *Baillie v. Cazelet*, 4 T. R. 579; *S. P. Skarrott v. Vaughan*, 2 Taunt. 266.

If a plaintiff, for the sake of costs, delivers a declaration, and afterwards accepts from the defendant a sum which was offered to him before declaration, he shall have costs only up to the time of the plaintiff's first offer. *Sawbridge v. Caswell*, 4 Taunt. 255.

Where a defendant applied to the plaintiff's attorney to settle the action the day after being served with process, held that he was not liable for the costs of the declaration. *Charlwood v. Berridge*, 1 Esp. 345—*Eyre. S. P. Golding v. Grace*, 2 W. Black. 740. *But see Partington v. Williams*, 2 N. R. 399, and *Fawcett v. Christie*, 2 B. & P. 515.

If after action commenced, and before money can regularly be paid into court, a tender is made of a sum for damages, with costs up to that time, and refused, the court will, on motion, permit that sum to be paid into court, and struck out of the declaration, and will order all subsequent costs to be paid by the plaintiff, although the plaintiff goes for other causes of action than those on which the sum is tendered. *Roberts v. Lambert*, 2 Taunt. 283. *But see Burmester v. Hilch*, 13 East, 551.

If after action commenced, and before declaration, the defendant offers to pay the debt and costs, and the plaintiff refuses to receive it, the court will permit the defendant to pay into court the debt and the costs up to the time of his offer only, and the plaintiff will be compelled to pay the costs of the application, and all costs in the action subsequent to the offer. *Zeevin v. Cowell*, 2 Taunt. 203.

Vol. I.

4 J

**Plaintiff's Procedure for**

—If, after action brought, the debt without the knowledge of the plaintiff, the action may be proceeded in. *Toms v. Powell*, 7 East, 531. *Esp. 40: S. P. Holland v. Jekinson v. Thornton*, 1 Camp. *Swain v. Senate*, 2 N. R. 9. *Haw*, 1 Taunt. 341.

Where the defendant, ha judge's order to stay proceed debt and costs, gave an under on or before a given day, on granted, and the costs were al the defendant refused to pay plaintiff could not compel the such payment, although the u was made before the order, as ditional in terms; and that i plied with, the plaintiff mig action as if no such order had man v. Bach, 8 Moore, 102.

Where there was an under costs of an action in a limited ti not so paid:—Held, that the p ceed in the action for nominal v. Holland, 1 Tidd's Prac. 574.

A defendant paid into court an order which did not contain taking from the defendant to p it being doubtful whether the cepted that sum, would be ent defendant offered to give the p of the term for that sum, in opinion of the court upon the qu tiff, notwithstanding, took the c upon the production of the rule into court, had a verdict for c court, upon motion, ordered the the defendant all costs incur Jones v. Owen, 2 C. & J. 476; 1

Proof of the rule to pay mon entitle the plaintiff to a verdict i mages, unless the defendant pr paid the costs under the rule master's allocatur. *Horsburgh* 558, n.—*Ellenborough*.

**5. Nolle prosequi**

By 8 Eliz. c. 2, s. 2, if after a plaintiff shall not prosecute his action, but shall willingly delay the same award the defendant his costs.

By 3 & 4 Will. 4, c. 42, s. 32 persons shall be made defendants in action, and any one or more of the nolle prosequi entered as to him such person shall have judgment of his reasonable costs.

By s. 33, where any nolle prosequi been entered upon any count, or as declaration, the defendant shall be have judgment for, and recover costs in that behalf.

If the plaintiff enter a nolle pro

defendant is entitled to costs under 8 Eliz. c. 2, s. 2. *Cooper v. Tiffin*, 3 T. R. 511.

Where a nolle prosequi is entered on any of the counts in a declaration, there was no rule for allowing costs on such counts. *Hubbard v. Biggs*, 16 East, 129.

In trespass against two defendants, one suffered judgment by default, and a writ of inquiry was executed as against him, and the plaintiff entered a nolle prosequi as to the other:—Held, that the latter was entitled to costs under 8 Eliz. c. 2, s. 2. *Jackson v. Chambers*, 2 Moore, 718.

Where, before the stat. 3 & 4 Will. 4, in an action against two, one of them pleaded his bankruptcy, and the plaintiff entered a nolle prosequi as to him, and proceeded to trial, and obtained a verdict against the other, who had pleaded the general issue, the former was not entitled to costs. *Harewood v. Matthews*, 2 Tidd's Prac. 1018.

Even although, before plea, the plaintiff was apprized of the bankruptcy. *Booth v. Middlecoat*, 6 Bing. 445; 4 M. & P. 183.

#### 6. Nonpros.

By 13 Car. 2, st. 2, c. 2, s. 3, if a plaintiff be nonprossed for want of declaration before the end of the term after appearance, the defendant is to have costs.

Where a defendant removes proceedings by a recordari facias loquelam from a county court into one of the superior courts, and signs judgment of nonpros in default of the plaintiff's appearing, he is entitled to costs. *Davis v. James*, 1 T. R. 371.

Where defendant removes proceedings from an inferior court by certiorari, plaintiff is not bound to follow the suit: in such case if defendant signs judgment of nonpros for want of a declaration, he is irregular, and is not entitled to costs. *Clerk v. Berwick*, 7 D. & R. 104; 4 B. & C. 649.

The defendant, an uncertificated bankrupt at the time of his arrest, put in bail and pleaded the general issue, and afterwards delivered a plea of his bankruptcy and certificate puis darrein continuance, on which the plaintiff withdrew the record, and countermanded notice of trial, and the defendant, after a rule to reply, signed judgment of nonpros and taxed his costs; the court ordered the proceedings on the judgment to be stayed without costs. *Baker v. Morrey*, 1 M. & P. 138.

The court of K. B. will not allow costs upon a judgment of nonpros for not entering the issue, upon a demurrer to a plea in abatement. *Micklam v. Bates*, 3 M. & R. 91; 8 B. & C. 642.

#### 7. Nonsuit.

The 23 Hen. 8, c. 5, the 8 Eliz. c. 2, s. 2, and the 4 Jac. 1, c. 3, give costs to the defendant where the plaintiff is nonsuited.

Where plaintiff is nonsuited defendant is entitled to costs. *Cameron v. Reynolds*, Cowp. 407.

Where a qui tam informer in debt on the stat.

21 Hen. 8, c. 13, is nonsuited, the defendant is entitled to costs. *Wilkinson q. t. v. Allet*, Cowp. 366.

On motion for a nonsuit, on the ground of variance between the declaration and the contract of guarantee therein set out, or for a new trial on the ground that the guarantee was not continuing, the court, being of opinion that the defendant was liable upon the contract, but that it was improperly declared on, made a rule that the verdict which had been found for the plaintiffs for the sum secured should stand, but that the defendant should be allowed to deduct therefrom his costs of the trial and taxation. On taxation, the offer allowed to the plaintiff his costs up to the notice of trial, and to the defendant all the subsequent costs:—Held, that he had done right. *Allen v. Kenning*, 3 M. & Scott, 80.

#### 8. Judgment as in case of a Nonsuit.

By 14 Geo. 2, c. 17, on the plaintiff's neglect to bring the issue to trial, the court may give judgment as in case of a nonsuit.

And by s. 3, the defendant shall, upon such judgment, be awarded his costs, in any action or suit, wherein he would, upon nonsuit, be entitled to the same, and in no other action or suit whatsoever.

The costs of a rule for judgment as in case of a nonsuit, are to be paid by the plaintiff. *Had v. Boorne*, Forrest, 3.

If such a rule be afterwards made absolute generally, without costs, that part of the order applies only, in the Exchequer, to the costs of the application, and not to the costs of the cause. *Shaw v. Mansfield*, 7 Price, 709.

Where the rule is discharged on the plaintiff's peremptory undertaking, no sufficient reason having been given for not proceeding to trial pursuant to notice, the defendant, in the Exchequer, is entitled to the costs of the application. *Harewood v. Hart*, 6 Price, 202.

Where a rule for judgment as in case of a nonsuit, is discharged upon a peremptory undertaking, costs incurred at the sittings in consequence of notice of trial are not allowed, unless mentioned in the rule. *Partington v. Wyatt*, 6 Bing. 171; 3 M. & P. 316.

A rule for judgment as in case of a nonsuit, for not proceeding to trial after issue joined in an ejectment and notice of trial given, discharged as a peremptory undertaking without costs, where the plaintiff gave a satisfactory reason for not proceeding pursuant to his notice, and had done all he could to apprise the defendant as early as possible that he should not try the cause. *Ward v. Burge v. Callaway*, 7 Price, 531.

Action against two, judgment against one by default, rule for judgment for the other as in case of a nonsuit, yet this defendant cannot have his costs taxed as in such a case. *Weller v. Chapin*, 1 Barr. 358.

Where the motion is discharged on a peremptory undertaking, the defendant is not in all cases entitled in the Exchequer to the costs of the ap-

plication as of course. *Brown v. Tanner*, 13 Price, 803; *McCl. 593*.

Where he gives a fair reason for not having proceeded, the costs abide the event. *Id.*

Contrary to the old practice, by which they were allowed to the defendant. *Id.*

The court of Exchequer discharged a rule for judgment as in case of a nonsuit, with costs, where the plaintiff showed reasonable ground for not proceeding to trial, and had offered the defendant, out of court, a peremptory undertaking to try at the next assizes. *Challinor v. Leech*, 13 Price, 666.

### 9. Not proceeding to Trial.

Where notice of trial for the Spring Assizes had been given, and the cause was made a remanet to the next summer assizes; and the defendant, having then attended with his witnesses, and found that the cause was not set down, afterwards applied for costs to be paid by the plaintiff for not proceeding to trial:—Held, that he was not entitled to such costs. *Gains v. Bilsen*, 1 M. & P. 17; 4 Bing. 414.

Where a corporation were defendants in a cause in which the record was withdrawn, in consequence of the absence of a material witness, who was a member of the corporation, and it did not appear that his absence arose from fraud or the act of the other corporators:—Held, that the prosecutor must pay the costs of not proceeding to trial pursuant to notice, as the absence of the witness, although without sufficient excuse, arose entirely from his own act. *Rex v. Great Yar. month*, 5 B. & A. 531.

Where a trial was put off at the instance of the defendant, who undertook to pay the costs of the day and also of the application, the court of C. P. granted an attachment for non-payment. *Rice v. Brown*, 1 B. & P. 39.

The payment of costs for not proceeding to trial is not a condition precedent to the party's right to proceed to trial. *Doe d. Hope v. Carter*, 1 M. & Scott, 516; 8 Bing. 330.

Unless it is so specified in the rule. *Wilson v. Collins*, 8 Bing. 374.

## III. OPERATION OF COURTS OF REQUESTS' ACTS.

### 1. Statutes.

[For the Cases upon the Jurisdiction of the several Courts of Request, and upon the Construction of the several Statutes, see tit. INFERIOR COURTS, Div. Courts of Request.]

By 39 & 40 Geo. 3, c. 104, s. 12, (London Act), of any action shall be commenced in any other court than the court of Requests, for any debt not exceeding 5*l.*, and recoverable by virtue of the acts in the court of Requests, the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to any costs; and if the verdict shall be given for the defendant, and the judge shall think fit to

certify that the debt ought to be in the court of Requests, the double costs.

By 23 Geo. 2, c. 33, s. 19, an action of debt or assumpsit any of the superior courts at V a defendant who shall live and of Middlesex, and be liable to county court, and the jury upon damages for the plaintiff and judge shall, in open court, see the record that the freehold or land, or that an act of bankrupt in question at such trial, the plaintiff costs, but the defendant shall

The 23 Geo. 2, c. 27, (West a form of plea to defendants in court of Requests, who are courts; and enacts, that if the nonsuited, or discontinue his shall pass against him, or judgment demurrer, the defendants shall

By the 22 Geo. 2, c. 47, (the if in any action, &c., for recover against any person (within the of the king's courts at Westminster appear to the judge, &c., that delivered by the plaintiff doth not an the plaintiff shall pay the defend

The 46 Geo. 3, c. 87, is also

By s. 1, of stat. 39 & 40 G jurisdiction of the court of Re is enlarged from debts of 40*s.* to Sept. 1800; and by s. 12, if any commenced in any other court, debt not exceeding 5*l.* within the plaintiff shall not recover any co that the words "shall be comm necessary construction be restrai of the 30th September, and not t the act, which was on the 9th of *Whitborn v. Evans*, 2 East, 135.

### 2. Part Payments in Re

Where, before action, a debt h under 40*s.* by part payment, the priv of costs by the Middlesex *gale v. Bernard*, 4 Bing. 169; 12

Where the plaintiff's witness p debt, which was originally abov below 40*s.* by part payment be brought, the case was held to Southwark Act, 22 Geo. 2, c. 47. *ken*, 8 East, 28. And see *Founta Taunt* 60.

So, upon the London Act. *Hor* 8 East, 317.

Where the plaintiff had claime defendant on two bills of exchange, had been made on the general ac was a fit question to be tried wheth the cause of action had been liquida refused to deprive the plaintiff of *genten v. Hood*, 2 Chit. 147.



The court will not allow a suggestion for double costs, under the Middlesex Act, where the original debt, being above 40s., has, by a balance of accounts, been reduced below that sum. *McCollum v. Carr*, 1 B. & P. 223.

Where an action was brought in K. B. for a debt of 9*l.* 17s., and the plaintiff's demand was reduced by partial payments on account, and the jury found a verdict for the plaintiff for 1*l.* 13s.:—

Held, that the defendant, who resided within the jurisdiction, was entitled, under the Middlesex Act, to his double costs of suit. *Chadwick v. Bunning*, 8 D. & R. 155; 5 B. & C. 532; 2 C. & P. 106; R. & M. 306.

Although it appeared by affidavit that the debt originally exceeded 40s., and although the plaintiff had failed in proving some of the items in his bill. *Id.*

Where a demand for plumber's work, and new materials found, amounting in value to 8*l.*, was reduced below 5*l.* by the plaintiff's taking the old lead and allowing for it, instead of using it as far as it would go, in which case the original demand would have been under 5*l.*, under the Southwark Act, 46 Geo. 3, c. 87, it is not a demand reduced below 5*l.* by balancing an account within the exception in the 12th section. *Porter v. Philpot*, 14 East, 344.

Where the plaintiff sued in a superior court for 34*l.* ascertained by a surveyor to be due to him for measured work and labour, done within the jurisdiction of the Rochester court of Requests, and the defendant proved payment to the amount of 24*l.*, and the jury, estimating the work at 26*l.* found for the plaintiff only 1*l.* 2s. damages:—Held, that this was not a case in which the defendant was entitled to enter a suggestion to deprive the plaintiff of costs, under the stat. 48 Geo. 3, c. 51, on the grounds, first, that he had reasonable cause for litigating his demand; secondly, that if the defendant intended to take advantage of 22 Geo. 3, it should have formed part of his defence at the trial; and lastly, that it fell within the exception contained in the 13th section of 48 Geo. 3, as being the balance of an account or demand originally exceeding 5*l.* *Harasant v. Larkin*, 7 Moore, 68; 3 B. & B. 257.

Where the plaintiff in assumpsit failed to prove his special counts, but upon the common counts recovered less than 5*l.* upon the balance of an account which contained items both on the debit and credit side:—Held, that by the London Act he was deprived of costs, it appearing that the defendant resided and traded in London. *Fomin v. Oswald*, 1 M. & S. 393; S. C. not S. P. 3 Camp. 357.

In an action to recover 3*l.* 6s. 6d. remaining due to the plaintiff on a bill of exchange for 8*l.* 6s. 6d., which bill was given to secure the balance of an account between the parties originally amounting to more than 40*l.*:—Held, that the defendant was not entitled to enter a suggestion to deprive the plaintiff of his costs under the Boston Act, (47 Geo. 3, s. 2, c. 1,) as s. 15 provides that the commissioners are not empowered to decide on any debt for any sum being the balance of an ac-

count on demand originally exceeding 5*l.* *Abbey v. Lill*, 2 M. & P. 534; 5 Bing. 289.

A balance of less than 5*l.* due on a bill of exchange for 17*l.*, drawn payable in London, and reduced by previous payment, was held a debt under 5*l.* arising within the jurisdiction of the Halifax Baron Court, the parties residing at Halifax. *Walker v. Watson*, 8 Bing. 414; 1 M. & S. 674.

### 3. Set-off.

Where a plaintiff sued a defendant for 2*l.* for work and labour, who pleaded a set-off amounting to 16*l.*, but refused to furnish the plaintiff with an account until after the commencement of the action, in which the plaintiff recovered a verdict for less than 10*l.*:—Held, that the defendant was not entitled to enter a suggestion on the roll to deprive the plaintiff of his costs under the Bath Act (45 Geo. 3, c. 67, s. 47). *Cook v. Langman*, 9 Moore, 625.

An action may be brought in a superior court when the demand is above 40s., though it is reduced by a set-off. *Gobed v. Birt*, 2 Chit. 394.

Where a plaintiff recovers less than 5*l.* against a defendant, resident within the jurisdiction of the Middlesex Act, and his demand has not been reduced by set-off, the defendant is entitled to double costs. *Jones v. Harris*, 1 Dowl. P. C. 374; *S. P. Humphreys v. Amos*, 1 Dowl. P. C. 376.

### 4. Payment into court, and Tender.

Payment of money into court is an admission of the jurisdiction of the superior court, so as to prevent a defendant from taking any objection on the ground of a court of conscience act. *Ellis v. Williams*, 5 Esp. 19—Ellenborough.

He cannot therefore fix the plaintiff with cost by pleading the London Act. *Id.*

A tender and payment into court, by which the plaintiff's claim is reduced below 40s., will not entitle the defendant to enter a suggestion on the London Act, although the issue on the tender is found for the defendant. *Waistell v. Kinson*, 3 Bing. 289; 11 More, 14.

Where the defendant pleads a tender to an action for goods sold, it does not preclude him from entering a suggestion upon the roll to deprive the plaintiff of his costs under the London Act. *Jordan v. Strong*, 5 M. & S. 196.

### 5. Judgment by Default.

After judgment by default, and the damages assessed upon a writ of inquiry, the defendant may, under the London Act, come into court and move to stay proceedings on payment of the damages assessed without costs. *Durston v. Bay*, 8 East, 239.

So, where the plaintiff sued defendants in a superior court for a demand above 5*l.*, and upon judgment by default the jury reduced the damages to 5*l.*, and it appeared that the defendants at the time of action brought, resided within the jurisdiction of the London court of Requests. *Fleming v. Davies*, 5 D. & R. 371.

After judgment by default, and writ of inquiry executed, the defendant cannot enter a suggestion under the Middlesex Act, to deprive the plaintiff of costs. *Sirutton v. Whitwell*, 1 M. & R. 562.

Nor can a suggestion be entered under that act, to entitle the defendant to double costs, after judgment by default and writ of inquiry; but only where there has been a trial. *Harris v. Lloyd*, 4 M. & S. 171.

#### 6. Effect of other Things.

Seemle, that the amount found by the verdict of the jury, and not the sum which the plaintiff claims to be due, is to be considered the debt for which the action is brought, and is to decide whether the plaintiff ought to have been sued in the court of Requests. *Baddley v. Oliver*, 1 C. & M. 219; 1 Dowl. P. C. 598; 3 Tyr. 145.

So, held on the London Act. *Shaddick v. Bennett*, 7 D. & R. 229; 4 B. & C. 769.

If a debt be reduced below 5*l.* by a plea of the statute of limitations, the case is within the London Act, and the plaintiff is not entitled to costs. *Id.*

Jurisdiction is given to the Bradford court of Requests, where the debt demanded does not exceed 5*l.* which means rightfully demanded; and if the plaintiff sues elsewhere, and recovers less than 5*l.* he will not be entitled to his costs. *Drew v. Coles*, 1 Dowl. P. C. 580; 2 C. & J. 505.

The defendant is entitled to have a suggestion entered to deprive the plaintiff of costs, where he does not recover 5*l.*, though his demand was in reality more than that amount, but he failed to prove it, through the absence of witnesses. *Moore v. Jones*, 2 Dowl. P. C. 58.

If there is a plea of tender as to part, and non assumpsit as to the residue, and the plea of tender being found for the defendant, the balance proved on the non assumpsit is under 40*s.*, yet, if that, added to the sum tendered, exceed 40*s.*, the defendant, though subject to the jurisdiction of the county court of Middlesex, is not entitled to double costs. *Heaward v. Hopkins*, 2 Dougl. 448.

If the plaintiffs sue in a superior court for a demand of above 40*s.*, which at the trial is cut down below that sum by the defence of infancy; and the jury thereupon find the damages for the plaintiff under 40*s.*; the defendant, residing in Middlesex at the time of the action brought, and liable to be summoned to the county court there, is entitled to enter a suggestion on the roll to that effect, entitling him to double costs of suit. *Bateman v. Smith*, 14 East, 301.

Where a cause is referred to arbitration, and the costs are to abide the event of the award, the defendant is entitled to them, if it appear by the award that the plaintiff's demand was originally under 40*s.*, and he might have recovered in a court of conscience. *Buller v. Grubb*, 2 Tidd's Prac. 884; 3 Dougl. 217.

And an award of less than 5*l.* will bring a cause within the London Act. *Day v. Mearns*, 2 Chit. 156.

The defendant cannot en the roll, under the Middlesex dict is found for 1*s.* damage upon a plea in abatement of *v. Le Pelletier*, 1 Chit. 636,

Where the plaintiff recovers no objection to entering a suggestion to that effect, under the London Act, the plaintiff believed he had a more than that sum. *Young*, 145; 6 Taunt. 452.

Where, in an action against a resident in the Isle of Wight by consent for 5*l.*, when the upwards of 6*l.*:—Held, that for the summary recovery of an island, the plaintiff was not entitled. *Oakes v. Albion*, 13 Price, 79.

The defendant is entitled to costs under the London Act, that if the plaintiff had postponed his action a few months, action would have been good. *Tucker v. Crosby*, 2 Taunt. 145.

Where a plaintiff recovers in a transitory action against a defendant within the jurisdiction of the county court of Requests' Act, the defendant is not entitled to a suggestion to deprive the plaintiff of costs, although the plaintiff resides in the county, because the cause of action did not accrue within the jurisdiction. *Graham v. Brown*, 309; 2 C. & J. 327; 2 Tyr. 145.

#### 7. Course of Proceedings.

The proper mode for the plaintiff to move for a writ of inquiry on the record after judgment is by a suggestion on the roll. *H. Black*. 351.

Where the plaintiff, having entered a general demurrer to such a writ of inquiry, on which the defendant has been assessed at less than 40*s.*, five days before the day of the term, and signed final judgment at the day of the term; the court of Requests refused to direct the plaintiff's taxation of costs to the plaintiff's demand, the plaintiff's affidavit stating the former proceedings, and that the defendant was resident within the jurisdiction of the inferior court; because the plaintiff had not entered a suggestion, and judgment was signed. *Id.*

The Southwark Act, 22 Geo. 4. c. 13, s. 1, may be pleaded to an action brought in the county court. *Id.*

Under the London Act, the plaintiff is not to pay the costs of proceedings on paying the money and not to require a suggestion. *Vickers*, 1 Chit. 636, n.

The court will not stay proceedings under the Middlesex Act, on an affidavit under 40*s.*, and that the parties are within the jurisdiction of an inferior court. *v. Dyche*, 2 Chit. 395.

A defendant living within the jurisdiction, may plead the Westminster Act, if he is sued in one of the superior courts for a debt under 40s. *Taylor v. Blair*, 3 T. R. 452.

But, if he omit to do so, the court will not, after verdict, either enter a suggestion on the record that the defendant lived within the jurisdiction, or stay the proceedings. *Id.*

Where there is a verdict for 40s. the defendant may suggest on the roll that he resided in Middlesex, in order to have the benefit of the Middlesex Act. *Fitzpatrick v. Pickering*, 2 Wils. 68; 1 Wils. 19.

If an action against a person within the jurisdiction of the Bath court of Requests be brought elsewhere, the court, on motion, will deprive the plaintiff of costs. *Baildon v. Pitter*, 3 B. & A. 210; 1 Chit. 635. *And see Axon v. Dallimore*, 3 D. & R. 51.

The court of C. P. refused to stay proceedings before verdict, upon payment of debt without costs, upon the ground that the action ought to have been brought in the Bath court. *Meredith v. Drew*, 8 Bing. 141; 1 M. & Scott, 225; 1 Dowl. P. C. 252.

Under the St. Alban's Court of Requests' Act, 25 Geo. 2, c. 33, the defendant must plead his residency within the liberty; and if he omit to do so, he will not be allowed to enter a suggestion to deprive the plaintiff of his costs where the verdict is under 40s. *Anstee v. Liley*, 1 M. & R. 564.

The court of Exchequer will not, on a motion to enter a suggestion for costs on the roll, receive the facts from affidavits, but will require the judge's report. *Oakes v. Albin*, 13 Price, 793; McClell. 582.

Where a rule nisi for entering a suggestion has been obtained on affidavit, and affidavits have been made on the other side, and used in showing cause, fresh affidavits for the purpose of controverting the statements of the latter, cannot be read in support of the rule. *Id.*

If the plaintiff in an action of assault, having recovered only 20s. damages, whereby he is entitled to no more than 20s. costs, bring an action on the judgment; and obtaining judgment by default in that action, enter it up for debt and costs, the court, on affidavit of the defendant being resident in the city of London, and liable to be summoned to the court of Requests, will, under the London Act, set aside the judgment as to the costs. *Foott v. Coare*, 2 B. & P. 588.

Under the London Act, where a plaintiff as assignee recovered less than 5*l.*, the court ordered a suggestion to be entered on the record to deprive the plaintiff of costs; but defendant having given notice of his intention to dispute the petitioning creditor's debt, &c. (which was proved at the trial), it was held that the plaintiff was entitled to the costs thereby occasioned; and the court ordered the suggestion to be entered accordingly. *Ward v. Abrahams*, 1 B. & A. 367.

To take advantage of a court of requests' act, to deprive the plaintiff of costs, the defendant must bring himself directly and expressly within the words of the act; and, therefore, if he

merely swears "that he keeps a counting-house, or warehouse," the act only specifying a "warehouse," and leaves it doubtful whether he sells his livelihood within the limits of the act, he does not show sufficient to entitle the court to interfere to deprive the plaintiff of costs. *Newton v. Pascock*, 1 Dowl. P. C. 677.

When a defendant is entitled to enter a suggestion under the Middlesex Act, the plaintiff is bound to find the record, or be answerable for the default of his attorney who withholds it. *Jones v. Harris*, 1 Dowl. P. C. 433.

#### 8. When Application to be made.

After final judgment, the defendant is too late to apply to the Court under a court of requests' act, in order to deprive the plaintiff of costs. *Calvert v. Eversard*, 5 M. & S. 510.

It is too late in the term, for the defendant after judgment signed, and execution levied, to enter a suggestion on a court of conscience act to deprive the plaintiff of his costs if he could have applied in the same term. *Watchers v. Cook*, 2 M. & S. 348.

A party entitled to enter a suggestion for the purpose of depriving the plaintiff of his costs, under a court of requests' act, must apply promptly, and it is not sufficient that he applies before final judgment is signed: where a defendant might have applied in Easter Term for such a purpose, but suffered all that term to elapse, and did not apply till Trinity Term:—Held, that he came too late, though the delay occurred through a negotiation having taken place respecting the case. *Hippesley v. Laying*, 7 D. & R. 265; 4 B. & C. 863.

Where a judge, at the trial, in pursuance of the 1 Will. 4, c. 7, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up, and execution is issued, and the amount paid under a *ca. sa.*, the defendant is not precluded from applying to the court above, to enter a suggestion to deprive the plaintiff of costs, under an act for a local court of requests, provided he comes to the court within the first four days of the next term. *Bodley v. Oliver*, 1 C. & M. 219; 1 Dowl. P. C. 536; 3 Tyr. 145.

A judge at the assizes has no power to order such a suggestion to be entered. *Id.*

#### IV. OPERATION OF STAT. 43 ELIZ., c. 6. (Certificate against costs.)

By 43 Eliz. c. 6, if upon any action personal in any of the superior courts at Westminster, not being for any title or interest of land, nor concerning the freehold or inheritance of any land, nor for any battery, it shall appear to the judges of the court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to 40*l.*, or above, no more costs than the sum recovered shall be awarded to the plaintiff, but less at the discretion of the court.

Where the judge certifies under the 43 Eliz., in actions of assault, there shall be no more costs than damages. *Walker v. Robinson*, 1 Wils. 93; 2 Str. 1232.

A judge may certify, although there be pleas of justification. *Broadbent v. Woodhead*, 2 Tidd's Prac. 988.

In an action for assault, battery, and false imprisonment, if the verdict be for 1s., and the judge certify under 43 Eliz., the plaintiff will be deprived of his costs, though a battery was proved at the trial. *Wiffin v. Kincard*, 2 N. R. 471.

Even where there was a separate count for the false imprisonment. *Briggs v. Bowgin*, 2 Bing. 333; 9 Moore, 628.

If a plaintiff sue for assault, battery, and imprisonment, but only prove an imprisonment, and obtain one farthing damages, a certificate of the judge under 43 Eliz. will deprive him of costs. *Emmett v. Lyne*, 1 N. R. 255.

If the plaintiff in trespass for beating the plaintiff's dog, recover less than 40s., the judge may certify under 43 Eliz., to prevent his recovering more costs than damages. *Dand v. Sexton*, 3 T. R. 37.

If, in an action on the case for an injury done to the plaintiff's right of common, by digging turves there, the judge certify under 43 Eliz. that the damages did not amount to 40s., the plaintiff shall have no more costs; for the interest or title of the land does not necessarily come in question in such action. *Edmonson v. Edmonson*, 8 East, 294.

Where the plaintiff recovered 5s. damages in trespass for taking his cart, and the judge certified under 43 Eliz., the court would not allow the plaintiff his costs. *Pyeburn v. Gibson*, 8 Moore, 450.

An issue on a plea of license, in trespass, found for the plaintiff, with 1d. damages, warrants a certificate of the judge, under 43 Eliz. *Howard v. Cheskyre*, 1 Ld. Ken. 245.

In trespass for entering the plaintiff's close, and digging a ditch, and cutting down a tree, with a count on an asportavit, to which the defendant pleaded not guilty and liberum tenementum, where the material question on the trial was, whether the tree grew on the plaintiff's or defendant's ground, the jury found a verdict for the former, with 37s. damages, (the value of such tree,) and the judge certified under 43 Eliz.:—Held, on a motion, that the master should be ordered to tax the plaintiff his costs, as the action was not within the statute; that notwithstanding the certificate, the plaintiff was entitled to his full costs; for although the title to the freehold did not in fact come in question, it might on the record so framed; and the cause could not have been tried in an inferior court. *Littlewood v. Wilkinson*, 9 Price, 314.

Where a statute prohibits an act, and gives damages for the violation, with costs, it does not take away the judge's power to certify under 43 Eliz. that the costs are less than 40s. *Williams v. Miller*, 1 Taunt. 400.

Though the statute 11 Geo. 2, c. 19, s. 19,

speaks of "full costs," it does not take away the judge's power to certify under 43 Eliz. that the costs are less than 40s. *Irvine v. Reddish*, 1 D. & R. 313; 5 B. & A. 796.

Where a plaintiff furnished defendant's wife with articles of dress, which were rendered unnecessary by the defendant's having supplied her wardrobe amply, and in an action for the price of the articles, (18l. 5s. 6d.), the jury found a verdict for plaintiff for 10s., the judge of C. P. certified to deprive him of costs. *Seaton v. Benedict*, 2 Bing. 187; 2 M. & P. 301.

A certificate to deprive the plaintiff of costs may be indorsed on the postea after costs have been taxed, although the attorney for the defendant was present, and did not object to such taxation. *Fazall v. Banks*, 5 B. & A. 536.

To a declaration of trespass quare domum fregit, with a count de bonis asportatis, the defendant pleaded the general issue, and accord and satisfaction, (the question at the trial being whether a term for years had expired), and the jury found a general verdict for the plaintiff, with damages under 40s., and the judge certified the amount of damages under 43 Eliz.:—Held, that the plaintiff was entitled to costs notwithstanding the certificate. *Wright v. Piggin*, 2 Y. & J. 544.

Where the plaintiff in an action against an attorney recovers less than 40s., the judge may certify under 43 Eliz., and deprive the plaintiff of costs. *Wright v. Nuttall*, 10 B. & C. 492.

#### V. OPERATION OF STAT. 21 JAC. 1, c. 16.

##### (Slander.)

By 21 Jac. 1, c. 16, s. 6, in all actions for slanderous words, if the jury either upon trial, or writ of inquiry, shall find or assess damages under 40s., the plaintiff shall only recover the same amount of costs as the damages given.

In an action for words, if they be in themselves actionable, and less damages than 40s. are found, full costs shall not be allowed, unless a colloquium and special damage be laid. *Surman v. Shelleto*, 3 Burr. 1688.

In actions for words with special damage, if a verdict be found for the plaintiff, and the words are in themselves actionable, no more costs than damages are allowed; but if otherwise, full costs. *Collier v. Gaillard*, 2 W. Black. 1062.

In actions for words not in themselves actionable, but where special damage is laid, the plaintiff is entitled to full costs, of whatsoever amount the damages found or assessed may happen to be. *Greaves v. Warner*, Hull. Costs, 28.

Where, in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid, referring to all the counts, and the plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40s., he is entitled to full costs. *Saville v. Jardine*, 2 H. Black. 531.

The stat. 21 Jac. 1, c. 16, s. 6, is confined to actions for slanderous words spoken of the person,

and does not extend to actions for libel, or slander of title, &c. *Hall v. Warner*, 2 Tidd's Prac. 997.

Although formerly it was thought that no costs were recoverable in scan. mag., the court ordered the costs to be taxed. *Bolingbroke (Lord) v. Woodfull*, Hull. Costs, 34.

In slander, though the defendant justify, and it be found against him, yet if the damages be under 40s., the plaintiff cannot recover more costs than damages. *Halford v. Smith*, 4 East, 567.

In an action for slanderous words, actionable only because spoken of and concerning the plaintiff in the way of his business, less than 40s. being recovered, the plaintiff is only entitled to the same amount of costs and damages. *Greenfell v. Pierson*, 1 Dowl. P. C. 406. And see *Berry v. Perry*, 2 Ld. Raym. 1588; *Turner v. Horton*, Willes, 438.

#### VI. OPERATION OF STAT. 22 & 23 CAR. 2.

##### (Certificate for Costs.)

By 22 & 23 Car. 2, c. 9, s. 136, in all actions of trespass, assault, and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under 40s., shall not recover any more costs than damages.

*When Assault justified.*—If, to a declaration stating that the defendant assaulted the plaintiff, and beat, bruised, wounded and ill-treated him, the defendant plead the general issue, and a justification as to the assault and ill-treating only, by a plea of *mollior manus imposuit*:—Held, that such latter plea admitted a battery, and that the plaintiff was entitled to full costs, although he had obtained a verdict for 1s. damages only, and the judge had not certified at the trial. *Johnson v. Northwood*, 1 Moore, 420; 7 Taunt. 689.

If, to an action for an assault and battery, the defendant plead the general issue and a justification to the whole, and the plaintiff obtain a verdict with damages under 40s., the plaintiff is entitled to full costs. *Smith v. Edge*, 6 T. R. 562.

In trespass for an assault and battery, where the defendant justifies the assault only, and the plaintiff obtains damages under 40s., and the judge does not certify, the plaintiff is entitled to no more costs than damages. *Page v. Creed*, 3 T. R. 391; *S. P. Brennan v. Redmond*, 1 Taunt. 16.

*Assault with other injuries.*—Where a declaration in trespass contained two counts, the first for assaulting the plaintiff and destroying a scraper affixed to his house; and the second for destroying the scraper; and the jury found a general verdict for him, damages 2s.:—Held, that he was entitled to his full costs. *Reece v. Lee*, 7 Moore, 269.

There shall be no more costs than damages in

trespass for an assault, battery, and tearing the plaintiff's clothes, if the jury find that the tearing was in consequence of the beating, and give less than 40s. damages. *Cotterill v. Tolly*, 1 T. R. 655.

Where, in trespass for assault and battery, the count, after stating the battery, goes on, "and the said defendant then and there tore the clothes, &c., of the plaintiff, (specifying them,) whereas he was then and there clothed, and which he then and there had on, &c.," and the damages are found under 40s., and the judge does not certify, the plaintiff is not entitled to more costs than damages. *Mears v. Greenaway*, 1 H. Black 291; *S. P. Lockwood v. Stannard*, 5 T. R. 462.

To a similar declaration, the defendant pleaded that he was not guilty of the said supposed assaults, in manner and form as the plaintiff had complained against him; and the jury having found a verdict for the plaintiff, damages 2s., and the judge not having certified:—Held, that the plaintiff was entitled to no more costs than damages, as the plea in substance denied the battery and tearing of the clothes, as well as the assault. *Weatherell v. Howard*, 10 Moore, 582; 3 Bing. 835.

If one count state an assault on a man, and an assault on the horse which he is riding, and the jury give a verdict with general damages under 40s., the plaintiff shall have no more costs than damages. *Bannister v. Fisher*, 1 Taunt. 357.

Trespass for assaulting, beating, and turning out of a room, whereby plaintiff was prevented from exercising the business of an attorney then. Plea, not guilty; verdict for the plaintiff, damages 1s.:—Held, that he was not entitled to more costs than damages. *Daubney v. Cooper*, 10 B. & C. 830.

If, in an action of trespass and assault for criminal conversation, the damages given at the trial are 1l. 11s. 6d., the plaintiff shall have full costs, without a certificate of the judge under the stat. 22 & 23 Car. 2. *Batchelor v. Bigg*, 3 Wils. 319; 2 W. Black. 854.

*Trespass to real Property.*—In trespass for throwing stones, &c., at the plaintiff's window belonging to his dwelling-house, and breaking the glass, &c., if the plaintiff recover less than 40s. he is entitled to no more costs than damages, unless the judge certify that the title to the house came in question. *Adlem v. Grimsey*, 6 T. R. 281.

In trespass for breaking free warren, though damages under 40s., the plaintiff shall have full costs. *Dacre (Lord) v. Tebb*, 2 W. Black 1151.

On trespass for breaking the plaintiff's close, and digging up the soil upon the place in which, &c., and taking and carrying away the same, if the defendant plead not guilty, and a verdict is found for the plaintiff, but with damages under 40s., and the judge does not certify, the plaintiff shall have no more costs than damages. *Clegg v. Molyneux*, 2 Dougl. 780.

If a defendant pleads a justification in trespass, and the plaintiff, without traversing it, avers a

Where to trespass at A., and throwing down, burning, and totally destroying the plaintiff's hedge there then erected, &c., whereby, &c., the defendant pleads the general issue, and justifies as to the throwing down the hedge, because it was erected on a common, over which he prescribes for right of common, and issue is taken on such right, which is found for him, and a verdict for the plaintiff with 20s. damages on the general issue, the facts stated in the special plea and found cannot be taken into consideration to show that the title to the freehold could not come in question on the declaration, and as on the declaration, the freehold might have come in issue, and the judge did not certify, the plaintiff is entitled to no more costs than damages. *Stead v. Gamble*, 7 East, 325; 3 Smith, 248.

Where a defendant justifies for a right of way, and the plaintiff replies extra viam, and the defendant pleads not guilty, the plaintiff shall have no more costs than damages, unless the judge certifies, for the title does not necessarily come in question, and, if it does, the judge ought to certify. *Cockeril v. Allanson*, Hull. Costs, 76.

In trespass quare clausum fregit, if the defendant plead not guilty, and a justification which does not make title to the land, upon which issues are joined, which are found for the plaintiff with damages under 40s., still the plaintiff is entitled to full costs. *Peddell v. Kiddle*, 7 T. R. 659.

Where, to an action of trespass, the defendant pleads a special plea of justification to the whole declaration, and the verdict is against him, the plaintiff is entitled to full costs, although the damages are less than 40s., and the judge at the trial does not certify. *Redridge v. Palmer*, 2 H. Black. 2: *S. P. Comer v. Baker*, 2 H. Black. 341.

In an action of trespass for entering plaintiff's dwelling-house, and making a great noise, till defendant compelled plaintiff to give him a promissory note, the jury giving only a guinea damages, no more costs than damages allowed. *Appleton v. Smith*, 3 Burr. 1282.

If the plaintiff in an action for mesne profits recover less than 40s., and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages. *Dee v. Davies*, 6 T. R. 593; 1 Esp. 358.

The plaintiff, in trespass for breaking his close, who recovers less than 40s., is not entitled to costs of increase, merely because a view was granted before trial, though upon the application of the defendant. *Flint v. Hill*, 11 East, 184.

A person acting under colour of 7 & 8 Geo. 4, c. 30, is entitled also to his full costs, as between attorney and client. *Wright v. Wales*, 3 M. & P. 96.

**Trespass to Goods.**—In trespass, the breaking a jar is sufficient to entitle the plaintiff to full  
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been proved that the goods have been restored, and the damages are under 40s., quære, whether the plaintiff shall have full costs? *Richardson v. Tomlins*, 1 East, 255—Eyre.

**Form and Time of certifying.**—Under the statute 22 & 23 Car. 2, a judge's certificate for costs in actions of assault and battery may be granted at any time between verdict and final judgment. *Johnson v. Stanton*, 4 D. & R. 156: 2 B. & C. 621.

An award is not equivalent to a judge's certificate under the statute. *Swinglehurst v. Altham*, 3 T. R. 138: *S. P. Anon.* 1 Chit. 185. And see *Ward v. Mallinder*, 5 East, 489; 2 Smith, 63.

Where, at the time of committing a trespass, the defendant asserts title, the judge will certify under the statute, although the defendant disclaim title at the trial. *Hamber v. East*, Peake's Add. Cas. 236—Ellenborough.

## VII. OPERATION OF STAT. 4 & 5 W. & M. c. 23. (Hunting.)

By a ridiculous act, 4 & 5 Will. & M. c. 23, s. 10, reciting that great mischiefs ensued by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, it was enacted, that if any such person should presume to hunt, hawk, fish, or fowl (unless in company with the master of such person duly qualified by law), such person should be subject to the penalties of the act, and might be sued for their wilful trespass in such their coming on any person's land, and if found guilty thereof, the plaintiff should not only recover his damages thereby sustained, but his full costs of suit.

To entitle a plaintiff to full costs in an action against an inferior tradesman for hunting, &c., under the statute, he must prove the defendant to be exactly such a sort of tradesman as he describes him in his declaration, though the description be alleged under a videlicet; thus, where a defendant was called a bricklayer, and proved to be a waller and not a bricklayer:—Held, that the plaintiff was not entitled to full costs. *Dickenson v. Pearson*, Hull. Costs, 93—Wilson.

Quære, whether an apothecary is an inferior tradesman under the statute? The court was equally divided. *Buxton v. Mingay*, 2 Wills. 70.

In trespass for hunting, laid upon the statute, against the defendant as a dissolute person, &c., if the plaintiff proves the trespass, but not the circumstances under the statute, he shall recover as in common actions of trespass, viz. no more costs than damages, if the damages are under 40s. *Pellant v. Roll*, 2 W. Black. 900.

## VIII. OPERATION OF STAT. 8 &amp; 9 W. 3, c. 11.

## 1. Wilful Trespass.

By 8 & 9 Will. 3, c. 11, s. 4, in all actions of trespass in any of the superior courts at Westminster, wherein at the trial it shall appear and be certified upon the back of the record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall have full costs.

The statute only extends to actions of trespass *vi et armis*, and not to trespass on the case as for a nuisance, &c. *Tipping v. Coot*, 1 Selw. N. P. 41, n. But see *Pedley v. Brampton*, 3 Price, 474; and *Barnard v. Mess*, 1 H. Black. 107.

Overseers entering a pauper's house, and taking away his bed after the plaintiff had desired them to go away, is a wilful trespass under the statute. *Anon. Woodf. L. T.* 549—Heath.

But that statute is not merely confined to persons bringing frivolous actions. *Lytleton v. Cross*, 4 B. & C. 117; 6 D. & R. 81.

Where it appeared on the trial that the trespass, though small, was committed after notice, and the jury gave less than 40s. damages, held that the judge was bound to certify for full costs. *Reynold v. Edwards*, 6 T. R. 11; *S. P. Swinnerton v. Jervis*, 3 East, 497, n.; 2 Tidd's Prac. 1004.

So, held after warning off. *Rudge v. Bond*, 3 East, 497, n.

A judge will not certify a wilful trespass unless there be proof of personal notice. *Bevan v. Reynolds*, Peake's Add. Cas. 217—Lawrence.

It is discretionary in the judge before whom the trial is had, to certify or not, according as it appears to him, under the circumstances proved, that the trespass was wilful and malicious. And the judge having declined to certify in a case where notice was given by the wife of the plaintiff to the defendant not to enter the locus in quo in his cart, there being no road there; notwithstanding which, the defendant persisted in going on for the purpose of viewing more conveniently the turning in of some cattle, in assertion of a disputed right of common in an adjoining inclosure of the plaintiff's, which right was found for the defendant, on a justification pleaded: the court refused to interfere. *Good v. Watkins*, 3 East, 495.

It was at one time held that a judge at Nisi Prius could not certify for costs under the statute out of court. *Ford v. Parr*, 2 Wils. 21.

But it has been since decided, that he may certify at any time between verdict and final judgment. *Woolley v. Whitby*, 4 D. & R. 147; 2 B. & C. 580; *S. P. Swinnerton v. Jervis*, 2 Tidd's Prac. 1004; 3 East, 497, n. And see *Gundry v. Start*, 1 T. R. 636; and *Harper v. Carr*, 7 T. R. 448.

## 2. Proceedings on Bonds.

By 8 & 9 Will. 3, c. 11, s. 8, in actions on bonds for non-performance of covenants or agreements contained in any indenture, deed, or writing, the plaintiff may assign as many breaches as he pleases, upon which the jury are to assess da-

mages; and upon the defendant paying the damages assessed, execution is to be stayed, but the judgment is to remain as a security for future breaches.

After judgment by default in debt on bond to secure an annuity payable quarterly; and scire facias thereon, suggesting a breach in non-payment of a quarter, and damages assessed to that amount on the statute:—Held, that the plaintiff was entitled to his costs on the 8th section, which directs a stay of proceedings on payment of future damages, costs and charges, toties quoties; though the 3rd section only gives costs *scire facias* after plea or demurrer. *Brost v. Booth*, 11 East, 387.

## IX. OPERATION OF STAT. 43, Geo. 3, c. 46. (Vexatious Arrests.)

## 1. Generally.

By 43 Geo. 3, c. 46, s. 3, in all actions wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant shall have been arrested and held to special bail, the defendant shall be entitled to costs of suit to be taxed: Provided it shall be made to appear to the satisfaction of the court upon motion to be made, and upon hearing the parties by affidavit, that the plaintiff had not any reasonable or probable cause for arresting the defendant in such amount; and provided the court shall thereupon, by a rule or order, direct such costs to be allowed; and the plaintiff shall be disabled from issuing execution for the sum recovered, unless it shall exceed, and then only for such sum as it shall exceed, the amount of the defendant's taxed costs: and if the sum recovered by the plaintiff shall be less than the defendant's taxed costs, he may, after deducting such sum recovered, have execution for the costs.

To entitle the defendant to costs under the statute, there must be an actual recovery by law, and a compromise for less than the sum sued on will not entitle the defendant to costs. *Linkwhite v. Bellings*, 2 Smith, 667.

The word "recover" in the act implies by verdict. *Weaver v. Birdsall*, 12 Price, 734.

Arrest for 100*l.*, 10*l.* paid into court, and verdict for plaintiff, subject to an award; costs to abide the event: only 39*l.* 18*s.*, including the 10*l.* found to be due: and the transactions between the parties being complicated. The court of C. P. refused to allow the defendant his costs. *Turner v. Prince*, 5 Bing. 191; 2 M. & P. 332.

The mere fact of a defendant being arrested for more than is recovered is not sufficient. *Roper v. Shewely*, 1 C. & M. 497; 2 Dowl. P. C. 14.

For the defendant is not entitled to costs under the statute, where a verdict has been taken for a less sum than that for which he was arrested, where the right to recover the whole sum claimed was fairly triable. *Edginton v. Head*, 3 Chit. 147.

A plaintiff arresting a defendant under a misapprehension of a doubtful point of law, is not

It was considered that to entitle the defendant to costs, where the plaintiff has arrested him for a larger sum than he recovers in the action, it must appear clearly that his intention was malicious, or at least vexatious. *Younie v. Mallison*, 1 Smith, 521.

It was held that it is sufficient to show that the plaintiff had no reasonable or probable cause for procuring the defendant to be arrested for the sum sworn to, it not being necessary to show malice. *Donlan v. Brett*, 10 B. & C. 117; 5 M. & R. 29; *S. P. Day v. Pictou*, 10 B. & C. 120; 5 M. & R. 31.

The defendant must satisfactorily show to the court that the plaintiff had no reasonable or probable cause. *Spooner v. Danks*, 5 M. & P. 701; 7 Bing. 772; 1 Dowl. P. C. 232.

Plaintiff arrested the defendant for 500*l.* Plea, coverture. Verdict for 38*l.* for money advanced since her husband's death. Defendant applied for costs under the statute:—Held, that to obtain her costs, it must be shown that the plaintiff knew of her coverture at the time of the arrest. *Id.*

Where the plaintiff failed in recovering the sum for which he arrested the defendant, the court allowed the defendant his costs, though the account was very long, and had been running for several years; it appearing that there must have been either gross neglect, or wilful overcharges in making out the account. *Hall v. Forget*, 1 Dowl. P. C. 696.

The statute is rather to be extended than confined in its operation. *Id.*

Where an attorney brought an action for his bill of costs, and arrested the defendant for a larger sum than was afterwards found to be due upon taxation, without having any probable cause for so doing:—Held, that this was a case within the statute, and if not, still that the court, in the exercise of its jurisdiction over its officers, might compel an attorney to pay costs under such circumstances. *Robinson v. Elsam*, 5 B. & A. 661.

Seemingly, that the court will not give a defendant his costs, unless they think that the defendant might successfully sue the plaintiff for a malicious arrest. *Turner v. Prince*, 5 Bing. 191; 2 M. & P. 305—Best.

A defendant is not entitled to costs unless he has been actually arrested or held to special bail. *Amor v. Blagfield*, 2 M. & Scott, 156; 1 Dowl. P. C. 277; 9 Bing. 91.

An attorney's undertaking to put in bail is not sufficient. *Id.*

## 2. Taking Money out of Court and staying.

A defendant cannot apply for costs under the 43 Geo. 3, c. 46, s. 3, if he pays a smaller sum into court than that for which he was arrested, and the plaintiff takes it out, and proceeds no farther in the action. *Butler v. Brown*, 3 Moore,

171., and be only paid 3*l.* into court. *Porter v. Pittman*, 2 D. & R. 266.

So, where a defendant was arrested for 15*l.*, and paid 6*l.* into court, which he had offered to pay before action brought. *Davey v. Renton*, 4 D. & R. 186; 2 B. & C. 711.

The defendant must show aliunde, that the plaintiff had no probable cause for arresting him for the amount. *Clarke v. Fisher*, 1 Smith, 428.

In C. P. it has been held, that if a defendant be holden to bail for a larger sum, and pay a lesser sum into court, which the plaintiff accepts and proceeds no farther in the action, the defendant may apply under the statute for costs. *Laidlaw v. Cockburn*, 2 N. R. 76.

If the plaintiff take out of court a less sum than that for which he originally proceeded, and under the amount fixed by the statute as that for which a defendant may be held to bail:—Held, in the Exchequer, not to be within the statute, if the plaintiff give a good reason for taking it out. *Plummer v. Savage*, 6 Price, 126; *S. P. Weaver v. Birdsall*, 12 Price, 734.

## 3. Cross Demands.

Where there are cross demands between parties, and the balance due to the plaintiff does not amount to the sum limited by the statute, for which the defendant may be arrested, such an arrest is within the principle of 43 Geo. 3, c. 46, s. 3, and must be considered as an arrest without any reasonable or probable cause. *Dromfield v. Archer*, 1 D. & R. 67; 5 B. & A. 513.

The plaintiffs having arrested the defendant, and held him to bail for 1123*l.*, and consented at the trial to take a verdict of 710*l.*, they having, at the time of the arrest, a sum of 407*l.* belonging to the defendant in their hands:—Held, that he was entitled to his costs under the statute, as the balance was the sum ultimately due to the plaintiffs, after deducting the latter sum, although the account on which the balance was due was a joint account between the defendant and a third person. *Foster v. Weston*, 4 M. & P. 277; 6 Bing. 527.

Where there have been mutual dealings between the plaintiff and the defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of the account, with full knowledge of at least a part of the defendant's demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the statute. *Ashton v. Naule*, 3 M. & Scott, 184.

## 4. Damages referred to Arbitration.

The plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascertaining the amount of the damages, and the arbitrator awarded a less sum than 15*l.*; upon an application to



the court to allow the defendant his costs, pursuant to 43 Geo. 3, c. 46:—Held, that in order to entitle the defendant to such costs, he must show that the arrest was vexatious and malicious. *Silversides v. Rowley*, 1 Moore, 92.

And if a defendant be arrested for 100*l.*, and the cause be afterwards referred to an arbitrator, who finds that 20*l.* only are due to the plaintiff, the defendant is not entitled to his costs on the ground of an arrest without probable cause. *Pain v. Aclon*, 3 Moore, 605; 1 B. & B. 278.

Defendant having been held to bail for 38*l.*, paid 2*l.* into court, which the plaintiff did not take out, but, before the cause was called on for trial, it was agreed to refer the cause and all matters in difference to an arbitrator, with power to him to examine the parties on oath, and call for books, &c.; the costs of the cause to abide the event; and the arbitrator having awarded only 1*l.* 19*s.* in addition to the 2*l.* paid into court:—Held, that the defendant was not entitled to his costs. *Keene v. Deeble*, 5 D. & R. 383; 3 B. & C. 491.

The defendant was arrested for 30*l.* At the trial, it appearing that the plaintiff was indebted to the defendant in a small sum, a verdict was taken for the former, for nominal damages, subject to a reference to an arbitrator, for ascertaining the amount, and he found that 12*l.* only were due from the defendant to the plaintiff:—Held, that the defendant was not entitled to costs, although he had tendered the sum awarded before the commencement of the action, as he ought to have pleaded the tender. *Bryson v. Simcox*, 1 M. & P. 355.

Defendant was arrested for 327*l.*, he tendered 250*l.*, but did not pay it into court. An arbitrator, to whom the cause was referred, awarded the plaintiff only 250*l.*:—Held not a case to entitle defendant to costs for a malicious and vexatious arrest. *Sherwood v. Taylor*, 6 Bing. 280; 3 M. & P. 641.

A cause and all matters in difference were referred to an arbitrator, the costs of the cause to abide the event of the award. The arbitrator found for the plaintiff a certain sum to be due on balance of accounts; but as the defendant had been arrested without any reasonable or probable cause for a larger sum than was due, he awarded him a sum of money as a compensation for the unlawful arrest, to be deducted from the balance found to be really due to the plaintiff, and directed a verdict to be entered for the plaintiff for the difference, deducting therefrom the damages awarded to the defendant. The court refused to allow the defendant costs, inasmuch as by the terms of the reference, the costs were to abide the event of the award, and that was in favour of the plaintiff. *Thompson v. Atkinson*, 6 B. & C. 193; 9 D. & R. 347.

The plaintiff, an attorney, arrested the defendant for 100*l.*, the amount of a bill of costs delivered, and served him with a copy of a declaration, the defendant pleaded the general issue, on which issue was joined; at the trial, the amount of the bill was, by consent of the parties, referred to the prothonotary to be taxed, and he found that 60*l.* only were due, as the plaintiff had neglected

to take out his certificate for a part of the time during which the business was done:—Held, that the defendant was not entitled to his costs under the statute. *Hinton v. Warren*, 12 Moore, 31.

### 5. Sale of Goods.

A vendor, arresting the vendee for the full amount of goods sold and delivered, is not liable to pay costs under the 43 Geo. 3, c. 46, s. 3, although part of the goods sent on approval had been returned to the vendor, and accepted by his servant, it not appearing that the vendor had personal notice of such return and acceptance. *Roper v. Shevely*, 1 C. & M. 497; 2 Dowl. P.C. 14.

Goods having been sold and delivered by plaintiff to defendant, defendant objected to them for bad manufacture, and plaintiff agreed to take them back. They were accordingly returned to the plaintiff, who afterwards sent them back to the defendant, and arrested him for their value. A verdict having been entered for the value of part only, being a less sum than that for which defendant was arrested:—Held, that he was entitled to costs. *Linley v. Bates*, 2 Tyr. 753; 2 C. & J. 659.

A plaintiff had sold goods to defendant, to be paid for, half in ready money, and half by bill at three months. The defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods:—Held, that he had no reasonable or probable cause for so doing, and that defendant was entitled to his costs. *Day v. Pictou*, 10 B. & C. 190; 5 M. & R. 31.

Where the plaintiff arrested the defendant for money due for coals, and recovered less than the sum sworn to, the defendant was allowed his costs, the plaintiff having previously to the arrest compounded a penal action for delivering the same coals short of measure, and the arrest being for the price of such coals considered as full measure. *Axon*, 2 Smith, 261.

The seller of a horse warranted it sound, the horse proved to be unsound, and the seller refused to take it back; there being no agreement to take the horse back, or an express right to rescind at the time, the purchaser has only a right to sue for damages; but having arrested the seller, and recovered a less sum, it was held to be an arrest without reasonable or probable cause, and that the defendant was entitled to his costs. *Gompertz v. Denton*, 1 Dowl. P. C. 623; 1 C. & M. 207; 3 Tyr. 233.

### 6. Other Instances.

If a defendant be arrested for 15*l.* for goods sold, and be indebted to the plaintiff in the sum of 14*l.* only, on a promissory note, payable by instalments, the court of C. P. will not allow the defendant his costs, pursuant to 43 Geo. 3, c. 46, as he might have been arrested on the note. *Pincher v. Brown*, 3 Moore, 590.

An action of debt on bond, where the plaintiff recovers a verdict for nominal damages only, and

takes his judgment for the penalty, is not within the relief of the statute, enabling the court to allow the defendant costs, if the plaintiff do not recover the amount of the sum for which he has held the defendant to bail. *Cammack v. Gregory*, 10 East, 525.

Where a bond is payable by instalments, some of which only are due, and the plaintiff arrests for the whole penalty, the court of C. P. will not interfere to give the defendant his costs; the penalty being, in law, the sum recovered. *Talbot v. Hodson*, 2 Marsh. 527: S. C. not S. P. 7 Taunt. 251.

If a defendant be held to bail on an affidavit for 17*l.*, out of which 6*l.* 10*s.* have been paid, the court of C. P. will not set aside the proceedings, under the 51 Geo. 3, c. 124, s. 1; but his remedy, if any, would be under the 43 Geo. 3, c. 46, for having been maliciously held to bail. *Spink v. Hitchcock*, 1 Moore, 131; 7 Taunt. 435.

The defendant was held to bail on an action for 25*l.*, he pleaded an abatement as to 12*l.* 10*s.*, and the general issue as to the remainder; verdict for the plaintiff for the latter sum. On motion for costs under the 43 Geo. 3, c. 46, supported by affidavit that the defendant believed the plaintiff had sued out bailable process, for the purpose of extorting from him the whole sum:—Held not a case of malicious arrest within the statute. *James v. Francis*, 5 Price, 1.

Where a defendant was arrested for a sum of money, in respect of the greater portion of which the plaintiff knew at the time that the defendant had obtained a discharge under the Insolvent Debtors' Act:—Held, that the defendant was entitled to his costs, as upon an arrest without probable cause. *Huntingtower (Lord) v. Heeley*, 7 D. & R. 369.

Executors holding a defendant to bail, without reasonable or probable cause, for a debt due to their testator, are liable to costs under the stat. 43 Geo. 3, c. 46, s. 3. *Feeley v. Reed*, 5 B. & A. 515, n.

But it will require a strong case to subject an executor plaintiff to costs under the statute. *Foulkes v. Neighbour*, 1 Marsh. 21.

The court cannot tax defendant his costs under 43 Geo. 3, c. 46, s. 3, in an action commenced in the Palace Court and removed to C. P. *Costello v. Corlett*, 4 Bing. 474: S. C. nom. *Costello v. Cawley*, 1 M. & P. 315.

So, after a removal into K. B. *Handley v. Levy*, 1 M. & R. 37; 8 B. & C. 637: S. P. *Connell v. Watson*, 2 Dowl. P. C. 139; *James v. Dawson*, 1 Dowl. P. C. 341.

### 7. Proceedings.

A rule nisi having been obtained for allowing the defendant his costs under the 43 Geo. 3, c. 46, s. 3, the plaintiff, in answer thereto by his affidavit, denied an agreement which was proved at the trial, and swore that the whole sum claimed was justly due to him: the court acted upon the evidence given at the trial, and made the rule absolute. *Glensville v. Hutchins*, 1 B. & C. 91.

An application for costs, under the statute, cannot be supported by reference to the notes of the judge before whom the cause was tried. *Fountain v. Young*, 1 Taunt. 60: S. C. not S. P. 6 Esp. 113.

An affidavit made to support such an application must show that there was no reasonable or probable cause for the arrest. *Id.*

Upon an application without sufficient grounds, the court of C. P., in discharging the rule, directed the costs of the motion to be paid by the defendant's attorney. *Rolfe v. Rogers*, and *Rogers v. Burgess*, 4 Taunt. 191.

Where the plaintiff recovers a less sum than that for which he arrests the defendant, and a motion is made to give the defendant his costs, the court will take into their consideration the way in which the debt was contracted; and, therefore, where the debt sued for was for beer supplied to a person who was habitually drunk, and the court thought the plaintiff was not entitled to recover it:—Held, that this was a case of want of probable cause within the meaning of the act, though the beer was proved to have been delivered. *Erle v. Wynne*, 2 Dowl. P. C. 23.

### X. OPERATION OF WELSH JUDICATURE ACTS.

13 Geo. 3, c. 51.]—Where at a trial at Hereford, upon a cause of action arising in Wales, the plaintiff recovered only 5*l.*, the judge thought himself bound to certify. *Cooper v. Davies*, 1 Esp. 463—Kenyon.

That part of the statute which relates to the plaintiff paying costs to the defendant, in personal actions arising in Wales and tried in England, unless 10*l.* are recovered, was wholly repealed from the 24th June, 1824, and the 21st sect. of the 5 Geo. 4, c. 106, enacting nearly similar provisions, except 50*l.* be recovered, did not come into operation till the 6th November, 1824; so that in all actions tried between those days, neither of the statutes applied, and the plaintiff got the same costs as if the cause arose entirely in England. *Moore v. Williams*, 1 C. & P. 468—Tent.

An action of covenant for not levying a fine was a personal action within the 13 Geo. 3, c. 51, s. 1. *Davis v. Jones*, 1 N. R. 267.

5 Geo. 4, c. 106.]—Under 5 Geo. 4, c. 106, s. 21, where a verdict was found for less than 50*l.*, it was in the discretion of the judge who tried the cause, whether he would testify that the cause of action arose in Wales, and that defendant was resident there at the time of the service of process; and his decision could not be revised by the court. *Jones v. Kenrick*, 2 M. & R. 448; 8 B. & C. 337; M. & M. 179.

Lord Tenterden, C. J., refused to testify where the evidence was merely that the defendant's usual place of residence was in Wales. *Id.*

To entitle the defendant, who at the time of the service of the writ was resident in Wales, to costs, the judge who tried the cause must have certified that the defendant was then resident in Wales.

It was not sufficient to state in the certificate the evidence from which such conclusion may be drawn. *Jardine v. Lewis*, 9 B. & C. 545.

The court, without a judge's certificate, would not enter a suggestion on the roll to deprive the plaintiff of his costs, in an action where the defendant resided in Wales at the time of serving process, although the sum recovered was under 50l. *Mortimer v. Harris*, 9 D. & R. 534.

#### XI. OPERATION OF OTHER STATUTES.

Although a plaintiff, in an action on the 5 Eliz. c. 4, be not entitled to costs if he recover, yet he must pay them if the verdict be found against him. *Jeynes v. Stevenson*, Bull. N. P. 194.

A certificate under 19 Geo. 2, c. 34, or 4 Geo. 3, c. 15, may be granted at a period subsequent to the trial, and out of court. *Sullivan v. Montague*, 1 Dougl. 106.

The costs of issuing writs of distringas under stat. 10 Geo. 3, c. 50, are to be paid before appearance, though no issue be levied. *Martin v. Townshend*, 5 Burr. 2725.

A judge's certificate that a custom-house officer "had probable cause for seizing goods," does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under stat. 23 Geo. 3, c. 70, s. 29, and 26 Geo. 3, c. 40, s. 31. *Baldwin v. Tenkard*, 1 H. Black. 28.

In a suit by the crown upon a bond under the Post-Horse Act, the court cannot give costs, although the farmer of the duties is the real party against the crown. *Rez v. Corum*, 1 Anst. 50.

The defendant, in order to deprive the plaintiff of his costs, under 43 Geo. 3, c. 141, tendered evidence to show that the offence mentioned in the conviction had actually been committed by the plaintiff: it was held, however, that that statute applied only to cases where convictions had been quashed, and, therefore, that the evidence was not admissible for that purpose. Quære, whether it was admissible in mitigation of damages? *Rogers v. Jones*, 5 D. & R. 268; 3 B. & C. 409; R. & M. 129.

Held, upon the stat. 52 Geo. 3, c. 113, s. 93, (Birmingham Paving Act), which gives costs in all cases where a verdict shall be found for any defendant, that four of several defendants who had obtained verdicts were entitled to costs, although the verdict was against the rest. *Hall v. Smith*, 2 Bing. 267; 9 Moore, 226.

#### XII. SEVERAL ISSUES.

##### 1. Part only for Plaintiff.

No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. *Reg. Gen.*, K. B., C. P. & Exch., H. T. 2 W. 4, 1 Dowl. P. C. 193; 8 Bing. 299; 1 M. & Scott, 425; 3 B. & Adol. 385; 2 C. & J. 189; 2 Tyr. 347; 4 Bligh, N. S. 601.

The rule is prospective, and applies to all taxations after the commencement of Easter term. *Cox v. Thomson*, 2 C. & J. 498; 1 Dowl. P. C. 572; 2 Tyr. 411.

Before the rule, a plaintiff was entitled to the costs of those counts only on which he obtained judgment. *Penson v. Lee*, 2 B. & P. 334; overruling, *Spicer v. Teasdale*, 2 B. & P. 49; *Bridge v. Raymond*, 2 W. Black. 800; *Norris v. Walden*, 2 W. Black. 1199. And see *Tempest v. Motely*, 1 Wils. 331; *Costa v. Sayer*, 2 Burr. 753.

And there being several defendants, some of whom suffer judgment by default, made no difference. *Morgan v. Edwards*, 2 Marsh. 201; 6 Taunt. 398.

When there are issues joined on several counts, and on some a verdict for the plaintiff, and on others for the defendant, the defendant was not entitled to costs on that part of the record in which the verdict was found for him. *Butcher v. Green*, 2 Dougl. 677.

If there were two distinct causes of action in two counts, and as to one the defendant suffered judgment to go by default, and as to the other took issue and obtained a verdict, he was entitled to judgment for his costs on the latter count, notwithstanding the plaintiff was entitled to judgment and costs on the first count. *Dey v. Hawk*, 3 T. R. 654.

Under the rule, it has been held that when the general issue is pleaded to a declaration containing several counts, it tenders a distinct issue upon each count; and, upon taxation, the defendant is entitled to the costs of those counts found for him. *Cox v. Thomson*, 2 C. & J. 498; 1 Dowl. P. C. 572; 2 Tyr. 411.

And if a verdict be found for the plaintiff on some counts, and for the defendant on others, the defendant is entitled to have the costs of those counts which are found for him deducted from the general costs in the cause. *Knight v. Brown*, 2 M. & Scott, 797; 9 Bing. 643; 1 Dowl. P. C. 730.

Where, after verdict for the plaintiff, subject to a special case, one of the defendant's pleas is held bad, he is not entitled to the costs of witnesses in support of that plea. *Carterright v. Cook*, 1 Dowl. P. C. 529.

Where a plaintiff succeeds on one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are as necessary as the issues found against him, as on the issues found for him, the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him, and the defendant to none of his. *Richards v. Cohen*, 1 Dowl. P. C. 533.

Where witnesses are called to substantiate charges contained in counts upon which the defendant obtains a verdict, it is in the discretion of the prothonotary to allow or disallow their expenses, as he may conceive their evidence material to those counts upon which the plaintiff succeeds. *Andrews v. Thornton*, 1 M. & Scott, 670; 8 Bing. 431.

Where immaterial issues are found in favour of defendant, and judgment is afterwards entered for plaintiff non obstante verdicts, neither party

is entitled to the costs of the immaterial issues. *Goodburne v. Bouman*, 9 Bing. 667; 3 M. & Scott, 69; 2 Dowl. P. C. 206.

Where, in trespass, the jury found for the defendant upon a plea which went to the whole cause of action, and the judge thereupon discharged them as to the other issues:—Held, that the defendant was not entitled to the costs of the pleadings or witnesses in respect of the issues upon which no verdict was given. *Vallance v. Adams*, 2 Dowl. P. C. 118.

## 2. Several Defendants.

By 8 & 9 Will. 3, c. 11, s. 1, where several are defendants in actions of trespass, assault, false imprisonment, or ejections firmæ, and any one or more shall be acquitted, the persons acquitted shall be entitled to costs, unless the judge shall immediately after trial, in open court, certify upon the record that there was a reasonable cause for making such persons defendants.

By 3 & 4 Will. 4, c. 42, s. 32, where several persons shall be made defendants in any personal action, and any one or more of them upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for, and recover his reasonable costs, unless the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was reasonable cause for making such person a defendant in such action.

The 8 & 9 W. 3, does not extend to an action of assault against several, one of whom had let judgment go by default, and the others had pleaded not guilty, which was found for them. *Collins v. Harrison*, 1 Selw. N. P. 41—Wilmot.

That statute does not extend to an action of debt on bond against executors, one of whom is acquitted on the plea of plene administravit præter. *Norfolk (Duke) v. Anthony*, 2 Tidd's Prac. 1023.

Nor does it extend to an action on the case for a malicious prosecution; although the plaintiff allege in his declaration, that the defendant maliciously caused him to be apprehended by virtue of a magistrate's warrant, and to be falsely imprisoned, and detained in prison for a long time. In such an action, one of several defendants obtaining a verdict is not therefore entitled to his costs under that statute, if a verdict pass against the others. *Murray v. Nichols*, 6 Bing. 530; 4 M. & P. 280.

In a case of trespass against several for taking goods as a distress; on a verdict against one, the judge granted a certificate under that statute, that there was reasonable ground for making the other a defendant, for the purpose of depriving him of his right to costs. *Furness v. Fotherby*, 4 Camp. 136—Ellenborough.

If one of several defendants in an action of trespass and false imprisonment be acquitted, a certificate granted under that statute will deprive him of his costs. *Aaron v. Alexander*, 3 Camp. 35—Ellenborough.

Where some defendants demurred to some counts, and the other defendants went to issue

upon them, and all the defendants went to issue upon the other counts, and those defendants who demurred got judgment upon the demurrer before the issues were tried:—Held, that they were not entitled to have their costs taxed upon that judgment, under the 8 & 9 Will. 3. *Forbes v. Gregory*, 1 Dowl. P. C. 679; 1 C. & M. 435; S. C. nom. *Forbes v. King*, 3 Tyr. 385.

Where in an action against several defendants, who sever in their defences, judgment is obtained by one whose plea amounts to an absolute bar, the other defendants shall have the benefit of it, and not pay costs; but if the plea be merely a discharge to the party pleading it, the others will still be liable to costs, if they fail on their own pleas, though the plaintiff fail as to the other. *Baylis v. Dinely*, 2 Chit. 153.

Where in trespass two defendants pleaded, 1st, not guilty, and 2ndly, separate justifications, and one obtained a general verdict, and the other a verdict on his justification only:—Held, that the latter was not entitled to any costs on the issue found for him. *Holroyd v. Breare*, 4 B. & A. 700.

Three defendants being sued in trespass for assault and false imprisonment appeared by the same attorney, but severed in pleading. The same evidence was adduced for all, with the exception of one witness, who was called for one of them separately; that one being acquitted, the master taxed him 40s. costs only:—Held, that he was entitled on taxation to recover from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the master that he was not indemnified by the other defendants. *Griffiths v. Kynaston*, 2 Tyr. 757.

One of two defendants in replevin cannot have his costs upon acquittal. *Ingle v. Wordsworth*, 3 Burr. 1284; 1 W. Black. 355.

On a joint plea of not guilty to trespass and assault, if one defendant be found guilty with 1s. damages and 1s. costs, and the other acquitted, the latter is only entitled to 40s. costs. *Hughes v. Chitty*, 2 M. & S. 172.

If there be two defendants in an action of assumpsit, one of whom suffers judgment by default, and the other obtains a verdict, he who obtains the verdict is also entitled to costs. *Shrubb v. Barrett*, 2 H. Black. 28.

In a joint action of assumpsit against three defendants, two of them pleaded together, and the third by another attorney. The two former only appeared at the trial, and a verdict having been found for the defendants generally, judgment was signed, and the costs taxed by those two were paid by the plaintiffs. The court, on the motion of the third defendant, refused to direct the prothonotary to review the taxation, and allow his costs. *Smith v. Campbell*, 4 M. & P. 469; 6 Bing. 637.

Where there are several defendants, who obtain a verdict generally, the costs of all must be taxed at the same time, although they defend separately. *Id.*

Where, by an order of reference made in a cause where there were two defendants, the costs were directed to abide the event, and one of the defendants neither attended before the arbitrator, nor took any other part in the proceedings before him; quære, whether upon an award in favour of the other defendant, the master had power to tax costs for the two separately? *Dickins v. Jarvis*, 5 B. & C. 528; 8 D. & R. 285.

### 3. New Assignment.

Where the plaintiff's cause of action is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict on some issues, and the defendant on others, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but not the costs of the issues found for the defendant; on which, however, the latter is not entitled to claim any costs from the plaintiff: but where the defendant suffers judgment by default as to some causes of action, and pleads as to others, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, the latter is entitled to the costs of the issues found for him, and the plaintiff to those only of the judgment by default. Where, therefore, to an action of trespass, the defendant pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned, and the defendant suffered judgment by default as to the new assignment, and the plaintiff was bound to go to trial to get rid of the general issue, which would otherwise have barred his whole action, and he could not by any other means have obtained damages on the judgment by default:—Held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, although the jury found a verdict for the defendant on one of the special pleas, the costs of such issue being deducted, but not allowed to him on that issue. *House v. Thames Navigation*, 6 Moore, 324; 3 B. & B. 117; *S. P. Broadbent v. Shaw*, 2 B. & Adol. 940; 1 Dowl. P. C. 336.

So, although the jury find a verdict for the defendant upon all the special pleas which cover part only of the trespasses. *Booth v. Ibbotson*, 1 Y. & J. 354.

Trespass quære clausum fregit: pleas, not guilty, and justifications under a right of way: issue joined on not guilty; right of way traversed, and issue joined thereon. New assignment and judgment by default thereon; verdict for plaintiff 1s. on issue of not guilty; 40s. damages on the new assignment; and verdict for defendant on one of the justifications:—Held, that as the defendant had not withdrawn the general issue, and the plaintiff was put to the expense of going to trial to prove the trespass, the plaintiff was entitled to the general costs of the cause. *Vickers v. Gallimore*, 5 Bing. 196; 2 M. & P. 359.

Trespass quære clausum fregit: pleas, lib. ten. and four special pleas: replication, issue on all the pleas, and a new assignment; judgment by default on all the trespasses newly assigned,

and a relinquishment of the four last pleas as far as they related to the trespasses newly assigned. One shilling damages assessed on the judgment by default. Record went down for trial, and verdict found for the plaintiff on the plea of lib. ten. and for the defendant on all the other pleas:—Held, that as the defendant had left the plea of lib. ten. to the declaration on the record, the plaintiff was forced to go down to trial, and therefore was entitled to the general costs of the cause. *Forester v. Dale*, 1 Dowl. P. C. 412.

One count in trespass, and several pleas of justification, on which issues were taken; new assignment, as to which judgment by default; venire as well as to assess the damages on the judgment by default as to try the issues; all the issues found for the defendant:—Held, that the defendant was entitled to the costs of those issues. *Griffiths v. Davies*, 8 T. R. 466.

So, he is entitled to the whole costs of the trial, provided no other plea averring the trespasses newly assigned be found for the plaintiff. *Cross v. Johnson*, 4 M. & R. 290; 9 B. & C. 513.

Where a declaration in trespass consists of one count only, and the defendant justifies part of it, and the plaintiff new assigns without taking issue on the special plea, and obtains a verdict, he is entitled to the costs of all the pleadings. *Gundry v. Sturt*, 1 T. R. 636.

Where in trespass quære clausum fregit, the defendant pleads not guilty, and a justification of a right of way, and the plaintiff traverses the right of way, and new assigns extra viam; and there is a verdict for the plaintiff with 1s. damages on the new assignment, and for the defendant on the justification; the plaintiff is entitled to full costs, deducting the defendant's costs on the issue found for him. *Martin v. Valencia*, 1 East, 350.

In trespass quære clausum fregit, the defendant pleaded not guilty, and a justification of a right of way; the plaintiff, in his replication, admitted the right of way, and pleaded a new assignment extra viam, and obtained a verdict upon the issue of not guilty, and on the new assignment, with 1s. damages:—Held, that he was entitled to full costs. *Taylor v. Nicholls*, 3 B. & A. 443.

So, where the defendant pleaded first, not guilty, secondly, a justification of a right of way, and lastly, liberum tenementum; and the plaintiff joining issue on the first, traversed the second and last pleas, and new assigned as to the second; and an arbitrator found for him generally on the first and last pleas, and also on the new assignment, with 1s. damages, and for the defendant on the second plea:—Held, that the plaintiff was entitled to his full costs, deducting the defendant's costs on the issue found for him, although the witnesses of the latter were detained at the assizes by the plaintiff's having withdrawn his record for the purpose of amending it. *Trotman v. Abber*, 3 Moore, 555; 1 B. & B. 222.

Where, in trespass quære clausum fregit, the defendant pleaded a right of way, setting out the breadth of the way, and the plaintiff new assigne-

ed, to which the defendant pleaded not guilty; on a verdict for the plaintiff, on the new assignment, with 30s. damages, it was held that he was not entitled to his full costs. *Cockerel v. Allanson*, 3 Dougl. 109.

The question of apportionment of costs between plaintiff and defendant, on the several issues in trespass *quare clausum fregit*, of not guilty, right of way by prescription, by grant, and on new assignment *extra viam*, the first and third issues, and the new assignment as to part, being found for the plaintiff, and the second issue, and the other questions on the new assignment, for the defendant, having been brought fully before the court of Exchequer, who took time to consider it, it was decided that the defendant was only entitled to the disallowance to the plaintiff of the costs of the issues found for the defendant, and was not entitled beyond that to have the costs of those issues deducted from the costs allowed to the plaintiff. *Hopkins v. Barnes*, 2 Price, 136.

In trespass for cutting down trees, the defendant pleaded, first, not guilty; secondly, several pleas of justification, because the trees obstructed a highway; and the plaintiff in his replication joined issue on the plea of not guilty, and denied the highway, and new assigned cutting down trees *extra viam*; and the defendant joined issue on the special plea, and suffered judgment by default on the new assignment; the jury having found a verdict for the defendant on the issues on the special pleas, and assessed damages on the new assignment:—Held, that the plaintiff was entitled to full costs, except upon the issues on the special pleas; and that the defendant was not even entitled to costs on those issues. *Longden v. Bourn*, 1 B. & C. 278.

In trespass, the defendant pleaded, first, not guilty; and, secondly, justification. Issue on the first plea, traverse to the second, and new assignment for excess. Issue joined on the traverse, plea of not guilty withdrawn, &c., judgment by default on the new assignment, *nol. pros.* as to the issue on the second plea, and a writ of inquiry executed on the judgment by default:—Held, that the plaintiff was only entitled to the costs of executing a writ of inquiry. *Ruddock v. Smith*, 1 Dowl. P. C. 467.

Where, in trespass *quare clausum fregit*, the jury found for the defendant on the issue taken as a common right of way pleaded, and found no shilling damages, by consent, on a new assignment, to which there was judgment by default: the defendant was held by the court of Exchequer to be entitled to the general costs of the trial; and the plaintiff not to be entitled, on the taxation of costs, to have allowed to him the costs of the assessment of damages, as the costs of executing an inquiry, although he had a witness attending at the trial to prove notice given to the defendant before action brought, not to trespass *extra viam*: and the master having allowed the plaintiff costs on that principle, was ordered to review his taxation in that respect; the court holding that he was entitled to no more costs than damages. *Herber v. Read*, 9 Price, 36.

#### 4. What is the substantial Finding.

A declaration in trespass contained four counts for fishing in the plaintiff's several and free fishery, and taking away his fish. Pleas, first, not guilty; secondly, that the locus in quo belonged to J. S.; and thirdly and fourthly, that the several and free fishery belonged to him. The plaintiff newly assigned, setting out the abutments of his close, and traversed J. S.'s several and free fishery in his replication. Pleas to the new assignment, first, not guilty; secondly, that the close newly assigned was the soil of J. S.; and thirdly, that he had common of fishery over it. The last issue was found for the defendant, as well as that part of the first which related to the second, third, and fourth counts of the declaration. All the other issues were found for the plaintiff, with 1s. damages, and 40s. costs on the first count:—Held, that the defendant was entitled to the general costs of the action, deducting only the costs of such issues as were found for the plaintiff, on the ground that the whole cause of action had been substantially found for the defendant on the last issue. *Bennett v. Coster*, 4 Moore, 110; 1 B. & B. 465. And see 2 Moore, 83.

Trespass for breaking and entering the plaintiff's free fishery in A., and also in B., and also in A. and B.: pleas, first, not guilty; second, that the said free fisheries were parcel of a navigable harbour, &c., common to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's manor. Rejoinder, taking issue on such prescription:—Held, that on verdict for the plaintiff on the general issue, and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff was not entitled to costs. *Vivian v. Blake*, 11 East, 263.

The defendant in replevin avows for rent in arrear, and that the goods had been clandestinely removed. The plaintiff pleads, first, non tennit; second, no rent in arrear; and, third, that the goods were not clandestinely removed. The last issue only was found for the plaintiff:—Held, that the defendant was entitled to deduct from the plaintiff's costs, the costs of the two first issues which were found for the defendant. *Cook v. Green*, 1 Marsh. 234; 5 Taunt. 594.

#### 5. Demurrers.

If one of several pleas pleaded by defendant be adjudged bad on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant upon the *poetea*, if afterwards, upon trial of the issues joined on the other pleas, defendant should have a verdict, even though it should appear on the whole of the record that the plaintiff had no cause of action. *Duberley v. Page*, 2 T. R. 391.

Where a declaration consists of two counts, and there is a joinder in demurrer on plea to one, and plea to the other, and judgment for defendant on the former, and verdict against him on the latter, plaintiff is entitled to costs on verdict, but not defendant on demurrer. *Astley v. Young*, 2 Burr. 1332.

If the plaintiff take issue on several pleas, one of which is insufficient in law, and has a verdict on all the issues except that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is entered up for the plaintiff, still he shall not be allowed any costs upon the issue found for the defendant. *Kirk v. Newill*, 1 T. R. 266.

Where in assumpsit the defendant pleaded the general issue, and the statute of limitations to the whole sum demanded, and, as to part of it, that the promises were made by the defendant's testator, and one A. B. jointly, which A. B. survived the other, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs:—Held, that the defendant was not entitled to have the costs of the issue found for her deducted from the costs of the trial, which the plaintiff was entitled to on the issues found for him: aliter where all the issues at the trial are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry. *Poetan v. Stanway*, 5 East, 261; 1 Smith, 499.

#### 6. Certificate under 4 & 5 Anne, c. 16.

By 4 & 5 Anne, c. 16, ss. 4 & 5, leave to plead several matters is given to defendants and plaintiffs in replevin; and if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue for the plaintiff, he shall have costs, unless the judge shall certify that the defendant or plaintiff in replevin had a probable cause to plead such matter upon which the issue shall be found against him.

The statute, being a remedial statute, ought to be so construed as to advance the remedy, and this construction is analogous to that which has been put upon the statute of Gloucester. *Volium v. Simpson*, 2 B. & P. 368.

In trespass the defendant pleaded three different justifications to three different counts, and on issue joined had a verdict for him on two, and against him on the third:—Held, not to be within the statute, and that therefore the plaintiff was entitled, as at common law, to costs on the whole declaration. *Anon.* Bull. N. P. 335.

That statute only applies to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. *Richmond v. Johnson*, 7 East, 583.

If there be a certificate against any more costs than damages upon the stat. 43 Eliz. c. 6, s. 2, the plaintiff shall not have the costs of the double pleas, on which all the issues were found for him, although the judge have not certified under the stat. 4 & 5 Anne. *Id.*

Where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that the plaintiff had probable cause

for pleading the matters on which those issues are joined. *Dodd v. Joddrell*, 2 T. R. 235.

#### 7. Mode of taxing Costs.

The defendant is entitled to the costs not only of the pleadings which form, but also of the trial of those issues which are found in his favour. *Brooke v. Willett*, 2 H. Black. 435.

Where the jury, in returning a verdict, say that they find for the plaintiff as to part of the declaration, he will not be allowed the expenses of witnesses called to support a different part, although the verdict be entered for him generally. *Cocks v. Peachey*, 2 M. & R. 420.

In trespass, where two defendants appeared by the same attorney and pleaded not guilty, and separate justifications, and one obtained a verdict generally, and the other on his justification, but the plaintiff succeeded against him on the plea of not guilty:—Held, that the master in taxing the former costs was right in allowing only one half of the attorney's costs for appearance. *Helroyd v. Breare*, 4 B. & A. 700.

In trespass quare clausum fregit, where the costs of some issues were found for the plaintiff, and some for the defendant, and the prothonotary allowed the latter the general costs in the cause, and the plaintiff the costs of the pleadings on the issues found for him:—Held, that the costs on such latter issues included only those of the pleadings thereon; the only exception being in an action of replevin, where both parties might be considered as actors. *Othir v. Calvert*, 8 Moore, 239; 1 Bing. 275.

Where the defendant at the assizes pleaded a plea puis darrein continuance, to which plaintiff having replied, defendant demurred to the replication, and obtained judgment on demurrer:—Held, that he was entitled to the costs incurred since the plea puis darrein continuance only. *Lytleton v. Cross*, 6 D. & R. 81; 4 B. & C. 117.

Where in case against an agent for misfeasance, the declaration, in addition to special counts on the misfeasance, contained two in trover, with an allegation of special damage; and the plaintiff failed in substantiating the counts for misfeasance, or the allegation of special damage, but recovered on the common count in trover:—Held, that he was only entitled to the costs of that count, divested of special allegation, and the expenses of such witnesses only as were incurred to support the parts of those counts on which the verdict was taken. *Lopes v. De Tastet*, 7 Moore, 120; 3 B. & B. 292.

The court will not send a taxation back to the prothonotary to tax for the defendant the costs of pleading non assumpsit, where the plaintiff, by succeeding on another issue, has entitled himself to the general costs of the cause. *Hibbert v. Fox*, 5 Taunt. 660.

In an action on a policy of insurance, with a count for money had and received, if the defendant pay no money into court, but establish as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his

counsel in opening the case; in such case neither party is entitled to the costs of the first count, but the plaintiff is entitled to the costs of the count on which he succeeds, and so much of the expenses of the trial as were necessarily incurred by him in support of that count. *Penson v. Lee*, 2 B. & P. 330.

Where the plaintiffs brought four actions against two insurance companies for a loss by fire, and a verdict was found for the former against each company, on two of the causes only:—Held, that costs were to be apportioned equally, although three causes only were set down for trial at the same sittings, there being a demurrer pending in the other. *Severn v. Olive, and Same v. Stede*, 6 Moore, 235; 3 B. & B. 72.

### XIII. LIABILITY OF EXECUTORS AND ADMINISTRATORS.

#### 1. Suing in representative Character.

By 3 & 4 Will. 4, c. 42, s. 31, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff; and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

Before the statute, executors were not liable to costs either upon a nonsuit or verdict, where they necessarily sued in their representative character, and could not bring the action in their own right; as upon a contract entered into with the testator or intestate, or for a wrong done in his lifetime. *Smith v. Rhodes*, 2 Tidd's Prac. 1014.

The question was, whether the money, if recovered, would be assets in the hands of the executor, and, if it would, the executor declaring as such was not liable to costs. *Thomson v. Stent*, 1 Taunt. 322.

If an executor sued in covenant against the assor of his testator for not providing timber upon his own demand after the testator's death, he was not liable to pay the costs of a judgment in case of nonsuit, because he must have declared as an executor. *Cooke v. Lucas*, 2 East, 98. And see *Powley v. Newton*, 2 Marsh. 148; 1 Taunt. 543; *Booth v. Holt*, 2 H. Black. 277.

In covenant by the plaintiff, as administratrix, as a breach subsequent to the death of her intestate, and judgment against her on demurrer, she was not liable to costs. *Tattersall v. Groote*, 2 C. & P. 253.

A plaintiff sued as administrator upon a contract made with his intestate, and assigned by the plaintiff to J. S., for whose benefit the action was brought; it appearing that the contract had been annulled, with the privity both of the plain-

tiff and J. S., and that the former was indemnified by the latter, and a verdict being found for the defendant, the court of C. P. made an order on the plaintiff to pay the costs. *Comber v. Hardcastle*, 3 B. & P. 115.

An administrator was not liable to costs of nonsuit when the cause of action arose in the lifetime of the intestate. *Jones v. Williams*, 6 M. & S. 178.

Where the plaintiffs sued as executors for the balance of an account due to their testator, and it appeared at the trial that the balance claimed arose out of matters of account between the plaintiffs in their own right as surviving partners of the testator, and they were accordingly nonsuited:—Held, that the court had no power to order the defendant to have his costs taxed, and allowed him as costs in the cause, and to become part of the judgment. *Barnard v. Higdon*, 3 B. & A. 213.

A. sued as executrix of B. on a policy effected by B. in his lifetime, in which he was jointly interested with C. and D. now living, and was nonsuited:—Held, that she was entitled to the privilege of an executrix, to be exempt from costs. *Wilton v. Hamilton*, 1 B. & P. 445.

If an executor sued as executor for money received by the defendant, since the testator's death, to the plaintiff's use, and failed, he was liable to pay costs. *Goldthwaite v. Patie*, 5 T. R. 234.

If an executor declared on a trover and conversion in the testator's lifetime, and also on a trover and conversion after his death, and was nonsuited, he was not liable to pay costs. *Cockrill v. Kynaston*, 4 T. R. 277.

An executor or administrator was liable for costs in trover, for a conversion after the death of the testator or intestate. *Monkland v. De Granige*, 2 Tidd's Prac. 1015.

If the conversion were in the time of the administratrix, and she was nonsuited in the action of trover, she was liable to pay costs, though she never was in fact in possession of the goods since the intestate's death. *Bollard v. Spencer*, 7 T. R. 358.

Administrators declaring in trover, on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, were liable to costs; for the fact of their possession was immaterial, and they might sue in their own right. *Hollis v. Smith*, 10 East, 293.

Where after a nonsuit, it appeared on the face of the count that the plaintiffs might have sued in their own right, they were held liable to costs. *Jones v. Jones*, 1 Bing. 249; 8 Moore, 146.

Where a plaintiff executor added one count as executor, stating a cause of action for which he might declare in his own right, if he was nonsuited, he was liable to costs. *Grimstead v. Shirley*, 2 Taunt. 116.

An executor, nonsuited, &c., upon a declaration containing a count on an account stated with the plaintiff as executor, of moneys owing to him as executor, was liable for costs in respect of such



count. *Doubiggin v. Harrison*, 4 M. & R. 622; 9 B. & C. 666.

A declaration by an executor stated that the defendant, being indebted to the testator at the time of his death, in consideration thereof promised the plaintiff, as executor, to pay him the amount. The statute of limitations was pleaded:—Held, that the plaintiff, being nonsuited, was liable to costs, though he did not declare upon an account stated. *Slater v. Lawson*, 1 B. & Adol. 893.

The plaintiff sued, as administratrix, upon promises to the intestate for work and labour, and also on an account stated with the plaintiff, as administratrix, concerning money due to the intestate, and alleged a promise to pay her:—Held, that it thereby appeared that the contract was made between the plaintiff and another person within the words of the stat. 23 Hen. 8, c. 15, and therefore that after a nonsuit the defendant was entitled to the costs; but so far as the pleadings were concerned, to the costs of that count only in which the promise was laid to be to the administratrix. *Jobson v. Forster*, 1 B. & Adol. 6.

## 2. When Defendants.

*Plea of plene administravit.*—Where an executor or administrator pleads several pleas to the whole declaration, and one of them is found for him, he is entitled to the postea and costs, although the other be found against him. *Garmans v. Heskeith*, and *Cockson v. Drinkwater*, 2 Tidd's Prac. 1016.

Where executors pleaded non assumpsit, the statute of limitations, and plene administraverunt, and the two first issues were found for the plaintiff, and the last for the defendants:—Held, that the defendants having established an absolute bar, were entitled to the postea and the general costs. *Ragg v. Wells*, 8 Taunt. 129.

Where an executrix pleaded, 1st, non assumpsit; 2d, ne unques executrix; and 3d, plene administravit; and the issues on the first pleas were found for plaintiff, and on the last for defendant; it was holden, that the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial. *Edwards v. Bethel*, 1 B. & A. 254.

An executor having pleaded non assumpsit, as well as plene administravit, and plene administravit prester; &c., and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the non assumpsit, and being entitled to judgment of assets quando acciderint, is entitled to the general costs of the trial, though the issue of plene administravit, be found for the defendant. *Hindsley v. Russell*, 12 East, 232.

Upon the pleas of non assumpsit, and plene administravit, the plaintiff joined issue, and omitted to pray judgment of assets quando: the first issue being found for the plaintiff, and the second for the defendant, the defendant is entitled to the postea and general costs. *Hogg v. Graham*, 4 Taunt. 135.

*False Pleas.*—A bankrupt executor, pleading

a false plea, after commission, is liable to costs. *Howard v. Jemmett*, 3 Burr. 1368; 1 W. Black. 400.

Quære, whether a sham plea by an executor, of judgment recovered against himself, be deemed false within the executor's own knowledge? *Burroughs v. Stevens*, 5 Taunt. 554; 1 Marsh. 211.

*Judgment of Assets.*—A defendant executor is not liable to costs on a judgment of assets in futuro. *Baff v. Deschamps*, 2 Tidd's Prac. 1116.

Upon a judgment of assets quando acciderint, on a plea by an executor of a judgment contained, and plene administravit, the plaintiff is entitled to costs de bonis testatoris. *Assn. 1* (Ch. 629, n).

A plaintiff who takes judgment of assets quando upon plene administravit, and obtains a verdict on non assumpsit testator, is entitled to judgment for the costs de bonis testatoris, et si non, de bonis propriis. *Marshall v. Wilder*, 4 M. & R. 671; 9 B. & C. 655.

## 3. Discontinuance and Nonsuit.

Where the plaintiffs as executors brought an action on a bond given by the defendant to their testator, to which he pleaded a set-off, which the plaintiffs were advised by counsel (after notice of trial had been given) would constitute a good defence to the action, the court allowed them to discontinue, without payment of costs. *Shelley v. Hammond*, 8 Moore, 689.

A plaintiff who sued as an administrator was allowed to discontinue his action without costs in the Exchequer. *Hugh v. Loyd*, Hull Costs, 266.

Not liable to costs upon a discontinuance, as for not proceeding to trial according to notice, unless he has knowingly brought a wrong action, or otherwise been guilty of a wilful default. *Wright v. Jones*, 2 Smith, 260; 2 Tidd's Prac. 1015; *S. P. Bennett v. Cohen*, 4 Burr. 127.

An executor on discontinuing his action and pay costs, where he has knowingly brought it wrong. *Harris v. Jones*, 3 Burr. 1451; 1 W. Black. 451.

The plaintiffs, as executors, having sued one of the co-obligors on a joint and several bond in K. B., to which usury was pleaded, suffered a nonsuit, and brought a second action against another co-obligor in C. P., in which the case having gone off pro defectu juratorum, they brought a third action against all three co-obligors, in order to exclude the evidence of one upon the usury, and moved to discontinue the second action, without costs; but the court of C. P. would not allow them to discontinue on payment of costs. *Melhuish v. Maunder*, 2 N. R. 72.

After a double default and peremptory undertaking given, the court permitted an administratrix to discontinue an action where the declaration contained two sets of counts, the one laying the promises to the intestate, and the other to the plaintiff as administratrix, upon the terms of paying the costs of the latter counts, there up

pearing to be no vexation on the part of the plaintiff. *Blackway v. Edwards*, 2 Y. & J. 569.

A side-bar rule to discontinue on payment of costs was discharged, because obtained after bail had justified. *Belcher v. Gansell*, 4 Burr. 2502.

Serving a rule to discontinue, does not of itself discontinue an action; there must be an appointment to tax the costs. *Whitmore v. Williams*, 6 T. R. 765.

Taxation of costs, without payment of them after a summons to discontinue, is no discontinuance. *Edginton v. Proudman*, 1 Dowl. P. C. 152.

An executor shall pay the costs of a nonpross. *Hawes v. Saunder*, 3 Burr. 1584.

And if he wishes to be relieved from them, he should apply to the court for leave to discontinue without payment of costs. *Anon.* 1 Chit. 623, n.

So, administrators are liable to pay the costs of a nonpross. *Higgs v. Warry*, 6 T. R. 654.

#### 4. Other Cases.

Where, in covenant by the testator, executors pleaded a judgment recovered puis darrein continuance, to which the plaintiff replied, and on demurrer, judgment was given for the defendants:—Held, that they were entitled to the costs incurred after such plea, but not those of the previous proceedings. *Lytleton v. Cross*, 4 B. & C. 117; 6 D. & R. 81.

An executor having pleaded non assumpsit, and a speciality debt sufficient to cover the assets, shall be permitted to withdraw the first plea, on payment of the costs occasioned only by that plea. *Deans v. Grimp*, 2 W. Black. 1275.

Executors were liable to costs in error, in cases where they would be liable in the original action. *Williams v. Riley*, 1 H. Black. 566.

Executors or administrators were not necessarily exempted from costs on interlocutory motions. *Anon.* 2 Tidd's Prac. 1015.

Where the defendant pleaded the general plea of bankruptcy, to an action brought by an executor or administrator, and obtained a verdict, the plaintiff was not liable to costs under 5 Geo. 2, c. 30, s. 7. *Martin v. Norfolk*, 1 H. Black. 528.

Where plaintiff sued as executor, and was nonsuited upon evidence being given at the trial that the supposed testator was still alive, the court refused to allow costs to the defendant, it appearing from affidavits on both sides to be still at least doubtful whether the supposed testator were living or not. *Zechariah v. Page*, 1 B. & A. 386.

A plaintiff suing as executor, having been appointed under a former will, which the testator had afterwards revoked, and having surreptitiously obtained a probate of the first will, which was soon after annulled by the Ecclesiastical court, who also revoked the probate, but not till after the action had been commenced against the defendant, who was the executor of the last will, was held liable to the costs of the cause. *Shaw v. Mansfield*, 7 Price, 709.

An executor suing in his representative character upon a contract made with his testator, is liable to costs upon a judgment as in case of a nonsuit, where such costs have been occasioned by his wilful default. *Woolley v. Sloper*, 3 M. & Scott, 248; 9 Bing. 754; 2 Dowl. P. C. 208.

#### XIV. COSTS IN ARBITRATION.

##### 1. Construction of Reference as to Costs.

Costs of a suit, on a rule of reference, are common costs. *Marder v. Cox*, Cowp. 127; S. P. 2 W. Black. 953.

Unless specially ordered otherwise. *Barker v. Tibson*, 2 W. Black. 953.

The general terms "costs," in a rule of reference, does not include the costs of that reference. *Bradley v. Tunstow*, 1 B. & P. 34; 7 Taunt. 213.

Costs of an arbitration under an order of Nisi Prius are not costs in the cause. *Taylor v. Gordon*, 9 Bing. 570; 2 M. & Scott, 725; 1 Dowl. P. C. 720.

Where, by the rule of reference, the costs were to abide the event of an award, that includes the costs of the reference as well as of the cause. *Wood v. O'Kelly*, 9 East, 436.

Where a cause has been referred by rule of Nisi Prius, and the costs directed to abide the event, that must be taken to mean the legal event; therefore, where an action of trespass was brought for pulling down the plaintiff's gates, and assaulting him; and the defendants justified to all the counts except one, under different rights of way, and pleaded not guilty to the whole; and under the above rule the arbitrator awarded a right of way to the defendants different from any of those pleaded by them, and found five shillings damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negated by the arbitrator, the plaintiff can recover no more costs than damages; for the arbitrator's award is not tantamount to a judge's certificate under the 22 & 23 Car. 2, c. 9. *Swinglehurst v. Altham*, 3 T. R. 138; S. P. *Ward v. Malinder*, 5 East, 489; 2 Smith, 63; S. P. *Anon.* 1 Chit. 185.

So, where a cause had been referred to arbitration, and costs were directed to abide the event, in an action of trespass to land, and the arbitrator found no damages for plaintiff, but directed both parties to pay their own costs:—Held, that the plaintiff was entitled to no costs. *Willis v. Osborne*, 1 Chit. 183.

By rule of court a cause and all matters in difference were referred to an arbitrator, and the costs of the cause were to abide the event; the arbitrator directed the verdict to be entered for the plaintiffs; but that they should not take out execution for the debt until they had paid a larger sum due to the defendant:—Held, that the plaintiff's attorney might still take out execution for the costs. *Highgate Archway Company v. Nash*, 2 B. & A. 597; 1 Chit. 325.

Costs of a reference are costs in the cause, where the reference is for the benefit of the unsuccessful party. *Tregoning v. Attenborough*, 1 Dowl. P. C. 225; 5 M. & P. 453; 7 Bing. 733.

Where a cause is referred to an arbitrator, and the costs are to abide the event, and the arbitrator awards a specific performance of something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs, although the arbitrator does not award a verdict to be entered in form; as where, in an action of trover for corn, the arbitrator, instead of awarding damages and a verdict, awarded that the plaintiff should have a right of entering the defendant's barns, &c. *Anon.* 1 Smith, 426.

It seems, in this case, the costs were to abide the event of the award, not "the event of the cause." *Id.*

The general term "costs" in an order of reference of an indictment, which stated that if the arbitrator should be of opinion that the defendant was guilty, and the prosecutor entitled to costs, the defendant agreed to pay them, does not include those of the reference and award. *Rex v. Moate*, 3 B. & Adol. 237.

## 2. Other Things.

Where a party applies to set aside an award, and fails in his application, he shall pay costs. *Anon.* Hull. Costs, 431.

Where an inquisition of damages was excessive, and, on a rule for setting it aside on that ground, the matter was referred to an arbitrator, to determine for what sum the verdict should stand, nothing being said as to the costs of the application at the time, and the arbitrator having reduced the damages by his award:—Held, that the plaintiff was not entitled to the costs of the application for setting aside the inquisition. *Lewis v. Harris*, 4 D. & R. 129; 2 B. & C. 620.

By order of reference costs were to abide the event; there were two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The master taxed the whole costs of the cause and the reference in one sum to the other defendant, by whom payment was demanded of the plaintiff. The court refused to grant an attachment for non-payment of those costs. Quære, whether the master had power to tax costs for the two defendants separately? *Dickins v. Jarvis*, 5 B. & C. 528; 8 D. & R. 285.

Where the authority of an arbitrator was revoked because the party could not procure the attendance of material witnesses before the arbitrator, the court refused to allow any costs. *Aston v. George*, 2 B. & A. 395; 1 Chit. 204.

Where, in three several actions of trespass, covenant, and replevin, brought by the same plaintiff against the same defendant, and referred to arbitration, the costs of the reference were awarded to be equally borne by the parties: and the master, on taxation, allowed the defendant, as costs of reference, two distinct sums for the attendance, loss of time, and travelling expenses of the same witnesses in two different actions; and

made no allowance to the plaintiff for a sum sworn to have been paid by him to the arbitrator, as costs of the reference: the court of Exchequer discharged a rule nisi for reviewing the taxation, but without costs, it not being alleged that the two former sums were allowed for attendance, &c., in one day: the latter sum not appearing in the plaintiff's bill produced before the master, and no objection having been made at the time of taxation. *Utting v. Evans*, M'Clel. 12.

## XV. IN PARTICULAR PROCEEDINGS.

### 1. Actions on Judgments.

By 43 Geo. 3, c. 46, s. 4, in actions on judgments recovered, the plaintiff shall not be entitled to costs, unless by the order of the court, or some judge thereof.

This does not extend to an action brought to recover the costs of a judgment of nonsuit. *Ba-net v. Neale*, 14 East, 343.

Where a judgment was signed, and execution taken out for costs in an action on a judgment, without leave of the court, or a judge, under the statute, it was held irregular; but where recognizances of bail were taken in C. P., and the bail were sued in that court to judgment, and having no property, actions were brought on the judgment in K. B., in order to take their persons, costs were allowed by the court *nunc pro tunc*. *Armstrong v. Fuller*, 1 Chit. 190.

The statute does not entitle a defendant to stay the proceedings on the payment of the debt without costs, where there is probable ground for the plaintiff's also claiming interest on part of the debt. *Wood v. Silletto*, 1 Chit. 473.

A defendant against whom judgment had been obtained sued out a writ of error, and to an action on the judgment pleaded nul tiel record; the court allowed the plaintiff his costs of the action upon the judgment. *Garnwell v. Barker*, 5 Taml. 264.

### 2. Demurrers.

By 8 & 9 Will. 3, c. 11, s. 2, if judgment shall be given against the plaintiff on demurrer, either plaintiff or defendant, the defendant shall have costs.

By 3 & 4 Will. 4, c. 42, s. 34, where judgment shall be given either for or against a plaintiff or defendant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf.

The court of C. P. ordered the costs of a special demurrer to a declaration in replevin, for not inserting the name of the close in which, &c., to abide the event of the cause. *Patten v. Dudley*, 2 M. & P. 78.

### 3. Ejectment.

A new defendant in an ejectment may give a rule to reply, and nonprose the plaintiff, but he

can have no costs. *Goodright d. Ward v. Bad-*  
*title, 2 W. Black. 763.*

The only mode of recovering the costs of a nonsuit upon the merits in ejectment is to serve the lessor of the plaintiff with a copy of the consent rule and allocatur of costs, and to attach him if he does not obey. *Doe d. Prior v. Salter, 3 Taunt. 485.*

Where a lessor of the plaintiff dies after nonsuit, the court will not grant a distringas upon his goods for a contempt in the executor, in not obeying the order upon the consent rule to pay costs; and the case not being within the statute 17 Car. 2, c. 8, the defendant seems without remedy for his costs. *Doe d. Lintol v. Ford, 2 Smith, 407.*

Where the lessor of the plaintiff, having entered into the common consent rule to pay costs, died between the commission-day and the trial, and the plaintiff was nonsuited upon the merits:—Held, that the executor of the lessor was not liable for the costs under such rule, given by the testator. *Doe d. Payne v. Grundy, 2 D. & R. 437; 1 B. & C. 284.*

The lessor of the plaintiff dies before the commission-day at the assizes, and the plaintiff is nonsuited for not confessing, &c.: the executor of the lessor shall have no costs taxed on the common rule. *Thrustout v. Bidwell, 2 Wils. 7.*

In an ejectment the court will compel the real defendant to pay the costs, although he is not a party on the record. *Doe d. Masters v. Gray, 10 B. & C. 615.*

Where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (who was a pauper) should abide the event of the ejectment against the other; and that action was tried, and the lessor of the plaintiff obtained judgment, and took possession of all the tenements, the court compelled the landlord to pay the costs of that ejectment. *Thrustout d. Jones v. Shenton, 10 B. & C. 110.*

#### 4. Error.

The 3 Hen. 7, c. 10, and 19 Hen. 7, c. 20, give costs of error to the plaintiff, where his judgment is affirmed on error brought by the defendant.

By 13 Car. 2, stat. 2, c. 2, s. 16, the defendant in error is to have double costs, upon affirmance of judgment after verdict.

By s. 11, the statute does not extend to penal actions, except debt for not setting out tithes.

The 8 & 9 Will. 3, c. 11, s. 2, gives defendants in error costs, upon discontinuance of the writ of error, or nonsuit thereon.

The 4 Ann. c. 16, s. 25, gives them the same costs on quashing writs of error for defects, as on affirmance.

The stat. 13 Car. 2, is confined to cases where the judgment so affirmed is for the plaintiff below, and not where the defendant below obtains judgment upon a special verdict. *Baring v. Christie, 5 East, 545; 2 Smith, 142.*

The court of Exchequer Chamber is bound to allow double costs to the defendant in error, on the affirmance of a judgment of K. B., but it is entirely a matter in their discretion whether or not interest shall be allowed on such affirmance. *Shepherd v. Mackreth, 2 H. Black. 284.*

A writ of error having been quashed, because brought by a feme covert, the defendant in error is entitled to costs under stat. 4 Ann. c. 16. *M'Namara v. Fisher, 8 T. R. 302.*

No costs are allowed on the stat. 3 H. 7, c. 10, where a writ of error is nonprossed before the transcript of the record by the clerk of the errors of K. B. *Salt v. Richards, 2 Smith, 121; 7 East, 111.*

Where errors are argued in the House of Lords, although having been argued below, and judgment is affirmed, though the alleged errors may be well worthy of consideration, the plaintiff in error must pay the costs of the proceedings, as if the case had not been argued at all in that house. *Doran v. O'Reilly, 5 Dow, 233.*

Where a judgment for a plaintiff was reversed on a writ of error in fact:—Held, that the plaintiff in error was entitled to the costs of the original action, although not to the costs in error. *Anon. 2 Tidd's Prac. 1244.*

Judgment having been given in C. P. for the plaintiffs on special verdict in assumpsit, which was reversed upon writ of error in K. B., the defendant is entitled not only to judgment of acquittal, but also for the costs of his defence in C. P., being the same judgment which the court below ought to have given; the defendant in such case being entitled to his costs by the stat. 23 Hen. 8, c. 15. *Gildart v. Gladstone, 12 East, 668.*

The court of K. B. will not refer it to the master to tax the plaintiff his costs in error in parliament on a judgment affirmed on error in Dom. Proc., without awarding costs, and remitted to the court, to the end that such proceedings may be had thereon as if no such writ of error had been brought. *Beale v. Thompson, 2 M. & S. 249.*

Judgment for the plaintiff in error from an inferior court, that it might be referred to the master to tax the plaintiff's costs, where the defendant had not joined in error, in compliance with the usual show-bar rule, can only be obtained by a rule to show cause in the first instance. *Swift v. Bottom, 1 D. & R. 183.*

Costs of reversing in a court of error, a judgment for the defendant in ejectment, are recoverable in an action of trespass for mesne profits. *Nowell v. Roake, 7 B. & C. 404; 1 M. & R. 170.*

Executors and administrators are liable to costs in error in cases where they would be liable in the original actions. *Williams v. Riley, 1 H. Black. 566.*

The court of C. P. will not compel security for costs in error, on the ground of the plaintiff in error being a lunatic. *Steel v. Allan, 2 B. & P. 437.*

Seemle, if two courts have been of the same

opinion on any point, and their judgments are appealed from and affirmed, the House of Lords will give costs on the affirmance. *Duverger v. Fellowes*, 1 Clark & Fin. 39.

An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 H. 7, c. 10, which is confined to judgments recovered by plaintiffs below, and affirmed on a writ of error. *Golding v. Dias*, 10 East, 2.

Neither is such defendant in error entitled to his costs on the stat. 8 & 9 W. 3, which is confined to judgments for defendants on demurrer. *Id.*

But where defendant in trespass pleaded several special pleas, upon which issues were joined, and the defendant obtained judgment in C. P.; and plaintiff then brought error in K. B., and the judgment was there affirmed: the defendant was held to be entitled to costs in error by 8 & 9 W. 3, that statute not being confined to judgments for defendant on demurrer. *Ricketts v. Lewis*, 1 B. & Adol. 197.

The statute was held not to apply where the party about to sue out such writ had, in order to avoid execution, paid the damages and costs to the opposite attorney, with a notice to retain them in his hands; and the attorney had deposited the sum in a bank where it produced interest. *Wright v. Fairfield*, 2 B. & Adol. 959.

Where, after demurrer to a replication in form, the demandant obtained judgment, and upon the trial of several issues in fact, a verdict being found in favour of the demandant, the latter had judgment that he recover his seisin against the tenant; and upon a writ of error brought, the common errors being assigned, the judgment was affirmed:—Held, that the demandant was entitled to double costs under the statute 13 Car 2. *Cockerell v. Cholmeley*, 10 B. & C. 564.

The costs of proceedings upon writs of error from the court of Exchequer to the court of Exchequer Chamber, are to be taxed by the master of the court of Exchequer. *Reg. Gen. M. T.* 2 Will. 4, Exchequer Chamber, 1 C. & M. 466; 2 C. & J. 685; 2 Tyr. 761; 2 Dowl. P. C. 138; 3 M. & Scott, 298.

The costs in error to the Exchequer Chamber from the court of Exchequer ought to be taxed in the same manner as costs are taxed upon bills of exceptions. *Att.-Gen. v. Key*, 2 C. & J. 10.

#### 5. Extents.

In cases of extents, costs are not recoverable where goods and lands are seized, and the goods alone are more than sufficient to pay the debt levied, not even in the case of an immediate extent. *Rez v. Hopper*, 3 Price, 40.

The stat. 25 Geo. 3, c. 35, held not to give the crown a right to costs, in cases where it is not necessary to resort to a sale of the lands. *Id.*

Quære, whether in the case of lands being actually sold under an extent in aid, the prosecutor would be entitled to costs? *Id.*

So, costs are not recoverable on an extent in aid under the 53 Geo. 3, although sued to secure the stamp duties on policies of insurance in the hands of an insolvent agent of the company, and founded on their bond to the crown for the due payment of those duties, and although the debt be of such a nature as that an immediate extent might have been issued on it. *Rez v. Boyle*, 1 Price, 434.

In scire facies against the consor of a recognizance to the crown, no costs are recoverable by the defendant, though he succeed on demurrer and in error. *Rez v. Bingham*, 1 Tyr. 262; 1 C. & J. 379; S. C. nom. *Hollis v. Bingham*, 1 Dowl. P. C. 280.

#### 6. Feigned Issues.

Costs are recoverable in a feigned issue, as in any other action; though the statute directing the issue take no notice of costs. *Fitzwilliam (Lord) v. Maxwell*, 2 Marsh. 355; 7 Taunt. 31.

Upon the trial of a feigned issue, the costs must follow the verdict, and the court has no discretionary power to give or not to give costs. *Herbert v. Williamson*, 1 Wils. 324.

But quære, when the court permit parties to try a feigned issue, whether they will not compel them to consent that the costs shall be in the discretion of the court? *Hookins v. Berkeley (Lord)*, 4 T. R. 402.

Costs upon a feigned issue were directed to be taxed from the time when it was first ordered by consent of parties. *Thomas v. Powell*, 1 Bar. 603; 2 Ld. Ken. 292.

Where an action, brought under the direction of the court of Chancery, is defeated by a formal objection, that court will make the person taking such objection pay all costs. *Wray v. Barns*, Peake, 69—Kenyon.

At the trial of a feigned issue at bar, in which the attorney-general was defendant, the plaintiff was nonprossed:—Held, that he should pay no costs, the defence being on behalf of the crown who neither pays nor receives costs. *Williams v. Att.-Gen.*, Hull. Costs, 238.

But where the king is not a party, the plaintiff on a nonsuit in a feigned issue, is liable to costs, though the point of controversy should turn upon a grant from the crown. *Bagshaw v. Wynne v. Bangor (Bishop)*, Hull. Costs, 343.

#### 7. Mandamus.

By 1 Will. 4, c. 21, s. 6, in all cases of applications for writs of mandamus, the costs of such application, whether the writ be granted or refused, and also the costs of the writ, if issued and obeyed, shall be in the discretion of the court; and the court is authorized to order and direct by whom and to whom the same shall be paid.

The statute is confined to cases where the application is originally made after the act came into force. *Rez v. Wix*, 2 B. & Adol. 197. *And see Rez v. Hungerford Market*, 2 B. & Adol. 384.

Where a rule nisi for a mandamus to justice

to hear an appeal is discharged, with costs to be paid to the justices by the appellants, the parish which appeared to support the refusal of the justices is not entitled to its costs, although served with the rule nisi, and although the justices did not appear by counsel. *Res v. Staffordshire Justices*, 1 Dowl. P. C. 507.

The court of K. B. determined, that if an application be made for a mandamus to a bishop without good foundation, they would discharge the rule with costs. *Res v. Chester (Bishop)*, M. T. 27 Geo. 3, 1 T. R. 485. And see *Res v. Canterbury (Archbishop)*, 15 East, 159.

Where justices of peace had made a false return to a mandamus to appoint overseers for a township, and the court had thereupon granted a rule nisi for a criminal information; and on showing cause against that rule contradictory facts were disclosed, which were directed to be tried by an issue; and after it had been prepared and delivered, the justices had abandoned the issue, and obtained a judge's order for staying proceedings, without prejudice to the question of costs; the court ordered the justices to pay the prosecutor the costs of preparing and delivering such issue. *Res v. Lancashire Justices*, 1 D. & R. 485; 5 B. & A. 755.

A corporator who, upon having been removed, had been restored by a mandamus, could not recover the costs of the mandamus from the corporation. *Herman v. Tappenden*, 3 Esp. 278; 1 East, 555.

#### 8. Penal Actions.

By 18 Eliz. c. 5, s. 3, if any informer or plaintiff shall willingly delay or discontinue his suit, or shall have verdict or judgment against him, the defendant shall have his costs.

Where a qui tam informer upon the statute 21 Hen. 8, c. 13, is nonsuited, the defendant is entitled to costs. *Wilkinson q. t. v. Allot*, Cowp. 366.

On a bona fide, but not on a collusive compensation, the plaintiff may also be allowed a reasonable sum for his costs. *Wood q. t. v. Jackson*, 2 W. Black. 1157.

Costs were allowed to a defendant on an information for killing game, where he had judgment for want of a declaration. *Law q. t. v. Worrall*, 1 Wils. 177.

Where the penalty is given to a common informer, though the party grieved happen to bring the action, he must bring it as a common informer, and shall not have costs. *Anon. Bull. N. P.* 333.

On an information to recover penalties under the game laws, if a verdict passes in favour of one defendant, and against another, the acquitted defendant is not entitled to his costs. *Davies q. t. v. Birt*, 1 C. & P. 439—Littledale. S. C. not E. P. 5 D. & R. 353; 3 B. & C. 586.

A defendant removing an information from the sessions, who has a verdict, shall have his costs. *Rees q. t. v. Hodgson*, 1 Wils. 139.

By charter granted to the college of physicians, confirmed by statute, no one shall practise physic within the city of London, or seven miles round, unless licensed by the college, under a penalty of 5*l.* for every month he so practises, to be sued for by the college, payable half to the king, and half to the college. The penalty is a debt vested in the college, the withholding of which is an injury for which damages may be recovered, entitling the college to receive costs if they succeed, and rendering them liable to pay costs, under 4 Jac. 1, c. 3, s. 2, where they fail. *Physicians (College) v. Harrison*, 4 M. & R. 404.

#### 9. Prohibition.

The 8 & 9 Will. 3, c. 11, s. 3, gives costs to the plaintiff in prohibition on judgment for him, either on plea or demurrer; and to the defendant on verdict for him, or on nonsuit or discontinuance.

By 1 Will. 4, c. 21, s. 1, the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer or otherwise, shall be entitled to the costs attending the application and subsequent proceedings.

Where a rule is made absolute for issuing a prohibition, the costs of the rule cannot be granted to the successful party under 1 Will. 4, c. 21, s. 1; that statute only applying to cases where there have been pleadings in prohibition. *Res v. Kealing*, 1 Dowl. P. C. 440.

Where it was made a term on enlarging a rule for a prohibition, that the party applying should declare, and he did declare, and the defendant instead of pleading obtained a judge's order staying the proceedings upon payment of costs incurred since the rule to declare. Upon motion to set aside that order it was held, that the plaintiff in prohibition was not entitled to any further costs. *Pentress v. Harvey*, 1 B. & Adol. 154.

Where the judgment on demurrer, to a declaration in prohibition, was that a writ of prohibition issue as to part of the libel, and a writ of consultation as to the rest. *Seemle*, that it is not a case within 8 & 9 W. 3, c. 11, s. 3, so as to entitle plaintiff to costs. *Free v. Burgoyne*, (in error), 2 Bligh, N. S. 65; 1 Dow, N. S. 115; 6 B. & C. 27, 538; 8 D. & R. 587; 9 D. & R. 14, 601.

Therefore, where there was judgment in K. B. for a prohibition against proceeding in a suit in the Ecclesiastical court, against a clergyman pro salute anime, on the ground of fornication; but a consultation was granted so far as related to the proceeding for deprivation:—Held, that the 8 & 9 W. 3, c. 11, which gives costs to the party, who obtains judgment in prohibition, did not apply, as it was a qualified judgment, which in substance was for the defendant in the prohibition; and that if it was to be considered a *casus omissus*, there was no authority in the court to give costs. *Id.*

Before the statute of 1 Will. 4, a defendant who succeeded upon demurrer in prohibition, was not entitled to costs. *Brymer v. Atkyns*, 2 Tidd's Prac. 983.

And no costs could be awarded on prohibition

against executors, against whom judgment was obtained on demurrer, upon a question whether they were entitled to a general or limited probate. *Scammell v. Wilkinson*, 3 East, 202.

Where a plaintiff was put to declare in prohibition, and was nonsuited at the assizes, the defendant was only entitled to his single costs under the stat. 8 & 9 W. 3, and not to double costs under the stat. 2 & 3 Ed. 6, c. 13, s. 14, which latter only applies to cases where the party, who is hindered of his suit in the Ecclesiastical court by the prohibition, acquiesces in it; and then the party obtaining it must, within six calendar months, verify his suggestion by the depositions of two witnesses in the court which granted the prohibition; otherwise the party hindered shall have a consultation, and double costs and damages. *Frask v. French*, 15 East, 574.

#### 10. *Quare impedit.*

Costs are not allowed in quare impedit. *Widdowes v. Carlisle (Bishop)*, 3 Bing. 404; *S. C. nom. Wyndow v. Carlisle (Bishop)*, 11 Moore, 269.

Therefore, a defendant is not entitled to costs on judgment as in case of nonsuit. *Id.*

Though the defendant have judgment on demurrer in quare impedit, he is not entitled to costs under sect. 2 of stat. 8 & 9 W. 3, c. 11. *Thrale v. London (Bishop)*, 1 H. Black. 530.

#### 11. *Quo Warranto.*

The 9 Anne, c. 20, s. 5, gives costs to the relators in informations in the nature of a quo warranto; and if judgment be given for the defendant he shall have costs against the relator.

Costs are not given on an information quo warranto, unless in usurpation of offices, or freedoms in corporations. *Rez v. Williams*, 1 W. Black. 93.

The defendant in a quo warranto information against him, to show by what authority he held the office of registrar and clerk of the court of Requests of the city of Bristol, is not entitled to costs under the statute. *Rez v. Hall*, 2 D. & R. 341; 1 B. & C. 237.

The court will not stay proceedings in a quo warranto information until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. *Rez v. Wynne*, 2 M. & S. 346.

On a judgment for the relator, he is entitled to costs. *Rez v. Aweary*, 1 Anst. 178.

Where any one of several issues in a quo warranto information is found for the prosecutor, on which judgment of ouster is given, he is entitled to costs on all the issues. *Rez v. Downes*, 1 T. R. 453.

A prosecutor shall pay costs where he makes groundless and frivolous applications for an information in the nature of a quo warranto, knowing it to be so. *Rez v. Lewis*, 2 Burr. 780; 2 Ld. Ken. 497.

The prosecutor of a quo warranto information against a constable of Birmingham, is not enti-

tled to costs under the statute. *Rez v. Wells*, 5 T. R. 375.

The returning officer in an incorporated borough sending members to parliament, is not liable to costs within the operation of 9 Anne, c. 20, in the event of judgment against him on a quo warranto information. *Rez v. M'Key*, 8 D. & R. 393; 5 B. & C. 640.

#### 12. *Real Actions.*

The 8 & 9 Will. 3, c. 11, s. 3, gives costs to the plaintiff in actions of waste on judgment for him, either on plea or demurrer; and to the defendant on verdict for him, or on nonsuit or discontinuance.

Costs are allowed on an interlocutory proceeding in a writ of entry. *Dennis v. Bell*, 2 Hag. 387; 9 Moore, 745.

The prothonotary may allow the tenant in writ of entry the costs of setting aside interlocutory proceedings, and a judgment obtained by the demandant. *Id.*

A formedon may be discontinued on payment of costs. *Scot v. Perry*, 2 W. Black. 738; 3 Wils. 206.

#### 13. *Scire facias.*

The 8 & 9 Will. 3, c. 11, s. 3, gives costs to the plaintiff in scire facias on judgment for him, either on plea or demurrer; and to the defendant on verdict for him, or on nonsuit or discontinuance.

By 3 & 4 Will. 4, c. 42, s. 34, in all writs of scire facias, the plaintiff obtaining judgment, or an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after a plea pleaded, or demurrer joined.

The 8 & 9 W. 3, giving costs in all writs of scire facias, does not extend to a scire facias to repeal a patent prosecuted in the name of the king. *Rez v. Miles*, 7 T. R. 367.

### XVI. COSTS OF TRIAL.

#### 1. *Cause a Remanet.*

Costs are allowed when a cause goes off and remains to be tried for want of jurors. *Sparrow v. Turner*, 2 Wils. 366.

After verdict, the party succeeding is entitled to the costs incurred at a former session, when the cause, from press of business, was made a remanet. *Stander v. Hall*, 1 Ld. Ken. 338.

A cause having been made a remanet at the instance of the plaintiff, for default of verdict after a view by three only, by consent, and not returned by the sheriff; on an application to the court by the defendant for costs for not going to trial, they directed them to follow the event of the cause. *Mountcharles (Lord) v. York*, 1 Ld. Ken. 341.

The rule that costs should attend the final event of future trial, when the cause is made a remanet, was extended to other similar cases by both courts. *Burckell v. Bellamy*, 5 Burr. 2021.

2. *Bills of Exceptions.*

A bill of exceptions is not to be included in the taxation of costs in the court below, being no part of the record there until after judgment. *Gardner v. Bailie*, 1 B. & P. 32.

Where in case the plaintiff recovered a verdict at the trial, and had judgment in C. P., and upon a bill of exceptions returned into K. B., judgment was reversed, and the plaintiff took nothing by his writ:—Held, that the defendant could not have costs. *Bell v. Potts*, 5 East, 49; 2 Esp. 712. And see *Nowell v. Roake*, 7 B. & C. 404; 1 M. & R. 170.

3. *Special Cases.*

Where, after a verdict for a sum of money, two questions were raised for the opinion of the court on a special case, and one of them at the time of argument was withdrawn by mutual consent:—Held, that the plaintiff, retaining his verdict for the sum of money, was entitled to the costs of the special case, though the defendant succeeded on the point which was argued. *Gardner v. Jekyll*, 3 Bing. 330; 9 Moore, 620.

Where, instead of proceeding on a new trial, the parties agreed to state the facts specially, as if in a case reserved at the trial, on which the postea was afterwards delivered to the plaintiffs:—Held, they were entitled to the costs of the first trial. *Robertson v. Liddell*, 10 East, 416; 1 Chit. 19 a.

Where a case is reserved, from the insufficient state of which it is necessary to send the cause down to a second trial, and nothing is said respecting the costs, the party succeeding on such second trial is not entitled to the costs of the first. *Henkey v. Smith*, 3 T. R. 507; *S. P. Smith v. Haile*, 6 T. R. 71.

In a like case, the defendant, without going to trial again, gave the plaintiff a cognovit:—Held, that the defendant was liable to pay the costs of the former trial. *Booth v. Atherton*, 6 T. R. 144. And see *Elvin v. Drummond*, 4 Bing. 415; 1 M. & P. 88.

After a venire de novo, awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury find again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it be otherwise expressed in the rule granting the new trial. *Bird v. Appleton*, 1 East, 111.

## XVII. NEW TRIAL.

1. *Costs regulated by the Rule.*

A plaintiff is not entitled to an attachment for non-payment of the costs of a former trial, where the new trial was obtained on the terms of payment by the defendant, and the plaintiff has tried to cause the second time, without having entered payment previous to the last trial, because under such a rule the payment of costs by the defendant is a condition precedent to having a new trial. *Doe d. Daire v. Haddon*, Hull. Costs.

401: *S. C. nom. Doe d. Davie v. Haddon*, 2 Tidd's Prac. 946.

Where a new trial is granted to defendant on payment of costs, the plaintiff should not carry the cause down for trial until they are paid, for if he do he will have no remedy for them even if he should again obtain a verdict. *Id.*

Where a cause having been once tried, a new trial is granted, but a juror withdrawn, on the party who gained the verdict at the first trial undertaking generally to pay the other his costs: such an undertaking includes only the costs of the second trial. *Rouse v. Bardin*, 1 H. Black. 639.

There is no rule in the Exchequer against giving costs on a new trial being granted, although the verdict was against the opinion of the judge. *Gosley v. Barlow*, 1 Anst. 47.

Where the Exchequer, under special circumstances, granted a new trial of an ejectment, when a verdict had been found for the defendant, they imposed on him the terms of first paying the costs of the former trial and of the application. *Weak d. Burge v. Callaway*, 7 Price, 677.

The Exchequer will not order a party who is in prison, applying for a new trial on the ground of excessive damages having been given against him, to pay the costs of the former trial before the plaintiff's counsel proceed to show cause against the rule. *Goode v. Lewis*, 4 Price, 307.

A new trial after a perverse verdict of the jury is granted without costs; secus, after a mistaken or erroneous verdict. *Hosworth v. Samuel*, 1 Chit. 633, n.; 1 B. & A. 566; *S. P. Skilling v. Claridge*, 2 Chit. 426.

Where the verdict is perverse, the court will grant a new trial without payment of costs, although the damages given for the plaintiff are less than 20*l.* *Freeman v. Price*, 1 Y. & J. 402.

Where a nonsuit had been set aside, and before the second trial the defendant obtained leave to amend his particulars, so as to obviate the objection taken on the former trial, on which he was nonsuited, upon payment of costs, the plaintiff is not entitled to be paid the costs of the first trial previous to, and as the terms of the amendment; and the court would not, under such circumstances, order the master to review his taxation, on the objection that he had allowed the plaintiff only 20*s.*, the costs of a common amendment. The costs of the former trial were ordered to abide the event of the cause, and the court, on discharging a rule granted to show cause, refused to give the successful party the costs of the application. *Andrews v. Bond*, 8 Price, 538, 213.

Where a cause was taken by mistake, the court refused to make the payment of costs the condition of a rule for a new trial. *Etherington v. Kemp*, 1 Chit. 634.

Where the jury find an insufficient verdict, upon which the court can give no judgment, and a new trial is granted, the party ultimately successful is not entitled to the costs of the former trial. *Worcestershire Canal Comp. v. Trent and Mersey Navigation Comp.*, 2 Marsh. 475.



Where the plaintiff refuses to be nonsuited, contrary to the opinion of the judge, a new trial (if granted) shall be without costs: if he submits to an erroneous nonsuit, it shall be set aside without costs. *Porlein v. Pauley*, 1 W. Black. 670.

Where a mistaken verdict was given in consequence of the omission of the judge to draw the attention of the jury to a material feature in the case, the court imposed the terms of the payment of costs, on the granting of a new trial, the judge not having been requested to enter into a fuller explanation. But the costs of a former trial, where the verdict was set aside for misdirection, and of an intermediate postponement, by making the cause a remanet, were to abide the event. *Gibbins v. Phillips*, 2 M. & R. 238; 8 B. & C. 437.

Where the rule for a new trial expresses "without costs," the costs of the former trial are in no event allowed; where nothing is said in the rule about costs, if the second verdict be the same way with the first, the costs of the first trial are allowed; where the second verdict is not the same way with the first, the party obtaining it is not allowed the costs of the first trial. *Schullbred v. Nutt*, Hall. Costs, 395; *S. C. nom. Shoolbred v. Nutt*, 2 Tidd's Prac. 923.

The defendant in an action having obtained a verdict, a new trial was granted on the following terms:—The defendant to have the costs of both trials if he succeeded on the second; if the plaintiff succeeded he was only to have the costs of the second trial. *Peoley v. Millard*, 1 Tyr. 260.

Where there were three verdicts, the first in favour of the plaintiff, the second in favour of the defendant by reason of a misdirection, and the third in favour of the defendant upon the merits, and the rule for the first new trial reserved the consideration of costs, the court allowed the defendant to take the costs of the first or second at his option, and the costs of the third. *Body v. Eadaile*, 3 Bing. 174; 10 Moore, 569; *S. C. not S. P.* 1 C. & P. 62.

## 2. Rule silent.

If a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed in the second. *Reg. Gen. K. B., C. P., & Exch., H. T. 2 W. 4*, 1 Dowl. P. C. 191; 8 Bing. 297; 1 M. & Scott, 424; 3 B. & Adol. 383; 2 C. & J. 155; 2 Tyr. 346; 4 Bligh, N. S. 600.

The rule is not retrospective. *Carlisle v. Garland*, 2 M. & Scott, 180; 9 Bing. 85.

Where a new trial has been granted, and nothing was said in the rule concerning the costs of the first, although the same party succeeded on the second trial, he shall not have the costs of the first. *Mason v. Skurray*, 2 Dougl. 438.

Where a new trial is granted after a verdict for the defendant, on the ground of a misdirection of the judge, and the rule for the new trial is silent as to costs, and the plaintiff succeeds on the second trial of the cause, he is not entitled to

the costs of the first trial. *Birkis v. Wiles*, 1 Chit. 633.

Where a plaintiff was nonsuited in consequence of not producing formal proof of a private act of parliament, which the defendant's agents had previously agreed should be dispensed with, and the plaintiff obtained a rule nisi to set aside the nonsuit and have a new trial, which was afterwards made absolute, but was silent as to costs, and the defendant obtained a verdict on the second trial:—Held, that the costs of the application for a new trial, not having been inserted in the rule, were to be considered and taxed as costs in the cause. *Truslove v. Burton*, 10 Moore, 96; 9 Moore, 64.

Where the verdict was for the defendant, and a new trial awarded upon a question of law, without anything said as to costs, and instead of proceeding to a second trial the parties agreed to state the facts specially, as if in a case reserved at the trial, on which the costs were afterwards delivered: they were entitled to the costs of the first trial. *Robertson v. Liddell*, 10 East, 416; 1 Chit. 19.

A defendant having applied for and obtained a rule for a new trial after a verdict against him, instead of again going down to trial, gave a cognovit:—Held, that he was liable for the costs of the former trial. *Jackson v. Hallam*, 2 R. & A. 317; 1 Chit. 19.

The plaintiffs, having been nonsuited, obtained a rule for a new trial, which was silent as to costs. The defendant, without going again to trial, gave the plaintiffs a cognovit to confirm judgment, "and that the plaintiffs had sustained damages to the amount of one shilling, besides the costs to be taxed by the prothonotary, if he should think the plaintiffs entitled." The prothonotary having refused to tax the costs of the nonsuit, the court would not interfere, saying that, as the parties by the terms of the cognovit had agreed to constitute the prothonotary their arbitrator, they must be bound by his decision. *Elvin v. Drummond*, 1 M. & P. 68; 4 Bing. 41.

A rule for a new trial was obtained in an action where the jury had found a verdict for the defendant, but which rule was silent as to costs. The plaintiff afterwards obtained a rule to discontinue, and upon taxation the master allowed the defendant the costs of the trial:—Held, that the defendant was entitled to them. *Streeting v. Halse*, 9 B. & C. 369, n.; 4 M. & R. 545.

Where a rule nisi is obtained, and is silent as to costs, and on showing cause the opposite party applies to the court for them, which are refused, and the rule is discharged without any mention of costs, and the opposite party afterwards obtains a verdict, the costs of the opposition to costs in the cause, to which the plaintiff is entitled. *Johnson v. Closs*, 1 Chit. 559.

One of the jury having absconded before the verdict was delivered, and the plaintiff refusing to take a verdict from the eleven, a new trial was had and the plaintiff obtained a verdict:—Held, that he was entitled to the costs of both trials. *Harrison v. Bennett*, 1 Dowl. P. C. 687; 1 C. & M. 203; 2 Tyr. 740.

By the practice of the court of Exchequer, where a new trial is granted, the party who succeeds upon both trials was entitled to the costs of both trials, if the rule for the new trial was silent upon the subject of costs. *Loader q. t. v. Thomas*, 1 C. & J. 55.

In an action upon a statute which gives double costs, if a new trial was granted, nothing being said upon the subject of costs, the party who succeeded upon both trials was entitled to double costs of both trials. *Id.*

### 3. Costs to abide the Event.

Where the court orders a new trial, the costs to abide the event, such event means the ultimate event of the cause: therefore, if the verdict on the second trial be set aside, and, on a third the ultimate event is the same as at the first trial, the party succeeding in the last will be entitled to the costs of the first trial. *Meule v. Goddard*, 5 B. & A. 766.

When the costs of the former trial are to abide the event of a new trial, if the same party succeeds on the new trial, he has costs of both trials; if his opponent, he has only the costs of the new trial. *Shierlock v. Barned*, 8 Bing. 21; 1 M. & Scott, 58.

If costs are directed to abide the event, neither party has the costs of the first trial, if the event of the second is different from that of the first. *Cantam v. Fisk*, 2 Tyr. 155; 2 C. & J. 126; 1 Price's P. C. 148.

Plaintiff having obtained a verdict, the court of C. P. granted a new trial, directing that the costs of the former trial should abide the event of the new trial." On the second trial the verdict was for the defendant:—Held, that the defendant was only entitled to the costs of the second trial. *Chapman v. Partridge*, 2 N. R. 382; 2 C. not S. P. 5 Esp. 256.

So, where the defendant on the first trial obtained a verdict, and the court, in granting a new trial, directed the costs of the former trial to abide the event of the second, and on that trial the plaintiff obtained a verdict:—Held, that he was only entitled to the costs of such second trial. *Brown v. Boyn*, 5 Moore, 309.

When, upon setting aside a nonsuit, the costs are directed to abide the event, though the plaintiff succeeded on the second trial, he is not entitled to the costs of the first; neither is the defendant entitled to the costs of the first trial in such case; and when the same party succeeds on both trials, he is entitled to the costs of both. *Austen v. Fidds*, 8 T. R. 619.

When, upon setting aside a verdict for plaintiff, the costs are directed to abide the event, and when the plaintiff discontinues the action, the defendant is not entitled to the costs of the trial. *Sworth v. Samuel*, 1 B. & A. 566; 1 Chit. 633, n.

Where the plaintiffs in an action on a policy of insurance recovered for an average loss, and a new trial was granted, on the terms of the costs the first being to abide the event, and at the second trial the plaintiffs again recovered for an average loss only:—Held, that they were only

entitled to the costs of the second trial, and the defendant to the costs of neither. *Hudson v. Marjoribanks*, 8 Moore, 440; 1 Bing. 393.

### 4. Cause referred.

If a cause standing for trial be referred, and the arbitrator's award in favour of the plaintiff should be afterwards set aside, and the cause be in consequence subsequently tried, the plaintiff, if he should afterwards succeed on that occasion, will be allowed the costs of the former trial. *Pool v. Selwood*, 1 Price, 310.

Where the plaintiff obtained a verdict subject to an award, and the arbitrator made a material mistake in his award, and the defendant refused to refer matters back to him, the court of C. P. set aside the verdict, and discharged the rule for the reference; and the plaintiff, having taken the cause down to a second trial, and again obtained a verdict:—Held, that he was entitled to the costs of both trials. *Payne v. Bailey*, 7 Moore, 147; 3 B. & B. 304.

Where a rule for a new trial is silent as to the costs of the first, and the cause is afterwards referred at Nisi Prius, and determined in favour of the plaintiff, he is not entitled to the costs of the first trial. *Summers v. Formby*, 1 B. & C. 100.

After plaintiff had obtained a rule to set aside a nonsuit, defendant gave a cognovit for 1s. damages, and such costs as the prothonotary should think fit. The prothonotary disallowed plaintiff the costs of the trial, and the court would not interfere. *Elvin v. Drummond*, 4 Bing. 415; 1 M. & P. 88.

### 5. Other matters.

Where a cause is twice tried, and the verdict is found on each trial for the same party, he is entitled to the costs of both; but where the verdicts are found for different parties, the costs of the first trial are not allowed. *Trelawney v. Thomas*, 1 H. Black. 641.

Where a venire de novo is awarded, the party succeeding is only entitled to the costs of the second trial. *Lickbarrow v. Mason*, 6 T. R. 131.

If a venire de novo issues, the court of Exchequer has no power over the costs of the application for that writ. *Edwards v. Brown*, 1 Dowl. P. C. 282; 1 C. & J. 354; 1 Tyr. 281.

Although a defendant succeeded upon the first trial by a forgery, the court of C. P. cannot give the plaintiff, succeeding on the second trial, the costs of both. *Goodtill v. Walter*, 4 Taunt. 671.

Where a defendant had been prevented from going into a particular line of defence upon the trial, and having obtained a rule for a new trial, instead of proceeding gave a cognovit:—Held, that the plaintiff was entitled to the costs of the trial, as the cognovit admitted a want of merits. *Jackson v. Hallam*, 2 B. & A. 317; 1 Chit. 19. And see *Elvin v. Drummond*, 4 Bing. 415; 1 M. & P. 88.

A rule nisi for a new trial was obtained after a verdict for defendant, and the cause was then referred to arbitration, and the costs left in the dis-

cretion of the arbitrator. He awarded in favour of plaintiff, and directed defendant to pay the costs of the cause:—Held, that it meant such costs as the defendant would have been liable to pay, if, on a new trial, there had been a verdict for plaintiff. *Rigby v. Okell*, 7 B. & C. 57.

Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the master, in taxing costs, may allow fees on the second trial, with reference to those given on the first. *Wilkinson v. Malin*, 2 Dowl. P. C. 65.

If the plaintiff recover a verdict for a loss on a policy, and endeavour, on a rule nisi being obtained for a nonsuit, to support his verdict to that extent, although he be held entitled to a return of premium, he is not entitled to the costs of the rule, nor to any costs except of the count for money had and received, and of such parts of the brief and evidence as apply thereto. *Spitta v. Woodman*, 3 Taunt. 406.

Where the court granted a rule for a new trial on the application of the defendant, in a case where the plaintiff succeeded, and the latter applied to amend his declaration, but discontinued the action, not choosing to pay the costs of the former trial, as the condition of the amendment:—Held, that the defendant was not entitled to the costs of that trial, notwithstanding the plaintiff's discontinuance. *Gray v. Cox*, 8 D. & R. 220; 5 B. & C. 458. *And see S. C.* 6 D. & R. 200; 4 B. & C. 108; 1 C. & P. 148.

After a verdict for the defendant, and a rule absolute for a new trial, the plaintiff discontinues the action; the defendant is entitled to the costs of the trial. *Sweeting v. Halee*, 4 M. & R. 545; 9 B. & C. 369.

#### XVIII. ARREST OF JUDGMENT.

Upon arrest of judgment, each party pays his own costs. *Cameron v. Reynolds*, Cowp. 407.

If an avowant in replevin, after trial and verdict for the plaintiff, obtain judgment non obstantes verdicto, in consequence of the plaintiff's plea in bar being bad, he is not entitled to any costs upon the pleadings subsequent to the plea in bar, because he should have demurred to them. *De Costa v. Clarke*, 2 B. & P. 376.

Where the plaintiff obtained a verdict, and the court of Exchequer arrested the judgment, which judgment was reversed by the court of Exchequer Chamber:—Held, that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the court of Exchequer. *Adams v. Meredith*, 3 Y. & J. 419.

#### XIX. DOUBLE AND TREBLE COSTS.

##### 1. When allowed.

In a declaration of trespass, containing six counts, two only were founded on the stat. 8 Hen.

6, c. 9, s. 6. Judgment having gone by default, the plaintiff obtained general damages on a writ of inquiry, and 6d. costs. Treble costs having been taxed for the plaintiff on all the counts in the declaration:—Held, that he was not entitled thereto, but could only enter his judgment on the counts at common law, and with single costs. *Kemp v. Richardson*, 2 Moore, 238.

In an action on the 29 Eliz. c. 4, plaintiff is entitled to treble costs as well as treble damages. *Deacon v. Morris*, 2 B. & A. 393; 1 Chit. 137; *S. P. Tyte v. Glode*, 7 T. R. 267. *And see Wilkinson v. Ullott*, Cowp. 368.

By the 43 Eliz. c. 2, s. 19, a defendant in replevin is entitled to recover treble damages, with his costs also:—Held, that parish officers suing on a distress for poor-rates under that statute are only entitled to single costs. *Butler v. Furber*, 4 Moore, 296; 1 B. & R. 517.

The stats. 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 3, giving double costs to parish officers and, &c., extend not to actions against them for nonfeasance, such as the non-payment of money laid out for the support of one of their paupers by another parish into which he went, and for which an action of assumpsit was brought against them. *Atkins v. Bamwell*, 3 East, 92.

In all cases where justices of the peace, constables, &c., do anything in execution of their office, they may, under 7 Jac. 1, plead the general issue; and in case of a verdict in their favour, or judgment by nonsuit, they may to their double costs. *Anon. Lofft*, 373.

Parish officers, or persons acting on their behalf, are not entitled, under stat. 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, to double costs upon judgment as in case of a nonsuit, in an action brought against them for the price of goods sold and delivered to them for the use of the poor. *Blanchard v. Bramble*, 3 M. & S. 131.

To entitle a constable, &c., to double costs under 7 Jac. 1, c. 5, after a verdict for him, it must be certified by the judge who tried the case that he was acting in the execution of his office. *Grindley v. Holloway*, 1 Dougl. 307.

Which certificate, when granted, must certify that the defendant was such an officer, and that the action was brought against him for something done by him in the execution of that office. *Burper v. Carr*, 7 T. R. 446.

And the certificate may be granted either at the trial or afterwards. *Id.*

A certificate that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the stat. 7 Jac. 1, c. 5, need not be granted immediately after the trial of the cause. *Norman v. Denger*, 3 Y. & J. 203.

Where the plaintiff is nonsuited, the judge before whom the cause was tried may, after an interval of four years, upon an affidavit that the defendant was within the provisions of the stat. 7 Jac. 1, c. 5, grant a certificate to entitle him to double costs. *Id.*

The stat. 11 Geo. 2, c. 19, s. 22, gives double costs against a plaintiff in replevin only in three cases, viz. where he is nonsuit, discontinues his action, or has judgment given against him.

Therefore, where in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favour of defendant, it was held that he was not entitled to double costs under the statute. *Gurney v. Buller*, 1 B. & A. 670.

Defendants in replevin, who avowed generally under 11 Geo. 2, c. 19, for rent due on a demise, under which the plaintiff held as their tenant, were held entitled to double costs upon a judgment in their favour, notwithstanding they pleaded many other avowries, in various rights, from which circumstance it was suggested that they did not distrain as landlords, but with a view merely to try a title. *Johnson v. Lawson*, 2 Bing. 341; 9 Moore, 642.

A seizure for a heriot custom is not within the stat. 11 Geo. 2, c. 19, in respect to double costs. *Lloyd v. Winton*, 2 Wils. 28.

Where the master having taxed single costs, a motion was made that he might review his taxation and allow treble costs, the stat. 11 Geo. 2, c. 19, s. 12, having given treble the rent as damages, the court said that the statute had not given treble damages, but only directed how the single damages should be ascertained, and refused the rule. *Crocker v. Fothergill*, 2 B. & A. 662, n.

Where a defendant in replevin avows as landlord for rent in arrear, and obtains a verdict, he is entitled to double costs, although the action be really and bona fide brought to try the title to the land. *Stanniland v. Ludlam*, 7 D. & R. 484; 4 B. & C. 869.

By a canal act, the company were authorized to take certain lands for the purposes of the act, on making certain payments either by annual rents or sums in gross, and the persons from whom the land was to be taken were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums. An avowant, stating a distress under this act of parliament, is not entitled, on obtaining a verdict, to double costs under the stat. 11 Geo. 2, c. 19, s. 22. *Leominster Canal Company v. Norris*, 7 T. 2. 500; *S. P. Same v. Cowell*, 1 B. & P. 213.

Neither a certificate from the judge, nor a suggestion on the roll, is necessary to entitle a defendant to double costs, under 11 Geo. 2, c. 19, s. 22. *Finlay v. Seaton*, 1 Taunt. 210.

A surveyor of highways is not entitled to treble costs under the 13 Geo. 3, c. 78, s. 81, upon a verdict found for him. *Ward v. Bateman*, 1 C. & M. 185; 1 Dowl. P. C. 620; 3 Tyr. 221.

Where, in an action against officers of the exchequer for seizing goods, they do not tender amends before action brought, but pay money into court and afterwards gain a verdict, they are entitled only to single costs under stat. 23 Geo. 3, c. 70, s. 1. *Collins v. Morgan*, 1 H. Black. 244.

Under the 25 Geo. 3, c. 50, treble costs are

not given to persons sued for penalties under the act, as they are to persons prosecuted for using guns. *Smith v. Wallis*, 1 T. R. 252.

Commissioners of a court of requests, who have power to commit for contempt, are not within the 42 Geo. 3, c. 85, s. 6, which extends the 21 Jac. 1, (giving double costs), to all persons empowered to commit to safe custody; and therefore, where trespass for false imprisonment is brought against them for an act done in the execution of their office, and the plaintiff is nonsuited, they are not entitled to double costs. *Mackey v. Goodden*, 1 Dowl. P. C. 463.

Upon avowry for rates made on plaintiffs' lands, under 56 Geo. 3, c. 47, (local and personal), where plaintiffs were nonsuited, it was held that defendant was not entitled to a writ of inquiry of damages, the act only giving treble costs. *Gotobed v. Wool*, 6 M. & S. 128.

Where a verdict was found for some of several defendants, under the Birmingham Paving Act, (52 Geo. 3, c. 113), but against others who had been joined with them:—Held, that the former were nevertheless entitled to treble costs. *Hall v. Smith*, 2 Bing. 267; 9 Moore, 226.

## 2. How computed.

How double and treble costs are computed, see 1 Chit. 137 a, 139, 140, 141 a.

The true mode of estimating the amount of double costs is, first, to allow the defendant the single costs, including the expenses of witnesses, counsels' fees, &c., and then to allow him one-half of the amount of the single costs, without making any deduction on account of counsels' or court fees, &c. *Stanniland v. Ludlam*, 7 D. & R. 484; 4 B. & C. 869.

A rule for a suggestion to entitle a defendant to double or treble costs, &c., after nonsuit or verdict, is a rule to show cause in the first instance. *Prichard v. Peacock*, 1 Tidd's Prac. 496.

## XX. SECURITY FOR COSTS.

### 1. Infancy.

There are only three instances in which the court will interfere on behalf of a defendant to oblige the plaintiff to give security for costs: first, when an infant sues, the court will oblige the prochein ami, or guardian, or attorney, to give security for the costs; secondly, when the plaintiff resides abroad; and, thirdly, where there has been a former ejectment. *Doe d. Selby v. Alston*, 1 T. R. 493.

This applies to other actions, as well as ejectment. *Weston v. Withers*; 2 T. R. 511.

An infant lessor in ejectment must get some person to enter into security for costs. *Anon.* 1 Wils. 130.

The court of C. P. will not oblige an infant plaintiff to give security for costs. *Anon.* 1 Marsh. 4.

Quere, whether the court will grant a rule for an efficient procchein ami to be appointed, and security to be given for costs? at all events, the application is too late after moving to put off the trial. *Anon.* 2 Chit. 359.

But an infant who sues by his procchein ami need not give security for costs, even though the latter is sworn to be insolvent. *Yerworth v. Mitchell*, 2 D. & R. 423.

Where an infant sues by guardian who is sworn to be in insolvent circumstances, the court will require him to give security for costs. *Mann v. Berthen*, 4 M. & P. 215.

The court refused to compel an infant plaintiff to give security for costs, upon its being shown that the guardian had undertaken for them. *Anon.* Cowp. 128.

So, they will refuse, if the plaintiff be a real person. *Knotting v. Miles*, Loft, 594.

Where the lessor of the plaintiff is an infant resident abroad, or dead, the court will stay the proceedings until a real and substantial plaintiff be named, or some responsible person undertake for the payment of costs. *Smith d. Jordan v. Roe*, 1 Tidd's Prac. 578.

## 2. Residence abroad.

*When required at Law.*—If the plaintiff reside permanently abroad, the court will stay proceedings till he give security for the costs. *Pray v. Edie*, 1 T. R. 267. *Elan v. Rees*, 3 Dougl. 382. *But see Lamie v. Snell*, 1 Wils. 266, and *Boswell v. Irish*, 4 Burr. 2105.

So, in *C. P.* *Ganesford v. Levy*, 2 H. Black. 118. *But see Parquot v. Éling*, 1 H. Black. 106.

So, in the Exchequer. *Demanroffe v. Jackson*, 13 Price, 603.

It is not contrary to practice in the Exchequer to compel a plaintiff residing out of the jurisdiction to give security for costs. On the contrary the court would make such an order at discretion as a mere matter of justice. *Drury v. Johnson*, 13 Price, 489. *But see Beckman v. Le Grange*, 2 Anst. 359, and *Adams v. Coulthurst*, 2 Anst. 582.

So, if the plaintiff reside in Ireland. *Fitzgerald v. Whitmore*, 1 T. R. 362.

Or Scotland. *McLean v. Austin*, Sheriff v. *Ferguson*, Still v. *McIvor*, 1 Tidd's Prac. 579. *But see Maxwell v. Mayer*, 2 Burr. 1026; 1 W. Black. 271.

A plaintiff resident in Ireland is bound to give security for costs, although he may sometimes come over and sojourn in this country. *Mahon v. Martinez*, 4 Moore, 356.

A plaintiff was compelled to give security for costs on affidavit of his residing in Ireland, the cause not having been at issue, and the venue laid in Middlesex, and proceedings stayed in the meantime. *Maloney v. Smith*, McCl. & Y. 213.

But security for costs is not required of an English subject, though abroad. *Tullock v. Crowley*, 1 Taunt. 18.

The court refused to require security on the

ground that the plaintiff's residence was at Calcutta. *Nuncomar v. Burdett*, Cowp. 158.

Security for costs will not be required from an English officer serving in South America. *O'Langhla v. Macdonald*, 3 Moore, 77.

Nor from a foreigner during the time he is resident in this country. *Anon.* 3 Moore, 78.

Security is not required from a person whilst in this country, although usually residing abroad. *Anon.* 8 Taunt. 737.

And although it be sworn he is about to leave the country. *Ciragne v. Hassan*, 6 Taunt. 20; 1 Marsh. 421.

If the plaintiff is a native of England, and departs for France for a mere temporary absence, the court will not compel him to give security for costs. *Anon.* 2 Chit. 152.

If a plaintiff be resident abroad, the court of C. P. will require him to give security for costs, although he sue in the capacity of executor. *Chalier v. Finnis*, 3 Moore, 602; 1 B. & R. 27.

So, a defendant in replevin residing abroad must give security for costs. *Selby v. Crutcheley*, 4 Moore, 280; 1 B. & R. 505.

Where a plaintiff (a native of this country) quits it for a mere temporary residence abroad, the court will not require him to give security for costs; and an application for such a purpose cannot be supported on a mere affidavit of belief that it was the intention of the plaintiff to reside permanently abroad. *Cole v. Beale*, 7 Moore, 61.

A plaintiff, a Scotchman, not actually domiciled in this country, but only occasionally residing here, is bound to give security for costs. *Naylor v. Joseph*, 10 Moore, 522.

For such a plaintiff is within the meaning of the general rule applicable to persons who are not amenable to the courts here suing in this country. *Id.*

It seems that security for costs cannot be required from a foreigner, a master of a vessel trading to this country, but having no fixed residence here. *Kasten v. Plaw*, 1 M. & P. 30; & P. *McDon v. Ogle*, 2 Taunt. 253.

A public company carrying on all their business in Ireland were compelled to give security for costs, although they had 30000l. in a bank in London, and most of the members resided in England. *Limerick and Waterford Railway Company v. Fraser*, 4 Bing. 294; 1 M. & P. 23.

A party residing abroad may, upon being admitted to defend an ejectment as landlord, be required to give security for costs. *Dee v. Jackson*, 4 M. & R. 570.

If one of two plaintiffs be resident abroad, and the other in this country, the court will not compel the absent plaintiff to give security for costs. *Anon.* 1 Dowl. P. C. 300; 2 C. & J. 68; & P. *Minchin v. Minchin*, 1 Price's P. C. 159; & C. nom. *Wilson v. Minchin*, 1 Dowl. P. C. 293; & C. & J. 87; 2 Tyr. 166; *Anon.* 7 Taunt. 307.

If one of the plaintiffs reside within reach of the process of the court, security will not be required for the costs, though the other plaintiff be

a foreigner residing abroad, and although the first mentioned plaintiff be a bankrupt in execution for debt. *McCormell v. Johnston*, 1 East, 431.

A plaintiff will not be required to give security for costs, or disclose his place of residence, where there is no doubt whether he sues in his own right, and it does not appear that he is out of the kingdom. *Lloyd v. Davis*, 1 Tyr. 533; 1 Prior's P. C. 11.

The court will compel a plaintiff, executrix, who is out of the jurisdiction, to give security for costs: but such security will be confined to those costs only for which she would be liable. *Chamberlain v. Chamberlain*, 1 Dowl. P. C. 366.

The court will not compel a foreign ambassador to give security for costs. *De Montellano (Duke) v. Christina*, 5 M. & S. 503.

Nor a prisoner of war who sues for wages earned on board an English ship. *Morris v. Hall*, 2 B. & P. 236.

Security for costs is not required from a foreigner during his absence from this country, on board his own ship, if he reside here part of the year. *Durrell v. Mattheson*, 3 Moore, 33; 8 Taunt. 711.

A foreign seaman having brought an action for his wages against a foreigner, the court of C. P. refused to compel him to give security for costs, on account of his being on a voyage on board an English ship. *Henshen v. Garves*, 2 H. Black. 883.

So, they refused to stay proceedings till security is given for the costs in an action by a foreign seaman serving on board an English ship. *Jacobs v. Stevenson*, 1 B. & P. 96.

If an action be brought without the knowledge of the plaintiff, who is out of the realm, the court will require security for the costs to be given on the part of the plaintiff. *Ball v. Adrian*, 1 Taunt. 64.

Where the plaintiff carried on business abroad, and had no permanent residence in England, but was here at the time of bringing an action to try the validity of a commission of bankruptcy, with the permission of the Vice-Chancellor, and it was sworn that he had no intention of leaving the country, the court required him to give security for the costs of the action; but it seems that such security would not have been required if the action had been brought by the order of the Vice-Chancellor. *Oliver v. Johnson*, 1 D. & R. 560; 1 C. nom. *Oliver v. Johnson*, 5 B. & A. 908.

If a plaintiff, after leaving this country, commences an action, he will be compelled to find security for costs. *Wells v. Barton*, 2 Dowl. P. C. 160.

*When required in Equity.*—The simple fact that the plaintiff is gone abroad is not a sufficient ground to compel him to give security for costs. *Joby v. Hitchcock*, 5 Ves. jun. 699.

No order that a plaintiff residing abroad shall give security for costs will be made when there are co-plaintiffs residing in England. *Walker v. Webster*, 6 Ves. jun. 612.

A plaintiff is not compellable to give security for costs, unless he state himself, or it be sworn that he is resident abroad, or going to reside abroad. *Green v. Charnock*, 2 Cox, 284; 3 Bro. C. C. 371; 1 Ves. jun. 396.

It is not sufficient that the plaintiff appears by the bill to be out of the jurisdiction; he must appear to be resident abroad. *Id.*

On a decree, liberty was given to the plaintiff to bring an action in K. B., and an action was brought. The defendant applied to a judge of K. B. for the usual order for security for costs, the plaintiff being resident at Paris, and so stated in his bill. The judge referred the application to the court of Chancery, and the court ordered such security to be given. *Despres v. Mitchell*, 5 Madd. 87.

Cestuis que trust, bringing actions in the names of the trustees, were ordered to give security for costs. *Annesley v. Simeon*, 4 Madd. 390.

Where a plaintiff is bound to give security for costs, each defendant employing a separate clerk in court is entitled to a separate bond for 40l.; but the plaintiff is only bound to pay one 40l. *Lowndes v. Robertson*, 4 Madd. 465.

A plaintiff resident abroad, who had been ordered to give security for costs, but had not complied, was ordered to give the security, and on default his bill to be dismissed. *Camac v. Grant*, 1 Sim. 348.

A plaintiff residing out of the jurisdiction was allowed to pay 120l. into court, in lieu of giving security for costs in the usual manner. *Cliffe v. Wilkinson*, 4 Sim. 123.

The mere circumstance of the plaintiff being imprisoned does not entitle the defendant to call for a security for costs. *Baddeley v. Harding*, 6 Madd. 214.

### 3. Bankruptcy.

Security for costs will not be required of a bankrupt plaintiff residing abroad, especially if such residence is only of a temporary nature. *Roper v. Phillips*, 3 M. & R. 84.

A commission of bankruptcy having issued against the plaintiff who had gone with his family to New York, upon the petition of the defendant, who was the only creditor, and had chosen himself sole assignee, and the plaintiff having brought an action against the defendant to try the commission, the court refused to stay the proceedings till he should give security for costs. *McCulloch v. Robinson*, 2 N. R. 352.

A plaintiff having become bankrupt before plea pleaded, the defendant obtained an order for giving security for costs, and afterwards pleaded bankruptcy:—Held, that such plea could not be set aside, but that the order for giving security for costs should be rescinded, the plaintiff paying the costs of that application, and the defendant's rule being discharged. *Minchin v. Hart*, 1 Chit. 215. And see *Kinnear v. Tarrant*, 15 East, 622.

An uncertificated bankrupt suing for the be-

neft of his assignees may be compelled to give security for costs. *Sed quare*, 1 Chit. 267, n.

An uncertificated bankrupt, bringing an action of trover for goods, is required to give security for the costs in case he should fail in his suit. *Webb v. Ward*, 7 T. R. 296.

The court will not compel security for costs on the ground that the plaintiff is a bankrupt, or in Newgate. *Anon.* 2 Taunt. 61; 1 Rose, 111.

An uncertificated bankrupt suing for his own benefit, as for the produce of his earnings since the bankruptcy, cannot be compelled to give security for costs. *Cohen v. Bell*, 1 Tidd's Prac. 580.

Otherwise, where the action is brought or proceeded in by a bankrupt, whether certificated or not so, for the benefit of his assignees. *Sanders v. Purse*, and *Robertson v. Arnold*, 1 Tidd's Prac. 581.

Where a bankrupt brought trespass against the messengers to the commission, in which action he was nonsuited, without the validity of the commission being fully tried, and afterwards brought trover against the assignees to try the same question:—Held, that he should not be put to give security for costs. Semble aliter, if the question had been once fully tried. *Kennett v. Duff*, 2 Smith, 423.

Where a defendant obtains security for costs, on the ground that the plaintiff is become bankrupt, and that the action is continued by his assignees, he must undertake not to plead the bankruptcy. *Manley v. Mayne*, 3 M. & R. 381.

Where a plaintiff becomes bankrupt in the middle of a cause, the assignees, if they proceed with the action, must give security for all the costs. The defendant may apply for this security at any time before a fresh step in the cause is taken. *Mason v. Polhill*, 2 Dowl. P. C. 61.

The court of Bankruptcy will not, under any circumstances, before hearing, order a bankrupt to give security for costs. *Ex parte Munk*, 2 Deac. & Chit. 120.

A motion for it was refused with costs, to be set off against those due from the bankrupt. *Id.*

#### 4. Insolvency.

The court of K. B. required security for costs from a plaintiff who had taken the benefit of an insolvent act after issue joined, but before notice of trial given, and they ordered the proceedings to be stayed until the assignee or some one of the plaintiff's creditors should give such security. *Heaford v. McKnight*, 4 D. & R. 81; 2 B. & C. 579.

But the court of C. P. refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name for the benefit of J. S., who was alone beneficially interested in the result. *Morgan v. Evans*, 7 Moore, 344.

The court of C. P. will neither set aside the

proceedings, nor require an insolvent to give security for costs in an action where the assignees have refused to sue. *Turner v. Snow*, 1 Marsh. 477; S. C. nom. *Snow v. Turner*, 6 Taunt. 123.

An insolvent brought an action to recover property acquired by him after his assignment; no order had been made by the Insolvent Court to enable the assignees to issue execution against the property, and the court refused to require security for costs. *Clapworthy v. Collier*, 2 C. & J. 631.

#### 5. Other Circumstances.

If a plaintiff in error resides out of the jurisdiction of the court, they may require him to give security for costs; and unless he does so, the defendant in error may proceed on his judgment. *Lewis v. Owens*, 5 B. & A. 265.

The court of C. P. will not compel security for costs in error on the ground of the plaintiff in error being a lunatic. *Steel v. Allen*, 3 B. & F. 437.

A security for costs may not be required from a wife, who brings an action in her husband's name, he being abroad, on a promise expressly made to her. *Mingotti v. Drummond*, 11 L. R. 469.

Quere, if an informer in a qui tam action shall be obliged to give security for costs? *Golding v. t. v. Barlow*, Cowp. 24.

The court of C. P. will not require the plaintiff, in a qui tam action, to give security for costs, though it appeared by affidavit that he is insolvent. *Field v. Carron*, 2 H. Black. 27.

In such a case, the proper mode for the defendant to pursue is, to move the court that the issue money should be paid into the hands of the prothonotary. *Id.*

Where the plaintiff, after issue joined, has been convicted of felony, and received sentence of transportation, the court will compel him, or his attorney, to give security for costs retrospective and prospective. *Harvey v. Jacob*, 1 B. & A. 159.

Where, in trespass against parish officers for distraining for poor-rates, it appeared that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause, the court stayed the proceedings until he gave security for costs. *Tenant v. Brown*, and *Jones v. Brown*, 5 B. & C. 208.

Where the whole interest of a party in an award is assigned to another, the court will not compel the latter to give security for costs in an action brought by the former upon the award. *Day v. Smith*, 1 Dowl. P. C. 450.

But where property has been assigned by a debtor for the benefit of his creditors, the trustees have been compelled to give security. *Id.*

Where an order was made pendente lite, admitting the plaintiff to prosecute his action in forma pauperis, and an application by the defendant for security for, and taxation of, the

costs previously incurred, was not made for nearly two years afterwards, the court refused the application, and allowed a retrospective operation to the order. *Jones v. Peers, McIcl. & Y.* 282.

#### 6. Time and Manner of Application.

*When Application to be made.*—An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined. *Reg. Gen. K. B., C. P., and Exchequer, H. T.* 2 W. 4, 1 Dowl. P. C. 196; 8 Bing. 303; 1 M. & Scott, 429; 3 B. & Adol. 389; 2 C. & J. 196; 2 Tyr. 350; 4 Bligh, N. S. 604.

Before the rule the application to the court of Exchequer must have been made before issue joined, although the issue was joined in the preceding vacation. *Anon.* 5 Price, 610.

But, in K. B., a rule, calling on the plaintiff to give security for costs, might be made after issue joined. *Barker v. Hargreaves*, 6 T. R. 597.

But not after verdict. *Anon.* 1 Marsh. 4.

A plaintiff residing abroad, with the knowledge of the defendant, at the time of action brought, would not be required to give security for costs, after issue joined, unless some special reason was assigned to induce the court to impose such terms on the plaintiff. *Du Belloix v. Waterpark (Lord)*, 1 D. & R. 348, n.

In C. P. the motion requiring a plaintiff to give security for costs, on the ground of his being resident abroad, must have been made before plea pleaded. *Kasten v. Plaw*, 1 M. & P. 30. But see *Anon.* 2 Chit. 157.

Security for costs may be applied for after an order for time to plead, but before plea. *Wilson v. Minchin*, 1 Dowl. P. C. 299; 2 C. & J. 87; 2 Tyr. 166; S. C. nom. *Minchin v. Minchin*, 1 Price's P. C. 159.

Where a defendant pleads after it has come to his knowledge that the plaintiff is abroad, the court will not oblige the latter to give security for costs. *Brown v. Wright*, 1 Dowl. P. C. 95.

After a defendant has undertaken to accept short notice of trial, he cannot require security for costs from the plaintiff, a foreigner, residing abroad. *De Montellano (Duke) v. Garcias*, 7 Moore, 361; 1 Bing. 67; S. P. *Michel v. Pariski*, H. Black. 593; *Muller v. Gernon*, and *Steel v. Lucy*, 3 Taunt. 272, 273.

An application to make the plaintiff, who resided abroad, give security for the costs, refused, after notice of trial given; as the defendant might have applied earlier, after knowledge of the fact of the plaintiff's residence, and before so much of the costs incurred. *Walters v. Frythall*, 5 East, 38.

An application for security for costs, on the ground of the plaintiff's residing abroad, must be made promptly after the defendant knows that so. Where, therefore, after an action had been brought in November, 1820, the plaintiff went abroad in March, 1821.—Held, that the defendant applied too late in Easter Term, 1822, for se-

curety for costs, issue having been joined, and no affidavit being made when it came to the defendant's knowledge that the plaintiff had gone abroad; the affidavit in support of such motion, if made after plea, must expressly state that the defendant was not acquainted with the plaintiff's residing abroad when he pleaded. *Duncan v. Stent*, 1 D. & R. 348; 5 B. & A. 702.

In quo warranto informations, the court will not force an indigent relator to give security for costs, when it does not appear that the fact of indigence had not come to the defendant's knowledge before issue joined. *Rez v. Day, Rez v. Patteson*, 1 Dowl. P. C. 32.

*Previous Application.*—Application must in all cases be made to the plaintiff or his attorney before a motion for security for costs will be entertained. *Adams v. Brown*, 2 M. & Scott, 154; 9 Bing. 81; 1 Dowl. P. C. 273.

The court will not grant a rule that the plaintiff may give security for costs, unless application has been made to him to give security. *Bass v. Clive*, 3 M. & S. 283. And see 4 M. & S. 13; 4 Camp. 78.

But in one case such a rule was granted although it did not appear that application had been made to him to give such security. *Hancock v. Smith*, 2 Chit. 150.

The court will compel a plaintiff resident out of the jurisdiction to give security for costs, although no previous application has been made to the plaintiff's attorney, or notice of the motion given. But without such application or notice the rule nisi will not stay proceedings. *Jones v. Jones*, 1 Dowl. P. C. 313; 2 C. & J. 207; 2 Tyr. 216; S. P. *Baile v. Bernales*, 1 B. & A. 331; *Anon.* 2 Chit. 150.

Seemingly, a defendant is not entitled to a rule to show cause why the plaintiff should not give security for costs until he has applied to the plaintiff's attorney, and he has refused, or at least he is not entitled to make it absolute, if the plaintiff's attorney, having offered to give such security as the master should require, and to enter into a bond for the purpose, the defendant refuses to accept of this accommodation in order merely to gain time, or defeat the purposes of justice. *Cheap v. Potham*, 2 Smith, 661.

*Other Things.*—The court will not stay the proceedings, till the plaintiff, a foreigner, give security for the costs, unless the defendant have put in bail. *De la Preuve v. Duc de Biron*, 4 T. R. 697.

If a foreigner sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give security for the costs, without putting in bail for the other defendant. *Carr v. Shaw*, 6 T. R. 496.

On moving for a rule nisi to compel the plaintiff to give security for costs, the defendant must state in what stage the proceedings are: the court of C. P. will not grant the rule nisi in a cause in which interlocutory judgment has been



signed, until that judgment has been set aside. *Luxaletti v. Powell*, 1 Marsh. 376.

A defendant makes a motion at his peril, if it should be too late; therefore he need not state how far the proceedings have gone, and it is for the plaintiff to show that the motion is not in time. *Jones v. Jones*, 2 Tyr. 216; 2 C. & J. 207; 1 Dowl. P. C. 313.

Where a defendant moves that the plaintiffs, residing abroad, shall give security for costs, the court will not make the rule mutual on the ground that the defendant is also resident abroad. *Baxter v. Morgan*, 2 Marsh. 80; 6 Taunt. 379.

On a motion to compel the plaintiff to give security for costs, the court of C. P. will not enter into the merits of the case, nor grant the rule on account of the hardship of the case upon the defendant. *Ciragne v. Hassen*, 1 Marsh. 421; 6 Taunt. 20.

## XXI. TAXATION OF COSTS.

### 1. Practice.

*Statutes.*—By 1 Will. 4, c. 7, s. 6, no officer of the courts shall, for the purpose of taxing costs on any judgment to be signed by virtue of the act, be compelled to attend at any time between the last day of August and the 21st day of October in any year.

By 3 & 4 Will. 4, c. 42, s. 36, the judges, or eight of them, are empowered by rule or order to make regulations for the taxation of costs by any of the officers of the courts indiscriminately.

By 3 & 4 Will. 4, c. 47, s. 8, power is given to the court of Review in bankruptcy to order costs to be taxed by the registrars or deputy registrars of the court of Bankruptcy.

Taxation of costs is not necessary upon a cognovit. *Clothier v. Ess*, 3 M. & Scott, 216.

*Appointment.*—One appointment only shall be deemed necessary for proceeding in the taxation of costs, or an attorney's bill. *Reg. Gen. K. B.*, C. P., and Exchequer, H. T. 2 W. 4, 1 Dowl. P. C. 196; 8 Bing. 303; 1 M. & Scott, 429; 3 B. & Adol. 389; 2 C. & J. 195; 2 Tyr. 349; 4 Bligh, N. S. 604.

Before this rule, in K. B. the attorney, on whom a notice of an appointment to tax had been served, must have attended without waiting for a second, or the master might proceed ex parte. *Reg. Gen. K. B. H. T.* 32 Geo. 3, 4 T. R. 580.

And if the defendant in an action on a foreign judgment, which ordered costs to be paid, neglected to appear to tax the costs, the plaintiff might tax the costs ex parte. *Sadler v. Robins*, 1 Camp. 253—Ellenborough.

Where three appointments were made by the master upon an order for the plaintiff to amend upon payment of costs, and the attorney for the plaintiff attended the master accordingly, but no one appeared for the defendant, the master in the Exchequer might indorse the order, allowing

the sum of 3s. 4d. for the costs of the attendance, without requiring an affidavit of the series of the appointments, or of the attendances. *Prud v. Hammond*, 2 Y. & J. 32.

The court of C. P. will not require the attendance of a third person before the prothonotary in the taxation of a bill of costs, which had been referred to him, to assist a master in Chancery to whom the reference had been previously given. *Protheroe v. Thomas*, 3 Moore, 3; 8 Taunt. 674.

*Notice of Appointment.*—If it be agreed between the respective attorneys of the parties, that a particular person shall tax the costs, it is no answer to an action for such costs, that the defendant's attorney had no notice to attend the taxation, if he did not object when he was first apprised of its having taken place in his absence. *Waters v. Murrel*, 1 C. & P. 307—Garrow.

Where a bill of exchange is referred to the master to compute principal and interest, the plaintiff's attorney is not bound to serve the defendant with notice of an appointment of taxing costs: the defendant, if he wishes to be present, must take out a rule for that purpose. *Backfield v. Kendal*, 1 Chit. 693.

If a defendant pay money into court, which the plaintiff agrees to accept, he may serve the defendant with notice of an appointment before the master to tax the costs. *Kabell v. Hudson*, 4 T. R. 10.

*Notice of Taxation.*—Before taxation of costs one day's notice shall be given to the opposite party. *Reg. Gen. T. T.* 1 W. 4, K. B. C. P., and Exchequer, 2 B. & Adol. 780; 7 Bing. 26; 4 C. & P. 604; 1 C. & J. 472; 1 Dowl. P. C. 105; 1 Tyr. 523; 5 M. & P. 817; 1 Priest P. C. 110; 4 Bligh, N. S. 583.

One day's previous notice of the time of taxing costs upon rules, orders, town postea and inquisitions, and a copy of the bill of costs and affidavit of increase (if any), shall be given and delivered by the attorney or attorneys of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same office, at the time of service of such notice; and in the case of postea and inquisitions in country causes, the notice shall be given two days, and the copy and affidavit delivered two days before the taxation. *Reg. Gen. M. T.* 1 Will. 4, Excheq. 1 Price's P. C. viii; 1 C. & J. 279; 1 Tyr. 161.

Where, by the practice of the court, no need not be taxed, it is unnecessary to give the one day's notice. *Griffiths v. Liversidge*, 3 Dowl. P. C. 143.

Where, at the instance of one of several joint defendants, the taxation of the plaintiff's costs is deferred, notice of taxation on another day is not necessary. *Perry v. Turner*, 1 Dowl. P. C. 207; 2 C. & J. 89; 2 Tyr. 126; 1 Price's P. C. 161.

Reasonable costs of serving a notice of taxation will be allowed, and if the defendant resides

in the country, and had not employed an attorney, an attorney in the country may be employed to serve him with a notice of taxation. *Thorp v. Wordy*, 2 C. & J. 488; 1 Dowl. P. C. 576; *S. C.* nom. *Thorp v. Werthy*, 2 Tyr. 489.

Seemingly, that a judgment signed without due notice of taxing costs may be set aside for irregularity; but where due notice has been given, and the taxation is postponed at the request of defendant, reasonable notice of re-appointment is sufficient. *Perry v. Turner*, 1 Price's P. C. 161; 2 C. & J. 89; 2 Tyr. 198; 1 Dowl. P. C. 300.

Irregularity in an execution in signing judgment and seizing goods, without delivering a copy of the bill of costs, or giving a day's notice before taxing it, must be complained of promptly. Where ten days intervened between the seizure of the goods, and the striking of a docket against the defendant without any step to set aside the execution, it was held that an application for that purpose after that time (the defendant's bankruptcy having intervened) was too late, and that the irregularity, if any, was waived. *Rutledge v. Giles*, 2 Tyr. 169.

## 2. Cases as to Costs allowed.

### (a) Writ and Proceedings.

In the taxation of costs, held, that the master was justified in allowing the expenses of two writs issued in one action against the defendant into two counties, where it was doubtful in which county he was to be found. *Morris v. Hunt*, 1 Chit. 544. And see — *v. Bonar*, 2 Chit. 148.

Plaintiff's attorney was not entitled to charge defendant for costs of declaration on subp. ad resp. in the Exchequer unless an appearance was entered. *Ex parte Arden*, 1 Price's P. C. 149.

If a writ be returnable in the first return of the term, and the defendant give notice that the debt and costs will be paid before the appearance day, and accordingly tender the debt and costs of the writ before that day, the plaintiff is not entitled to the costs of a declaration delivered de bene esse. *Partington v. Williams*, 2 N. R. 398.

Quære, whether he would be entitled to such costs if no notice had been given? *Id.*

The costs of a special original were allowed as between attorney and client, where the action was brought on a bond, the penalty of which was more than 50*l.*, but the sum due was only found to be 20*l.* — *v. Bonar*, 2 Chit. 148.

### (b) Attorney's Attendance.

The allowance to a non-resident attorney for attending a trial is two guineas a day, including all expenses; but where he attends more than one trial, one guinea per day for each. Where he attends as a witness, one guinea a day additional. *Ex parte Whitehead*, 1 Price's P. C. 136.

### (c) Fees to Counsel.

A plaintiff may be allowed for fees to three counsel on the taxation of costs in a cause of difficulty. *Morris v. Hunt*, 1 Chit. 544.

Where, in actions on a policy of insurance against several, the attorney had only made out a full brief in one cause, and short statement in the others, but the master allowed for the full briefs in all, the court of K. B. made a rule for him to review his taxation. *Martineau v. Barnes*, 1 Tidd's Prac. 666.

### (d) Jury.

The master may allow the sum of one guinea each to talesmen, on the trial of a cause by a special jury in London or Middlesex. *Morris v. Hunt*, 1 Chit. 544.

Where there is a certificate that a cause was proper to be tried by a special jury, it is the practice to allow only the costs actually allowed and paid to the jurors. But the court of K. B. doubted whether the proper construction of the statute was not that the party should be entitled, in such cases, to all the costs, from which, if there had been no certificate, he would have been excluded. *Cursum v. Durham*, 2 Chit. 154.

### (e) Other Cases.

Costs of entering judgment *nunc pro tunc* are costs in the cause. *Carlisle v. Garland*, 2 M. & Scott, 180; 9 Bing. 85.

The court of C. P. will allow the costs of a rule to repay defendant money deposited with the sheriff, which had been paid into court under 7 & 8 Geo. 4, c. 71, with the costs in the cause. *Symes v. Rose*, 5 Bing. 269.

Where plaintiff, on the eve of trial, accepted from defendant a cognovit for a certain sum payable at a future day, in full discharge of the action, and the master, on taxation, allowed plaintiff costs previous to the cognovit: the court refused to admit plaintiff's affidavit, stating a verbal agreement that he should have such costs in case defendant made default in payment, and that he made such default; and made the rule for the disallowance of such costs absolute. *Anon.* 7 D. & R. 375.

Where defendant had entered into an agreement with the plaintiff in writing, but not stamped, and the plaintiff's attorney engrossed a copy thereof; and, before action, tendered the same, properly stamped, to the defendant, which he refused to sign; the court directed the master to include the costs of stamping the agreement in the costs of the action. *Bowen v. Putman*, 2 Esp. 728—Kenyon.

A plaintiff is entitled to the allowance of a sum sworn to have been paid by him for the postage of foreign letters, as being solely applicable to the cause; but he is entitled to the expenses of the production and translation of such letters only as are applicable to such parts of the counts as relate to the verdict. *Lopes v. De Tastet*, 7 Moore, 120; 3 B. & B. 292.

Upon a petition to the Lord Chancellor, he made an order that the costs should be paid by the defendants. In an action for the maintenance, whereby the plaintiff incurred costs in judicial proceedings, he cannot either recover the

costs ordered to be paid in the shape of special damage, or the extra costs as between himself and his attorney. *Hathaway v. Barrow*, 1 Camp. 151—Mansfield. And see *Winstanley v. Head*, 4 Taunt. 192.

In taxing the costs upon a mortgage transaction, the mortgagee is not allowed the expense of a declaration of trust from him to a cestui que trust, who lends the money. *Martin's case*, 5 Bing. 160.

D., having given a cognovit for 357l., mortgaged certain premises as a security for the payment of that sum, and the costs of the judgment, and all other costs and charges whatsoever attending the same. The mortgagee having levied execution, her right to the goods seized was disputed in actions at the suit of certain persons who claimed to be assignees of D. under a bankruptcy. The mortgagee failed upon a first trial, but succeeded in a second, D. not proving to be a bankrupt:—Held, that the mortgagee could not claim from D. the costs of this action, as costs or charges attending the judgment confessed by D. *Doe d. Holt v. Roe*, 6 Bing. 447; 4 M. & P. 177.

The mortgagor, on the levy being made, gave the sheriff notice that the goods seized belonged to him jointly with another person, upon which the sheriff impelled a jury to determine to whom the property belonged:—Held, that the mortgagee was entitled to claim of the mortgagor the costs of the inquisition, if the mortgagee had paid them to the sheriff, and the court referred it to the prothonotary to ascertain that fact. *Id.*

In an action brought to recover the balance of an account, the parties agreed that the amount should be referred to two arbitrators, who, in settling the balance due, were to be guided by the decision of a jury in regard of a certain cargo of cotton shipped by the plaintiffs, the costs of which formed one of the items. The jury found that the plaintiffs were not entitled to charge the defendants with the costs of the cotton; and the arbitrators, after excluding such costs pursuant to the verdict, found a certain sum to be due to the plaintiffs. The prothonotary, on taxation, refused to allow the plaintiffs the costs of the trial which applied to the cotton:—Held, that he was right in so doing. *Fairlie v. Parker*, 1 M. & P. 438.

### 3. Pleadings.

Such parts only of pleadings to which a demurrer relate are to be copied in the demurrer book; and if any other parts be copied, the costs are not to be allowed on taxation, either as between party and party, or attorney and client. *Reg. Gen. C. P.*, H. T. 8 & 9 Geo. 4, 4 Bing. 549.

Whereas declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties by reason of their length, and the same may be drawn in a more concise form; now, for the prevention of such expense, it is ordered, That if any declaration in

assumpsit hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to the order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule as may be applicable to the case; or if any declaration in debt be so filed or delivered for similar causes of action, and for which the action of assumpsit would lie, shall exceed such length, as costs of the excess shall be allowed to the plaintiff, if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. And it is further ordered, That as the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof to be deducted from the amount of the attorney's bill. *Reg. Gen. T. T.* 1 Will. 4 K. B. C. P., & Exch., 2 B. & Adol. 783; 7 Bing. 774; 4 C. & P. 607; 1 C. & J. 475; 1 Dowl. P. C. 107; 1 Tyr. 525; 5 M. & P. 819; 1 Priest P. C. 112; 4 Bligh, N. S. 585.

Where several special counts are inserted in the same agreement, the plaintiff is entitled to a verdict on one count only, and to the costs of that count. A bill of exceptions would lie, if a judge were to direct that all the counts were proved. *Ward v. Bell*, 2 Dowl. P. C. 76.

### 4. Expenses of Evidence.

In trover a verdict was taken for plaintiff to the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator, by order of Nisi Prius, to ascertain the amount of deterioration, which amount, with the costs of the cause, were to be paid to plaintiff:—Held, that the expense of witnesses attending the arbitrator were costs in the cause. *Tregunning v. A. tenborough*, 7 Bing. 733; 5 M. & P. 453; 1 Dowl. P. C. 225.

In an action of slander, although there be no justification, and no special damage alleged, the plaintiff, if he recovers, is entitled to the expenses of witnesses necessary to prove an immoderate explanatory of the slander, and his professional reputation. *Andrews v. Thornton*, 8 Bing. 431; 1 M. & Scott, 670.

A charge for a document tendered, but not received in evidence, cannot be supported. *Dyball v. Underwood*, 11 Price, 511.

Expenses of successful searches for pedigrees are allowed for by the prothonotary in taxing costs. *Johnson v. Lawson*, 2 Bing. 341.

In an action on the case to recover damages for the disturbance of a water-course, where the prothonotary had allowed the expenses attending such plans as had been used for the information of the court at the trial, such expenses were of

terwards ordered to be allowed. *Holmes v. Holmes*, 9 Moore, 158; 2 Bing. 75.

Expenses of a person sent to inquire after the subscribing witnesses to a bond, not allowed in the taxation of costs. *Laing v. Bowes*, 3 M. & S. 89.

#### 5. Expenses of Witnesses.

##### (a) Remuneration for Loss of Time.

Generally.]—Compensation for loss of time disallowed to two merchants coming from abroad as witnesses. *Moor v. Adam*, 5 M. & S. 156; *S. P. Lowry v. Doubleday*, 5 M. & S. 159, n.

A broker is not entitled to compensation for loss of time. *Lopes v. De Tastet*, 7 Moore, 120; 3 B. & B. 292.

Where the prothonotary, on the taxation of costs, allowed for various sums expended in experiments, and a compensation for loss of time to scientific and professional men employed in making them, with a view to ascertain the increased risk or advantage in a new process of boiling sugar by means of heated oil, and who were called as witnesses at the trial; the court of C. P. directed him to review his taxation, on the ground that no such allowance or compensation ought to be made. *Severn v. Olive*, *Same v. Slade*, 6 Moore, 235; 3 B. & B. 72.

A plaintiff will not be allowed his expenses in the construction of a model, nor a compensation for loss of time by scientific persons who had been sent to a distant part of the country to inspect a building there, although he could not safely have proceeded to trial without their testimony. *Bayley v. Beaumont*, 11 Moore, 497.

In taxing costs, the contingent losses which witnesses may have suffered by obeying the subpoena cannot be allowed. *Hullusson v. Staples*, 1 Dougl. 438.

If the plaintiff subpoena the defendant's attorney to produce books, the latter is not entitled to receive any thing from the plaintiff for expenses or loss of time in attending as a witness. *Pritchard v. Walker*, 3 C. & P. 212—Vaughan.

**Foreign Witnesses.**—Reasonable allowance in costs may be made for the loss of time of a necessary foreign witness, who is not accessible to subpoena, and who will not attend without compensation. *Lomergan v. Royal Exchange Assurance Company*, 1 Dowl. P. C. 233; 5 M. & P. 35; 7 Bing. 729.

The courts of C. P. and K. B. will allow the costs of detaining a foreigner here to give evidence upon a trial, computed from the day of the writ sued out to the day of trial. *Sturdy v. Anson*, 4 Taunt. 697; *S. P. Anon.* 1 Chit. 89, n.

The costs of bringing over a necessary witness from the continent to this country are to be allowed. *Cotton v. Witt*, 4 Taunt. 55.

But not the costs of his return. *Id.*

Although it was previously held in C. P. that the costs were only to be allowed from the time

of the witness's coming within the jurisdiction of the court. *Hagedorn v. Allnutt*, 3 Taunt. 379.

A plaintiff, who brings over a foreign witness hither, in order to judge by his testimony whether there is ground to bring an action, and afterwards sues, and examines the foreigner at the trial, may be allowed the costs of detaining him here from the time of the writ sued out until the trial, and a reasonable sum for his sustenance here during the same time, but not the costs of his passage hither, or of his return. *Schimmel v. Lousada*, 4 Taunt. 695.

If a witness is bona fide sent for from a foreign country to support an intended action, though the writ is not sued out until after his arrival, the plaintiff is entitled in that case to the costs of bringing him over, his subsistence and compensation for his loss of time spent here pending the suit, for the purposes thereof, and to the costs of his return. *Tremain v. Barrett*, and *Same v. Faith*, 1 Marsh. 463, 563; 6 Taunt. 88.

But if the witness is sent for to give evidence in one action which is discontinued, and the plaintiff calls him as a witness in another action against a different defendant, but arising out of the same transaction, he is entitled in the second action to the costs only of the witness's subsistence and detention for the purpose of the second action, but not of his voyage hither or of his return. *Id.*

**Remedy of Witness.**—A witness attending a trial under a subpoena is not entitled to a compensation for his loss of time, although the party requiring his attendance expressly promises to pay him for such loss. *Willis v. Peckham*, 4 Moore, 300; 1 B. & B. 515.

A witness attending at the trial of a cause on subpoena cannot maintain an action for compensation for his loss of time in attendance, even though he is an attorney. *Collins v. Godefroy*, 1 Dowl. P. C. 326; 1 B. & Adol. 950.

A promise by an attorney, after trial, to pay a witness a compensation for his loss of time, cannot, it seems, be enforced, either by action or attachment. *Bates v. Sturges*, 2 M. & Scott, 172; 7 Bing. 585.

##### (b) Maintenance.

Where foreign witnesses appear to be domiciled in this country, they are not entitled to the expenses of their return home; and it seems that a party is not entitled to the costs of witnesses, unless they have been paid to them previously to taxation. *Lopes v. De Tastet*, 7 Moore, 120; 3 B. & B. 292.

Where the captain of a merchant ship, domiciled in this country, was detained by the plaintiff for a considerable time to give evidence in a cause, but before issue was joined or notice of trial given:—Held, that the master was at liberty, in taxing the costs, to allow the expenses of maintaining the witness during such detention. *Anon.* 2 D. & R. 424; *S. C. nom. Berry v. Pratt*, 1 B. & C. 376.

Subsistence allowed in costs in a policy cause, to the master of a ship insured, a material witness, from the time of subpoena to the time of trial, although the witness resided in England, was not examined, was a master in the royal navy, and did not show the permission of the Admiralty for him to engage in the merchant service. *Mount v. Larkins*, 8 Bing. 195; 1 M. & Scott, 357; 1 Dowl. P. C. 262.

But refused for his further detention pending a rule for a new trial, upon a point to which his evidence was not applicable. *Id.*

So, in another cause, the court approved the allowance, on taxation, of subsistence money for a witness, the captain of a ship, from the service of the subpoena till the time of trial. *Temperley v. Scott*, 1 M. & Scott, 601; 8 Bing. 392.

If a plaintiff subpoena witnesses in a cause then ready for trial, but which does not afterwards, in fact, come on to be tried, in consequence of his declining to reply and take issue on a new fact, subsequently put on the record by additional plea, the expenses of the actual attendance of those witnesses are allowable on taxation of his costs, (the plaintiff ultimately succeeding on the trial of the cause), although he do not countermand his notice of trial in time, notwithstanding there might have been time enough for him to have done so during the intermediate period, and even to have replied and taken issue on the additional plea; on the ground that a plaintiff shall in such case be considered entitled to a reasonable time to give instructions for advice, and otherwise prepare himself. But it should seem that in such cases there must appear to have been some unnecessary delay, or other suspicious conduct, on the part of the defendant. *Allison v. Newerre*, 1 Price, 381.

The court will not allow the expenses of the plaintiff's witnesses, brought too early to the assizes to attend on a trial there. *Anon.* 2 Chit. 200.

A witness who is subpoenaed in London in August, to attend a trial at the adjourned sittings in October, and who is at the time of service on the eve of departure for the continent, is entitled to the expenses of coming from the continent to attend the trial. *Vice v. Anson (Viscountess)*, 3 C. & P. 19; M. & M. 76—Tenterden: S. C. not S. P. 7 B. & C. 409; 1 M. & R. 114.

The plaintiff is also entitled to the expense of detaining such witness in this country, to await the trial of the cause, although opportunity is afforded of examination upon interrogatory. *Loznergan v. Royal Exchange Assurance*, 7 Bing. 725; 5 M. & P. 447, 806; 1 Dowl. P. C. 223.

#### (c) Application for Admission.

The expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected

to make such admission. *Reg. Gen. K.B.C.P.*, and *Exch.*, 2 Will. 4, 1 Dowl. P. C. 199; 8 Bng. 307; 1 M. & Scott, 433; 3 B. & Adol. 309; 3 C. & J. 201; 2 Tyr. 352; 4 Bligh, N. S. 607.

The expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge, a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the judge, upon attendance before him, shall endorse upon such summons, that he does not think it reasonable to require such admission. *Reg. Gen. K. B., C. P., & Exch.*, H. T. 9 Will. 4, 1 Dowl. P. C. 199; 8 Bing. 307; 1 M. & Scott, 433; 3 B. & Adol. 392; 2 C. & J. 801; 2 Tyr. 352; 4 Bligh, N. S. 607.

#### (d) Examination on Interrogatories.

By 1 Will. 4, c. 22, the courts may examine witnesses on interrogatories where they shall deem it necessary.

By s. 3, the costs of the writ or commission as to be in the discretion of the court.

By s. 9, the costs of the rule or order for the examination of witnesses under any commission or otherwise, and of the proceedings thereon, as to be costs in the cause unless otherwise directed either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court.

Before the statute, the costs of examining witnesses, whether at home or abroad, upon interrogatories, were always borne by the party obtaining the rule for that purpose, and did not abide the event of the cause, unless so ordered by the court. *Anon.* Hull. Costs, 539; 3 Tidd's Prac. 863.

If the rule of court for the examination of witnesses by commission expressed that the depositions of witnesses at Hamburg and Lubeck were to be taken, and the commission was directed to persons at Hamburg, the expense of bringing witnesses from Lubeck to Hamburg were allowed upon taxation. *Muller v. Buerherne*, 3 B. & P. 556.

Where the defendant put off a trial on the terms that a witness going abroad should be examined on interrogatories:—Held, that the plaintiff having detained the witness until the trial, after he had been examined on interrogatory, and cross-examined by the defendant, was entitled to the costs of the detention, but that the defendant was entitled to deduct his costs of cross-examining on interrogatories. *Patterson v. Dunn*, 1 Chit. 89.

Where a party obtained leave, by consent, to examine witnesses abroad on depositions, he was not entitled to be allowed the expense of taking the depositions in the taxation of costs, though he succeeded. *Taylor v. Royal Exchange Assurance Company*, 8 East, 393.

The party succeeding was not entitled to the costs of examining witnesses on interrogatories, or taking office copies of depositions; but each party applying paid his own expense, unless it was otherwise expressed in the rule. *Stephens v. Crickton*, 2 East, 259.

Plaintiffs had obtained a mandamus under stat. 13 Geo. 3, c. 63, s. 44, for the examination of witnesses in India, and the writ and depositions were returned to this country; but the defendants did not join in the application for the writ, nor examine nor cross-examine witnesses under it, and the plaintiffs obtained a verdict:—Held, that they were not entitled to the costs attending the writ, or of the office copies of the depositions. *Fairlie v. Parker*, 1 M. & P. 438.

Where a defendant obtained a mandamus under 13 Geo. 3, c. 63, s. 44, to examine witnesses in India, the plaintiff, having recovered a verdict, was entitled to his costs of cross-examining such witnesses. *Whytt v. Macintosh*, 2 M. & R. 133; 8 B. & C. 317.

#### (e) Question of Admissibility.

Where there is a reasonable ground to believe that the testimony of a witness will be admissible, his expenses may be allowed on taxation of costs against the adverse party. *Rushworth v. Wilson*, 1 B. & C. 267.

Where the master, on the taxation of costs for not proceeding to trial pursuant to notice, disallowed the expenses of a witness brought from Newcastle-upon-Tyne to London, to give evidence by comparison of hand-writing in a cause where the defence was forgery, the court ordered the master to review his taxation; and held, that upon a question whether the evidence were or were not admissible, the expenses of the witness ought not to have been disallowed. *Mutchinson v. Allcock*, 1 D. & R. 165.

The master is in general sole judge of what witnesses shall be allowed on taxation, and, therefore, when he had, in an action of libel, disallowed all witnesses to prove innuendoes, the court refused to interfere to make him review his taxation. *Skelton v. Seward*, 1 Dowl. P. C. 411.

#### (f) Witness not called.

The charges allowed for the attendance and expenses of witnesses must depend on the circumstances of the case. It is not because some of those who have been subpoenaed are not examined that they are not to be allowed for in taxing costs. *Bagnall v. Underwood*, 11 Price, 511.

The court will not direct the master to review his taxation, because he has allowed expenses for witnesses who were not called. *Adamsen v. Noel*, 1 Chit. 200.

It seems that where many witnesses are unnecessarily called by the successful party, the judge will inform the prothonotary of the circumstances, in order to guide him in his taxation of costs. *Lark v. Webster*, 1 C. & P. 105, 106, n.—Park.

Where, upon application to the attorney for the defendant to admit certain facts in proof, and

he refused, and afterwards, upon going to trial, it appeared that, by having pleaded a tender, it became unnecessary to prove them, but the plaintiff took witnesses to the assizes for that purpose, and was allowed their expenses in the taxed costs, notwithstanding they were not called upon the trial, the court refused to revise the taxation. *Hanhorn v. Thomas*, 3 Smith, 361.

If the plaintiff subpoena witnesses, and remunerate them accordingly, who have been previously subpoenaed by and received their expenses from the defendant, which circumstances they conceal from the plaintiff; the court of C. P. will allow the latter the expenses he has paid those witnesses for their attendance, although they were not called for him at the trial, on the ground that such payment was obtained by fraud. *Benson v. Schneider*, 1 Moore, 76; 7 Taunt. 272, 337; Holt, 416.

#### 6. Reviewing Taxation.

Where the plaintiff's attorney had been guilty of gross misconduct towards the defendant, in consequence of which the prothonotary refused to allow the plaintiff any costs, the court of C. P. refused a rule for him to review his taxation, although the defendant had taken out a summons to stay proceedings in the action, on payment of debt and costs. *Adams v. Staten*, 7 Moore, 365; 1 Bing. 69.

The court of Exchequer will not interfere with the province of the master in the taxation of costs of increase, by ordering a new taxation in favour of the defendant, on the ground that the plaintiff himself has been the cause of increasing the amount of the costs, by unnecessarily and wantonly proceeding to trial after an offer to sign a cognovit, unless in a very strong and clear case; but it seems otherwise, where there has been no previous delaying the plaintiff by the proceedings of the defendant, and the conduct of the former has been palpably vexatious; or the defendant has made the offer in good time, and a cognovit executed has been actually tendered; and a rule, calling on the plaintiff to show cause why the master should not review his taxation of costs under such circumstances, having been discharged on affidavits filed in answer, stating facts which furnished a sufficient reason for what the master had done, it was discharged with costs. *Williams v. Wynne*, 2 Price, 344.

Costs of a rule for reviewing a taxation are not given where the mistake is with the master. *Ward v. Bell*, 2 Dowl. P. C. 76.

Where a submission to arbitration in a cause in the court of Exchequer is made a rule of the court of K. B., and by the award the costs are to be taxed by the master of the Exchequer, the court have no jurisdiction to direct a review of the taxation. *Chapman v. Lansdown*, 1 Anst. 273.

It is not necessary that a party applying for an order upon the master to review his taxation of costs, should first pay into court the amount of the items in the bill of costs, to which no objection has been made. *Bagnall v. Underwood*, 11 Price, 511.

The affidavit, on a motion in the Exchequer for the master to review his taxation of costs, must specify the charges objected to. *Daniel v. Bishop*, 1 M'Clel. 61; 13 Price, 129.

And it must be confined to the objections alleged against the taxation, and not enter into the merits. *Williams v. Hunt*, 1 Chit. 321.

No objections to the master's taxation can be taken, unless they are specified in the affidavit or rule. *Aliven v. Furnival*, 2 Dowl. P. C. 49.

Affidavits used before the master on taxation of costs, cannot be read on showing cause against a rule for reviewing the taxation, unless they are referred to in the rule; a notice that they will be used is not sufficient. *Cliffe v. Prosser*, 2 Dowl. P. C. 21.

## XXII. MEANS OF RECOVERING COSTS.

### 1. Application to the Court.

Where there are several defendants, each is liable for the whole costs; and if after satisfaction from any one the plaintiff takes it against another, such defendant may apply to the court. *Wilson v. Foote*, Bull. N. P. 335.

One defendant, who had given a general release to the plaintiff after the costs of nonsuit had been taxed, was ordered to pay to the other defendants their shares. *Darlow v. Collinson*, Bull. N. P. 335.

The court refused a rule relative to the payment of costs to the amount of only a few shillings, when every other point was settled. *Anon. Lofft*, 193.

A rule was refused to compel the attorney of a defendant, who was a member of parliament, to pay costs, as the proper remedy was by sequestration. *Anon. Lofft*, 156.

Trespass for breaking and entering plaintiff's close and cutting heath, &c.; plea not guilty, and verdict for the plaintiff. On the trial it appeared that the trespasses were committed by the direction of A. B., and the heath taken to his premises. On a motion being made that A. B. should pay the plaintiff the damages and taxed costs, the court refused the application, as the plaintiff ought before he brought the action to have ascertained who was the substantial defendant. *Berkeley v. Dimery*, 10 B. & C. 113.

### 2. Levy in Execution.

By 43 Geo. 3, c. 46, s. 5, in cases of executions against the goods of the defendant, the plaintiff may also levy the poundage fees and expenses of the execution, over and above the sum recovered by the judgment.

A plaintiff who levies costs and expenses of an execution, in addition to the sum recovered by the judgment, under 43 Geo. 3, c. 46, s. 5, must at his peril take care to keep them within such a reasonable sum as will be afterwards allowed in taxation by the prothonotary, otherwise the court of C. P. on motion will order the excess to be

restored, with costs to be paid by the plaintiff. *Benwell v. Oakley*, 2 Taunt. 174.

In order to discharge a plaintiff out of custody who is in execution for costs, it must appear that such costs were paid on his account: where, therefore, a plaintiff was in execution for costs arising to a magistrate, from a verdict in an action for false imprisonment, an affidavit, stating that they had been paid to the latter by the treasury, was held insufficient. *Butt v. Coenant*, 6 Moore, 65; 3 B. & R. 3.

### 3. Staying Proceedings in Second Action.

*In what Cases generally.*—The costs of a first action on the case must be paid before a second will be allowed to proceed on the same account, when the merits have been fully tried. *Milner v. Halsey*, 3 Wils. 149; 2 W. Black. 741.

The court of C. P. will not stay proceedings against a defendant till the debt and costs, recovered by him in a former action against the plaintiff, be paid. *Cooke v. Dobree*, 1 H. Black. 10.

In an action of trespass for false imprisonment, brought by an uncertificated bankrupt in C. P., after nonsuit in K. B. for the same cause, on the ground that he was not then prepared with evidence to prove the validity of a former commission; the former court will stay the proceedings, until the plaintiff pay the costs of the former action, as he then ought to have been prepared with evidence to substantiate the first commission. *Crawley v. Impey*, 2 Moore, 460.

After a nonsuit in trespass, the court will stay proceedings in a second action between the same parties for the same cause, until the costs of the nonsuit are paid, notwithstanding the plaintiff is a prisoner at the time of bringing the second action, and sue in forma pauperis. *Weston v. Withers*, 2 T. R. 511.

The court will not stay proceedings in a second action, by a pauper, until the costs are paid of a nonsuit in a prior one for the same cause, unless his conduct appear vexatious. *Hutton v. Colboys*, 1 Tidd's Prac. 94.

The defendant was arrested at the suit of the plaintiff, who becoming bankrupt, the proceedings were discontinued; and the assignees having again arrested the defendant, the proceedings were set aside, the Chancellor having superseised the commission; but a fresh commission being issued, and another set of assignees being chosen, they arrested the defendant again, and were proceeding in their action:—Held, that these proceedings could not be stayed until the costs of the proceedings at the suit of the first set of assignees were paid. *Darvason v. Simpson*, 2 Chit. 146.

A rule to stay proceedings in a second action on the statute of bribery, where the plaintiff's attorney would not pay the costs of a former nonsuit, nor discover the plaintiff's residence, was ordered to be discharged, if the costs were paid within a week, otherwise to be made absolute. *Moulton q. t. v. Bingham*, 2 T. R. 511, n.

So, a rule was made absolute for non-payment

of costs of a judgment as in case of a nonsuit, and of a rule to show cause why judgment as in case of nonsuit should not be entered. *Baldwyn v. Richards*, 2 T. R. 511, n.

A plaintiff, being nonsuited, was taken in execution by the defendant for the costs; and whilst in execution brought another action for the same cause: the court refused to stay further proceedings in the second action until the costs of the first had been paid. *Beeson v. Robins*, 8 D. & R. 42.

Where there were six actions against owners and six against the captain of a ship, for wages, the court of K. B. stayed the proceedings in one of the latter, until payment of costs in one by the same plaintiff against the owners, which had been tried, and in which there had been a verdict for the defendants. *Bond v. Gooch*, Hull Costs, 465.

The court of K. B. refused to stay proceedings in a qui tam action, till the costs of a nonpro in a former action, by a different plaintiff, were paid. *English q. t. v. Cox*, Cowp. 322.

So, where the plaintiff, having declared against the defendants as trustees, was nonprossed, and afterwards commenced another action against them by name, the court refused to compel him to pay the costs of the former action before he was allowed to go on with the second. *Pashley v. Poole*, 3 D. & R. 531.

Proceedings cannot be stayed in a court of equity, till the payment of the costs of a suit at law. *Anon.* 1 Chit. 195.

The court stayed proceedings in an action by husband and wife, until payment of costs in a former action for the same demand, at the suit of the husband only. *Lampley v. Sands*, 1 Tidd's Prac. 584.

*In Ejectment.*—The court will stay the proceedings in a second ejectment until the costs are paid of a prior one, even though it be brought by a third person, or for different premises, if the title be the same. *Doe v. Law*, and *Fairclain v. Throutout*, 1 Tidd's Prac. 583; 4 Dougl. 250; 3 Dougl. 405.

Proceedings in ejectment stayed till the costs of a nonsuit in a former ejectment, brought to try the same title, were paid. *Keene d. Angel v. Angel*, 6 T. R. 740; *S. P. Doe d. Correll v. Roe*, 1 Chit. 195.

Proceedings in ejectment stayed until the costs of a former ejectment, and also of an action for mesne profits, were paid. *Doe d. Pinchard v. Roe*, 4 East, 585.

Yet the court will not extend the rule to include the damages in the action for the mesne profits, however vexatious the proceedings of the present lessors of the plaintiff may have been. *Doe d. Church v. Barclay*, 15 East, 233.

Proceedings stayed till the costs of a former ejectment, brought by the father of the lessor of the plaintiff against the defendant's father on the same title, were paid. *Doe d. Feldon v. Roe*, 8 F. R. 645.

But refused where the ejectment was by the

heir-at-law for part of devised premises, after he had failed in a previous action for other parts. *Doe v. Harris*, 4 M. & R. 569.

Ejectment in C. P. and verdict for the plaintiff, and costs paid by the defendant, who then brought an ejectment in K. B. for the same premises, and recovered, but was not paid his costs; and now a third ejectment being commenced in C. P. by the plaintiff in the first ejectment, that court stayed proceedings till payment of the costs of the second ejectment in K. B. *Doe d. Walker v. Stevenson*, 3 B. & P. 22.

If the defendant in a former ejectment, who was then evicted, bring another ejectment for the same premises, the court will stay the proceedings until he pay the costs of the former cause. *Thrustout d. Williams v. Holdfast*, 6 T. R. 223.

A rule to stay proceedings in a second ejectment until the costs of a prior one were paid, in which the plaintiff had sued in forma pauperis, was granted. *Goodtitle v. Mayo*, 1 Tidd's Prac. 94.

So, where the lessor of the plaintiff never entered into the consent rule. *Smith d. Ginger v. Barnardiston*, 2 W. Black. 904.

It seems that the court will not stay proceedings, if the verdict in the first ejectment was obtained by fraud and perjury. *Doe d. Rees v. Thomas*, 4 D. & R. 145; 2 B. & C. 622.

Proceedings in ejectment were stayed the day before trial, till the costs of a former ejectment in K. B. were paid, after a long delay. *Doe d. Chadwick v. Law*, 2 W. Black. 1158.

So, proceedings in an ejectment by a fraudulent assignee of an insolvent debtor were stayed, till costs of former ejectments, brought by the debtor himself, were paid. *Doe d. Chambers v. Law*, 2 W. Black. 1180.

The court will not stay proceedings in a writ of right, until the costs of a prior ejectment are paid. *Chatsfield v. Souter*, 3 Bing. 167; 10 Moore, 572; *S. P. contra Bonyear v. Bonyear*, 2 Dowl. P. C. 207.

Proceedings in an ejectment cannot be stayed until the taxed costs of a bill in equity, filed by the same party for the recovery of the same premises, are paid. *Doe d. Williams v. Winch*, 3 B. & A. 602.

Where in ejectment a rule has been obtained for staying proceedings until the costs of a former ejectment have been paid, the court will not permit the defendant, in case those costs are not paid before a given day, to nonpross the pending ejectment. *Doe d. Sutton v. Ridgway*, 5 B. & A. 523. And see *Doe d. Irwin v. Roe*, 1 D. & R. 562.

COUNSEL—See BARRISTER.

COUNTY.

- I. CLERK—See OFFICER.
- II. COURT—See INFERIOR COURT.
- III. RATE—See RATE.



## COURT.

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- II. *Inferior*.—See INFERIOR COURT.
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## COVENANT.

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## I. FORM OF COVENANTS.

It seems, that, under the word "demise," the lessee may maintain an action of covenant against the lessor, for not having sufficient power to demise for the whole term, whereby the plaintiff was put to the expense of procuring a better title for the whole term. *Fraser v. Skeg*, 2 Chit. 646.

Where a lease of an undivided third part of certain mines, contained a recital of an agreement made by the lessee with the lessor and the owners of the other two-thirds, for pulling down

an old smelting mill, and building another of larger dimensions upon a waste near the mine, and also a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it:—Held, that such a covenant was to be implied; and that the lessor of the one-third might sue upon it in respect to his interest. *Sampson v. Easterby*, 4 M. & R. 422; 9 B. & C. 505; 2 C. nom. *Easterby v. Sampson*, 6 Ring. 644; 4 M. & P. 601; 1 C. & J. 105.

Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses:—Held, that this was an implied covenant, also, that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied. *Shrewsbury (Earl) v. Gould*, 2 B. & A. 487.

A proviso in a lease for twenty-one years, that if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do, upon twelve months' notice to the other of them, his heirs, executors, or administrators, extends, by reasonable intendment, to the devise of the lessor, who is entitled to the rent and reversion. *Roe d. Bamford v. Hoyle*, 12 East, 464.

Covenant by lessee, that he will at all times during the term plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry; if lessee plough the rabbit-warren and sheep-walk, covenant lies against him. *J. & Ban's (Duke of) v. Ellis*, 16 East, 352.

The plaintiff declared in covenant, and set out first an indenture, whereby the defendant, the original proprietor of a medicine, assigned all his interest in it to a third person, subject to a covenant by the assignee to pay him one-third of the profits during his and his wife's lives; and also covenanted with the assignee, that he would not thereafter, by himself or jointly with any other, prepare or sell, or engage with any other person in preparing or selling the said medicine, &c.: and then a second indenture, whereby the first assignee assigned all his interest in the medicine to the plaintiff, subject to the covenant of reversion: and then a third indenture between him and the defendant, (reciting the two former), and that he had agreed with the defendant for the absolute purchase of all his interest, as well in the said medicine, as in the one-third share so reserved to the defendant: by which indenture the defendant assigned to the plaintiff all that third share, and all other shares or proportions, right, title, interest, claim, or demand whatsoever of the defendant to the said medicine, or to the profits, &c., habendum to the plaintiff in like manner as the defendant might have done if these premises had not been made: with a covenant that the plaintiff might at all times thereafter prepare and

sell the medicine in the name of the defendant, and receive the profits thereof to his own use: and another covenant for further assurance: and then the plaintiff proceeded to assign breaches in the words of the first indenture between the defendant and the first assignee; that the defendant prepared and sold the medicine, and also engaged with others in preparing and selling it for his own profit, &c., and charged some of these breaches to be contrary to the first indenture, and to the defendant's covenants therein with the first assignee; but the second breach was charged to be contrary to the last indenture, and to his covenant with the plaintiff:—Held, that the last indenture alone (without the confirmation, which, however, the construction of it received from the two former recited therein) showed an intention in the defendant, and the words of it were large enough to assign to the plaintiff, not only the one-third share of the profits reserved by the first indenture, but all the defendant's right, title, and interest in the medicine, and all the future profits arising from the sale thereof, and that such assignment of all his interest and property in the medicine, raised an implied covenant that he would not prepare or sell the medicine, or engage with others in so doing for his own profit; such preparation and sale being a retention and exercise of the right of preparing and vending the medicine of which he was once a proprietor, in derogation of his deed, whereby he had conveyed such right to the plaintiff: and held, that the second breach was well assigned, which was charged to be against his covenant in the last deed with the plaintiff. *Seddon v. Senate*, 13 East, 63.

There is a distinction between express covenants and implied agreements, as to being enforced by injunction: in the former instance, but not in the latter, an injunction will be granted against tenants removing articles contrary to the custom of the country. *Kimpton v. Eve*, 2 Ves. & B. 379.

## II. CONSTRUCTION OF COVENANTS.

### 1. Generally.

The construction of covenants is the same in equity as at law; but equity will relieve against a strict performance upon equitable circumstances, and no wilful default. *Eaton v. Lyon*, 3 Ves. jun. 692.

A., being seized of certain real estates, limited part of them to the uses of his marriage settlement, and also covenanted with the trustees, that, in case of there being issue of such marriage, he would, by will or otherwise, devise all his real estates, and also all his personal estate and effects whatsoever, amongst the children of that and a former marriage, share and share alike:—Held, that this covenant applied only to such real and personal estate which A. might die seized or possessed of, and that it did not prevent him from disposing, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the date of the settlement. *Woodham v. Kirkman*, 3 B. & A. 531.

A., being possessed of a lease for years, covenanted in an indenture for making a family provision, that, if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue to B.; A. afterwards purchased the reversion in fee, and died:—Held, that A. did not, by the terms of the covenant, intend to preclude himself from purchasing the fee, and therefore his executors were not liable upon that covenant. *Williamson v. Butterfield*, 2 B. & P. 63.

A covenant by a party, that, so long as the defendant should continue and be in the actual receipt of the profits of a rectory, he would pay a yearly sum during the life of the rector, by two half-yearly payments, must be construed as a covenant for the payment of such yearly sum whilst the covenantor is in receipt of the profits during the life of the rector, and not whilst he is merely in receipt of the profits. *Combe v. Jones*, 2 Chit. 700.

Lessee of tithes covenanted for certain considerations for himself, his executors, and assigns, not to take tithes in kind from the tenants for twelve years, but to accept a reasonable composition, not exceeding three shillings and sixpence per acre:—Held, that his under-lessee of the tithes was not an assignee within the meaning of the covenant, nor bound by such a covenant of the lessee. *Brewer v. Hill*, 2 Anst. 413.

Nor could the tenant of the lands take advantage of such a covenant entered into with his landlord, to which he himself was no party. *Id.*

By an indenture reciting that A. has agreed to pay a debt owing from B. to C., A. covenants with B. to indemnify B. in respect of such debt. A. omits to pay C., who sues and obtains judgment against B. B. may recover the amount of the debt from A. before he has paid C. *Carr v. Roberts*, 2 Nev. & M. 42.

A message, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, was demised by lease: the reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land in one of two directions, the one by entering it from the residue of the demised premises; the other, and far the more convenient, by entering it from a public street:—Held, that the lessee was entitled to a way across the reserved land from the public street to that part. *Morris v. Edgington*, 3 Taunt. 24.

A covenant for "the free use of the newly-intended road whenever the same may be made," will not apply to a road which, when the parties contracted, was newly intended to be made, but was executed and complete before the sealing of the deed. *Crisp v. Price*, 5 Taunt. 548.

If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of the deeds. *Faia v. Ayers*, 2 Sim. & Stn. 533.

A covenant to do all lawful and reasonable

acts for further assurance, includes the levying a fine, though not particularly named. *King v. Jones*, 5 Taunt. 418; 1 Marsh. 107.

So the satisfying of a judgment. *Id.*

By deed, B., for himself, his heirs, executors, and administrators, covenanted that for and notwithstanding any act done by him (B.), it should be lawful for A. to receive certain money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of B., his executors or administrators, or any person claiming under him or them:—Held, that the words, “for and notwithstanding any act done by B.,” being inconsistent with the subsequent part of the covenant, ought to be rejected, and, therefore, that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of B., in respect of the contracts mentioned in the indenture. *Belcher v. Sikes*, 8 B. & C. 185.

## 2. What usual or customary.

The reasonableness of a covenant by a lessee, in a lease of land renewable for ever, that he and his heirs shall always live upon the lands, or pay an additional rent, with the usual remedies by distress and entry, is properly triable at law; and a court of equity ought not to interpose or give relief against it. *Ponsonby v. Adams*, 2 Bro. P. C. 431.

A party contracted for an assignment of the lease of a public-house, which in the agreement was described as holden at a certain net annual rent under usual and common covenants. And the lease contained a covenant by the tenant to pay land tax, sewers' rate, and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house; and it was proved that a considerable majority of public-house leases contained such a proviso:—Held, that the covenant to pay land tax, &c., was a common covenant in a lease, reserving a net rent; and that the proviso for re-entry must, with reference to a lease of a public-house, also be considered usual and common. *Bennett v. Womack*, 7 B. & C. 627; 1 M. & R. 644; 3 C. & P. 96.

A covenant not to assign without the leave of the landlord, is a fair and usual covenant. *Morgan v. Slaughter*, 1 Esp. 8—Kenyon.

Under a power to a tenant for life to lease for years, reserving the usual covenants, &c., a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. *Doe d. Ellis v. Sandham*, 1 T. R. 705.

## 3. Qualified Covenants.

A lease, containing a covenant by the lessee to repair the premises at all times, (as often as need or occasion should require), and “at farthest within three months after notice,” is one entire covenant, the former part of which is qualified by

the latter. *Horsfall v. Tester*, 1 Moore, 89; 1 Taunt. 385.

The lessor, after a demise of certain premises, with a portion of an adjoining yard, covenanted that the lessee should have “the use of the pump in the yard jointly with himself whilst the same should remain there, paying half the expenses of the repairs.” The words “whilst,” &c., reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant, though he remove it without reasonable cause, and in order to injure the lessee. But without those words, it would have been a breach of covenant to have removed the pump. *Rhodes v. Bullard*, 7 East, 116; 3 Smith, 173.

The lessee of a coal-mine, who covenanted to pay a certain share of all such sums of money as the coal should sell for at the pit's mouth, is not liable under that covenant to pay to the lessor any part of the money produced by sale of the coals elsewhere than at the pit's mouth. *Clifton v. Walmesley*, 5 T. R. 564; S. P. *Gerrard v. Clifton* (in error), 7 T. R. 676; 1 B. & P. 524.

A. conveyed to B. in fee, a messuage, buildings, yard, gardens, and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the said lands and hereditaments; with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains, &c., necessary for working the coal; except as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead:—Held, that the seller thereby reserved to himself the right to dig coals under the messuage, buildings, and homestead, and within 150 yards of the same respectively; but was not entitled to sink pits, erect engines, or make drains, within 150 yards of the messuage or buildings, or within the homestead. *Boulter v. Wallis*, 13 East, 444.

Lease by plaintiff to J. T., for years, of a messuage and farm, at a yearly rent, payable quarterly, and J. T. covenanted to pay the rent at the days and in manner therein mentioned, and also to pay interest in case the rent should be behind three quarters; and defendant covenanted that J. T. shall, at all times during the term, well and truly pay to plaintiff the said rent at the respective days, and also interest, and shall duly observe all the covenants, and that in case J. T. should neglect to pay the rent for forty days defendant shall pay on demand:—Held, that the defendant was not chargeable until after forty days and demand made; and plaintiff having declared generally, assigning for breach rent in arrear, and it appearing upon oyer that the lease contained the qualification above stated, that the breach was ill assigned; and there being general damages upon the whole declaration, which contained other breaches which were well assigned, that judgment nevertheless was awarded. *Smithmore v. Thisselton*, 6 M. & S. 9.

Lease to A., for a term of years, at a yearly rent, and under and subject to the payment of stipulated periods, during the term, of certain sums of money in the nature of fines, with a covenant on the part of the lessor, at the end of

the term, on due and punctual payment being made of the rent, and gross sums or fines at the time appointed for payment thereof, to grant a further or renewed lease. A. assigned to B. a part of the premises for the same term and interest as A. himself took under the lease, subject to the payment of a proportional part of the rent and gross sums or fines, (the amount of the proportion was not specified). C., afterwards, purchased of the lessor the reversion of the premises expectant on the lease to A., and, subsequently to acquiring the reversion, purchased A.'s interest in all the premises demised to A. by the lease, and not assigned by him to B. After this purchase by C., one of the gross sums or fines became due, but was not paid, and no proportion of it was demanded by C. from or was paid by B. —Held, that the double character filled by A. relieved B. from the strict performance of the covenant, and that the non-payment by B. of a proportion of the gross sum or fine was not, under the circumstances, a refusal to pay, or such a breach of the covenant as to deprive B. of his claim to a renewed lease of the property assigned to him, and a demurrer for want of equity was overruled. *Statham v. Liverpool Dock Company*, 3 Y. & J. 565.

Covenants in an indenture of sale, that the covenantors were seised of a good estate in fee simple, and had good right, &c., to convey:—Held, to be qualified and restricted by a subsequent covenant for quiet enjoyment, without let, &c., by them, their heirs, or other persons claiming under them. *Milner v. Horton*, 1 McEl. 647.

Releasors covenanted that, for and notwithstanding any act, &c., by them, or any or either of them done to the contrary, they had good title to convey certain lands in fee; and also, that they or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise that the releasee should peaceably and quietly enter, hold, and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whomsoever; and that the releasee should be kept harmless and indemnified by the releasors and their heirs, against all other titles, charges, &c., save and except the chief rent issuing and payable out of the premises to the lord of the fee:—Held, that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whomsoever, was not restrained by the qualified covenants for good title and right to convey for and notwithstanding any act done by the releasors to the contrary. *Lowell v. Richards*, 11 East, 633.

The assignor of a lease covenanted that he had at any time done or suffered any act or thing, whereby the premises intended to be assigned would be impeached or affected in title or estate: and that for and notwithstanding any such act, &c., the lease was a good, valid, and subsisting lease, and not forfeited, surrendered, or become void; and that he had in himself good right, full power and authority, to grant, assign, transfer,

and set over the same to the assignee in manner aforesaid; then followed a covenant for further assurance by the assignor, and all persons claiming under him:—Held, that the general words, that the assignor had full power to grant, assign, and set over, were restrained by the preceding part of the covenant, and therefore that such covenant was confined to the act of the assignor alone. *Foord v. Wilson*, 2 Moore, 592.

So, where the assignor covenanted that for and notwithstanding any act or thing by him done, the lease was valid; and further, that it should be lawful for the assignee at all times, during the term, quietly to enjoy, without the lawful let or interruption of the assignor, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, claiming any estate or right in the premises, and that clearly discharged by the assignor, his heirs, executors, or administrators, from all former incumbrances made or suffered by him, or by their or either of their acts or privity; and then followed a covenant for further assurance by the assignor, his executors and administrators, and all persons whomsoever claiming under him:—Held, that the general words in the covenant for quiet enjoyment, were restrained by the restrictive words in the covenant for title and further assurance, which preceded and followed it, and therefore that such covenant was confined to the acts of the covenantor, and those claiming under him. *Nind v. Marshall*, 3 Moore, 703; 1 B. & B. 319.

The assignor, in the deed of assignment of a lease, after reciting the original lease granted to another for the term of ten years, which by mesne assignments had vested in him, and that the plaintiff had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, and set over the same to the plaintiff, for and during all the rest, &c., of the said term of ten years, in as ample manner as the assignor might have held the same; subject to the payment of rent and performance of covenants; and then covenanted that it was a good and subsisting lease, valid in law, and for the said premises thereby assigned, and not forfeited, &c., or otherwise determined, or become void or voidable:—Held, that the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or of those who claimed under him; such as, 1st, a covenant against incumbrances, except an under-lease of part by the assignor for three years: 2ndly, for quiet enjoyment: 3rdly, for further assurance, and therefore where it appeared that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, though not till after the covenant of the assignor:—Held, that the assignee might assign a breach upon the absolute covenant for title. *Barton v. Fitzgerald*, 15 East, 530.

By indenture reciting a power vested in A. B. to dispose of certain premises, and that C. D. had contracted to purchase them, A. B. appointed and

conveyed them to the use of C. D., and his heirs, &c., and covenanted that the power in A. B. was then in force and not executed; and also that he, A. B., then had in himself good right, title, power, and authority to limit and appoint, and to grant, bargain, sell, &c., the premises to the said uses; and further, that the premises should be held and enjoyed to the said uses, without the let or interruption of A. B., or any claiming under or in trust for him; and also for further assurance by A. B. and all so claiming:—Held, that the second covenant was absolute, for good title against all persons, and not to be qualified by reference to the other covenants, inasmuch as there were no words, either in the second covenant itself, or in preceding or subsequent ones, to connect it with them. *Smith v. Compton*, 3 B. & Adol. 189.

Covenant by the assignor of certain shares in a patent right, that he had good right, full power and lawful authority to assign and convey the said shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have over the same:—Held, that the generality of the former words of the covenant was not restrained by the latter. *Hesse v. Stevenson*, 3 B. & P. 565.

A., after granting certain premises in fee to B., and after warranting the same against himself and his heirs, covenanted that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, and that he had full power, &c., to convey the same; he then covenanted for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself or any person claiming under him; and lastly, that he, his heirs and assigns, and all persons claiming under him, should make further assurance:—Held, that the intervening general words "full power, &c., to convey," were either part of the preceding special covenant, or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. *Browning v. Wright*, 2 B. & P. 13.

#### 4. What a Breach.

Whether a party has broken any of his covenants or not is a matter properly triable at law, as the damages (supposing a breach) cannot be settled without such trial. *Stafford v. London*, 4 Bro. P. C. 635.

A. grants a lease to B. of certain tenements, and covenants that if he, his heirs or assigns, should, during the said term, have any offer made for the disposal of certain land adjoining the demised premises, he or they should not dispose of the same without previously offering it to B., his executors, administrators, or assigns, at 5l. per cent. less than such offer. Before the expiration of the lease, A. sells to C. upon one entire contract, and for one entire sum, the whole of his estate, comprising, amongst other property, the demised premises, and the ground which was the subject of the covenant, without making any offer of the latter to B.:—Held, that this was no breach of the covenant, either absolute or implied, on the part of A. *Collison v. Lettison*, 2 Marsh. 1; 6 Taunt. 224.

A covenant that defendant has not permitted or suffered to be done any act whereby an estate was incumbered, is not broken by his consenting to an act which he could not prevent. *Hobson v. Middleton*, 9 D. & R. 247; & C. nom. *Hobson v. Middleton*, 6 B. & C. 295.

By a deed of separation, after reciting an agreement by the husband to allow the wife 250l. out of his salary as a searcher of his Majesty's customs, the husband covenants generally to pay her 250l. per annum during her life; the covenant is controlled by the recital, and dismissal from the office of searcher justifies non-payment of the annuity. *Hesse v. Albert*, 3 M. & R. 406.

Plaintiffs enfeoffed defendant with a piece of land, bounded on the west by a street, and on the east partly by buildings belonging to defendant, and partly by buildings belonging to W. G. Defendant covenanted "that he would not, at any time after the feoffment, permit or suffer any warehouse door to be opened or put out to the front of the street." A warehouse door was put out in the buildings belonging to W. G. at the eastern extremity of defendant's land, about eight feet distance from, but giving access to, the street:—Held, that this was a breach of the covenant by defendant, though the premises in which the door was put out did not stand upon his land, were not in his occupation, and were not level with the front of the street. *Liverpool (Mays, &c.) v. Tomlinson*, 7 D. & R. 556.

A covenant not to sue, arrest, imprison, or persecute a debtor, or his goods or chattels, lands or tenements, on account of a debt, extends to the issuing of a commission, which is a species of suit and proceeding against the goods of the bankrupt. *Small v. Marwood*, 9 B. & C. 300; 4 E. & R. 181.

A new breach of a covenant not to use rooms in a particular manner is committed every day the rooms are so used. *Doe d. Ambler v. Woodbridge*, 4 M. & R. 302; 9 B. & C. 376.

Where lessees of land and of coal-mines covenanted forthwith to proceed to sink for coal as far as could and ought to be accomplished, &c., on a default thereof to pay so much to the lessor as arbitrators should award, and the lessees gave bond to the lessor, conditioned to perform the award, which was made:—Held, that to an action on the bond it was a sufficient answer, that they had proceeded to sink for coal as far, &c. (in the words of the covenant), but that none could be found. *Hanson v. Boothmen*, 13 East, 22.

Covenant on a coal lease to pay a certain proportion of the value of 9 cwt. of the coals to be raised, unless prevented by unavoidable accident from working the pit. Plea, that the defendant was prevented by unavoidable accident. It appeared in evidence that the accident might have been remedied at a greater expense than the value of the coals to be raised:—Held, that plaintiff was entitled to recover. *Morris v. Smith*, 1 Dougl. 279.

If a lease contain a covenant for quiet enjoyment against the lessor, and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied cov-

nant for general title implied in the word "demise." *Merrill v. Frame*, 4 Taunt. 329.

Tenant for life, and his eldest son, the remainder-man in tail, leased to E. S. for ninety-nine years, and gave E. S., who was acquainted with their title, a bond conditioned for the due observance of their covenant for quiet enjoyment. E. S. underlet to W. for sixty years, and covenanted with W. against eviction by any one claiming under E. S., or by his acts, means, consent, neglect, default, privity, or concealment. Tenant for life and his eldest son being dead without issue, W. was evicted by the next remainder-man in tail:—Held, that E. S. was not liable on his covenant to W., the eviction being by title paramount, which E. S. had no means of defeating. *Woodhouse v. Jenkins*, 9 Bing. 431.

### 5. Extent of Liability.

One who covenants for himself, his heirs, &c., and under his own hand and seal, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting for and on the part and behalf of such other person. *Appleton v. Binks*, 5 East, 148; 1 Smith, 361.

The defendants, as directors of a mining company, agreed by deed to purchase a mine of the plaintiffs, the purchase money to be paid within twelve months by certain instalments "out of the moneys to be raised by the company," with a proviso, that in case they should not have received the deposits from the shareholders, so as to enable them to pay the money by the time stipulated for, the directors should be allowed a further time of six months; and the defendants covenanted that they would, "out of the said payments so to be made by the subscribers or shareholders in the said company," pay the purchase money, according to the terms and at the times before specified, subject to the aforesaid proviso:—Held, that this was a personal undertaking on the part of the defendants to pay at the expiration of the additional six months. *Hancock v. Hudson*, 12 Moore, 504: 1 C. nom. *Hancock v. Hodgson*, 4 Bing. 269.

Defendant, by a settlement made on his marriage, conveyed estates upon certain trusts, and overlanded with the trustees to pay off incumbrances on the estates, to the amount of 19,000*l.*, within a year:—Held, that, on his failing to do so, the trustees were entitled to recover the whole 19,000*l.* in an action of covenant, though no special damage was laid or proved; and an inquiry, on which nominal damages had been given, was set aside, and a new writ of inquiry awarded. *ethbridge v. Mytton*, 2 B. & Adol. 773.

An action of covenant lies against the assignee of a lease of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract; and in case of eviction the rent may be apportioned, as in debt or replevin. Aliter in covenant against the lessee himself, who is liable on his personal contract. *Stevenson v. Lambard*, East, 575.

### III. WHAT COVENANTS RUN WITH THE LAND.

A lessee of tithes covenanted for him and his assigns, that he would not let any of the farmers in the parish have any part of the tithes; this covenant runs with the tithes, and binds the assignee, against whom an action was brought for breach of covenant. *Bally v. Wells*, 3 Wils. 25.

A covenant in a lease, that the lessee, his executors and administrators, shall constantly reside upon the demised premises, during the demise, is binding on the assignee of the lessee, though he be not named. *Tutem v. Chaplin*, 2 H. Black. 133.

A covenant to insure premises against fire, which are situated within the weekly bills of mortality, as specified in the statute 14 Geo. 3, c. 78, runs with the land. *Vernon v. Smith*, 5 B. & A. 1.

A covenant in a lease, by the lessor, to supply two houses with good water at a rate therein mentioned for each house, runs with the land; for the breach of which the assignee of the lessee may maintain an action against the reversioner. *Jourdain v. Wilson*, 4 B. & A. 266.

A covenant that the lessor, his executors, or administrators, will not assign, does not bind the assignees. *Doe d. Cheere v. Smith*, 5 Taunt. 795; 1 Marsh. 359.

In a lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, &c., and assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate:—Held, that this covenant did not run with the land, nor bind the assignee of the lessee. *Congleton (Mayor, &c.) v. Pattison*, 10 East, 130.

A covenant by the lessee with the lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situated, from all costs and charges, by reason of the lessee's taking an apprentice or servant, who should thereby gain a settlement within, or become chargeable to the parish, was held to be an express covenant with the lessor, which did not run with the land; and that an action on it was well brought by his executors. *Walsh v. Fussell*, 3 M. & P. 455; 6 Bing. 163.

A mortgagee died seized of the residue of a mortgage term, subject to a proviso, that in case the mortgagor should pay him, his executors, administrators, or assigns, a certain sum on a given day, the term should determine; the mortgagee bequeathed this sum to the plaintiff by will, whom he appointed one of his executors:—Held, that he could not maintain an action of covenant in his own name, as assignee, although his co-executor had assented to the bequest, as the covenant with the mortgagee was collateral, and did not run with the land, and because it was broken in his lifetime. *Cankam v. Rust*, 2 Moore, 164.

Where J. B., being seized in fee, conveyed to the defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might take to his use a rent certain, to be issuing out

of the premises, and subject to the said rent, to the use of the defendant, his heirs and assigns; and the defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent; and to build within one year, one or more messuages on the premises, for better securing the said rent; and J. B., within one year, demised the said rent to the plaintiffs for 1000 years:—Held, that covenant would not lie by the plaintiffs for non-payment of the rent, or for not building the messuages, for that the covenant was in gross, and only personal to J. B. *Minnes v. Branch*, 5 M. & S. 411.

A testator, being seised in fee of certain lands, and also of a corn-mill, demised the former to a tenant for three lives, covenanting for a money-rent, and in addition thereto, that the lessee should perform certain suits and services; and amongst others, that he, his heirs and assigns, should do suit to the lessor's mill by grinding therein all such corn as grew upon the demised land: the testator afterwards devised the mill, and also the reversion of the land to the same person, who became seised upon the death of the devise; during the demise of the land, the lessee died intestate, and his wife took out administration of his estate and effects. An action of covenant being brought, assigning for a breach, a neglect to grind corn at the mill during the life-time of the lessee, and also since his death:—Held, that the reservation of the suit to the mill was in the nature of a rent, and that the covenant to render it ran with the land, whilst the ownership of the land and the mill remained in the same person; and entitled the latter to maintain an action at common law upon it against the personal representative of the lessee. *Vyppan v. Arthur*, 2 D. & R. 670; 1 B. & C. 410.

Where a declaration in covenant by the reversioner against A., the assignee of a lease for years, (granting license to B. to continue a certain channel open through the bank of a navigable river, upon certain conditions,) imported that the grantors had absolute possession of the channel, and full power to grant the use of it to B.; and it appeared by the indenture that they were described merely as the persons "who had the greatest proportion or share in the profits of the said river; and that they, by virtue of all or any powers and authorities vesting in or enabling them, granted the license to B., his executors, administrators, and assigns:"—Held, that the grantors had no authority to grant such an hereditament, within the meaning of the statute 32 Hen. 8, c. 34, as would bind the assignee of the grantee. *Portmore (Earl) v. Bunn*, 3 D. & R. 145; 1 B. & C. 694.

If the whole of a term is made over by the lessee, although in the deed he reserves the rent and a power of entry for non-payment to himself, and not to the original lessor, and although he introduce new covenants, the person to whom it is made over may sue the original lessor or his assignees of the reversion, or be sued by them, as assignees of the term, on the respective covenants in the original lease. *Palmer v. Edwards*, 1 Dougl. 187, n.

The assignee of a lease is not liable to the original lessor, for a breach of a covenant not running with the land, unless he be expressly named in the lease as a covenantor. *Gray v. Cuthbertson*, 2 Chit. 482; 1 Selw. N. P. 498; 4 Dougl. 351.

Covenant by lessor against assignee of lease, on a covenant by the lessee, for himself, his executors, and administrators, to pay to the lessor the amount of fruit-trees, &c., to be planted by the lessee, according to an appraisement to be made by two persons, one to be chosen by each of the parties. Breach that the defendant refused to name a person to make the appraisement. Demurrer:—Held, that this covenant did not run with the land, and that the assignee was not bound. *Id.*

And a covenant by lessor to pay for all trees planted by lessee, does not run with the land. *Id.* Quære, whether a covenant by the lessee of a public-house, that he and his assigns will buy all their beer of the plaintiff, is binding on the assignee? *Hartley v. Pehall*, Peake, 131—*Kearns*.

Quære, whether a covenant in a conveyance in fee with the grantors (lessees of waterworks) not to sell or dispose of water from a well to the injury of the proprietors of the said waterworks, their heirs, executors, administrators, and assigns, runs with the land, so as to bind, and be enforced by assignees? *Collins v. Plum*, 15 Ves. jun. 454.

The parties were left to law, and a demurrer was allowed from the inconvenience of enforcing such a covenant by injunction. *Id.*

In a lease from B. to A. of an undivided third part of a mine, A. covenanted with B. and C. and D., the other owners of the mine, to erect a smelting mill on a waste not demised, and not shown to belong to B., or to B. C., and D.:—Held, that such covenant ran with the land, inasmuch as it affected the mode of enjoying the demised premises; and passed to the assignee of the reversion of B.'s share of the mine. *Sampson v. Easterby*, 4 M. & R. 422; 9 B. & C. 56; S. C. nom. *Easterby v. Sampson*, 6 Bing. 644; 4 M. & P. 601; 1 C. & J. 105.

#### IV. DEPENDENT OR INDEPENDENT COVENANTS.

Where a covenant is part only of the consideration on one side, it is an independent covenant, and not a condition precedent. *Carpenter v. Cresswell*, 4 Bing. 409; 1 M. & P. 66.

Therefore, where plaintiff assigned to defendant a fish business, and also his interest in a salmon fishery, and agreed not to interfere with the business, and defendant agreed to grant plaintiff an annuity; in an action for the annuity, a plea that plaintiff had interfered in the business was held bad. *Id.*

Where, in articles of agreement under a penalty, there are mutual covenants between A. and B. to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action of debt for the penalty brought by A.

against B., on account of the non-performance of his part, B. may plead in bar a breach by A. of the covenant, which goes to the whole consideration. *St. Alban's (Duke) v. Shore*, 1 H. Black. 270.

Therefore, where in articles of agreement for the sale of lands, it was agreed that A., the seller, should take, in part of payment, a conveyance of other lands belonging to B., the buyer; and it was also agreed, that all timber trees, then upon any of the estates, should be valued by appraisers, and paid for by the respective purchasers at a given time: to an action of debt by A. against B. for the penalty, on his refusal to complete the purchase, B. may plead that A., before the time, cut down a certain number of trees, and thereby rendered himself unable to perform, and it was impossible for him to perform the agreement. *Id.*

In an agreement to demise certain pieces of land for a term of years, at a certain annual rent, in which there was no clause of re-entry; and "it was thereby further agreed and clearly understood, that in case the said lessor, or his heirs, executors, and assigns, should want any part of the said land to build or otherwise, or cause to be built, then the lessee, or his heirs, executors, or assigns, should and would give up such part or parts of the said land as should be requested by the lessor, by his making an abatement in proportion to the rent charged; and also to pay for so much of the fence, at a fair valuation, as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do."—Held, that this was merely a covenant, and not in the nature of a condition, operating in defeasance of the estate. *Doe d. Willson v. Phillips*, 2 Bing. 13; 9 Moore, 46. And see *Doe v. Willson d. Abel*, 2 M. & S. 541.

In an agreement enuring as a lease, "it was stipulated and conditioned that the lessee shall not underlet."—Held, that these words created a condition, upon a breach of which the lessor might maintain ejectment, without an express clause of re-entry. *Doe d. Henniker v. Watt*, 1 M. & R. 694; 8 B. & C. 308.

A., being possessed of a term for years, conveys it by way of mortgage, and then joins with the mortgagee in a lease for a shorter term, according to their respective estates and interests, and the lessee covenants with the mortgagor and his assigns to pay rent and keep premises in repair. During the lease, the term, with all the estate and interest of mortgagor and mortgagee, becomes vested in the assignee of the reversion. Yet the mortgagor may afterwards maintain an action of covenant against the lessee, the covenants being in gross. *Russel v. Stokes*, 1 H. Black. 562; 3 T. R. 678.

And the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it. *Webb v. Russell*, 3 T. R. 393.

In a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a pro-

viso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, and from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void:—Held, that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months' notice, expiring with the first three years, was not sufficient for that purpose. *Porter v. Shepherd (in error)*, 6 T. R. 665.

A covenant by a lessee to leave at the end of his term, compost, &c., he having the yard, barn, and a room to lodge in and dress diet, is a mutual, and not a conditional covenant. *Dodd v. Innes*, Loft, 56.

A covenant to be a hired servant for one year and a quarter, and to pay, at the expiration, 200l., when defendant should surrender his trade to plaintiff's nephew, or such other person as he should appoint. Upon demurrer:—Held, a condition precedent that plaintiff should have a sufficient security for the payment of the sum. *Anon.* Loft, 194.

A. agreed to sell B. his estate for a certain sum before a particular day, in consideration whereof B. agreed to pay that sum on the day, and on failure to pay 21l.:—Held, that they were dependent covenants, and that A. could not recover the 21l. without showing a conveyance on his part, or a tender of one. *Goodieson v. Nunn*, 4 T. R. 761.

Plaintiff covenanted to sell to the defendant a school-house, &c., and to convey the same to him on or before the 1st of August, 1797, and to deliver up the possession to him on the 24th of June, 1796; and in consideration thereof, defendant covenanted to pay the plaintiff 120l. on or before the said 1st of August, 1797.—Held, that the covenant to convey, and that for the payment of the money, were dependent covenants; and that the plaintiff could not maintain an action for the 120l., without averring that he had conveyed, or tendered a conveyance to the defendant. *Glazebrook v. Woodrow*, 8 T. R. 366.

Covenant to repair generally, and to repair within three months after notice in writing, are independent covenants. *Doe d. Morecraft v. Meux*, 7 D. & R. 98; 4 B. & C. 606; 1 C. & P. 346.

Where a lessee covenanted to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repair, by giving six months' notice in writing:—Held, that these were two distinct and separate covenants, the former of which was not qualified by the latter. *Wood v. Day*, 1 Moore, 389; 7 Taunt. 646.

A. covenants to build a house for B., and finish it on or before a certain day, in consideration of a sum of money, which B. covenants to pay A. by instalments, as the building shall proceed. The finishing the house is not a condition prece-



dent to the payment of the money, but the covenants are independent: A. therefore may maintain an action of debt against B. for the whole sum, though the building be not finished at the time appointed. *Terry v. Duntze*, 2 H. Black. 389.

Where anything is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it should be averred in the declaration that that thing was done. *Campbell v. Jones*, 6 T. R. 571.

But it is otherwise where the covenants are independent of each other; therefore where A. in consideration of 250*l.* paid by B., and of the further sum of 250*l.* to be paid, &c., covenanted that he would, with all possible expedition, instruct B. in a certain mode of bleaching linen, (for which he had obtained a patent), and B. covenanted that he would, on or before the 25th of February, 1794, or sooner if A. should before that time have instructed him, &c., pay the further sum of 250*l.*:—Held, that the covenants of A. and B. were independent covenants, and that A. might sue B. for the 250*l.* without averring that he had taught B. the mode of bleaching, &c. *Id.*

Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part. *Jones v. Barkley*, 2 Dougl. 684.

If one covenant with another to do a certain act in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms may be averred. *Hotham v. E. I. Comp.*, 1 Dougl. 272.

And where the payment of money by the plaintiff is to be concurrent with the act to be done by the defendant, an averment that he was ready and willing to pay is sufficient, without an actual offer. *Levy v. Herbert*, 1 Moore, 56; 7 Taunt. 314.

If one party covenants to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant. *Bone v. Eyre*, 2 W. Black. 1312; *S. C.* nom. *Boone v. Eyre*, 1 H. Black. 273, n.

But where there are mutual covenants which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for the breach of the other. *Id.*

By an indenture between A., and B. and his wife, and C. of one part, and D. and E. and the same C. of another part, it was recited, that F., also a party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he, F. giving sureties, namely, the said D., E., and C., for payment of an annuity to B.'s wife; and it was thereupon witnessed, that, in consideration of the covenants thereinafter entered into by A., B. and his wife, and C., and of 10*l.*, the said D., E., and C., each and every of them, covenanted with A., B. and his wife, and C., to pay the annuity. There followed co-

venants by A., B. for himself and his wife, and C., severally, for quiet enjoyment, and for executing an assignment to F. when required. The deed was signed and sealed by D., E., and C., and by F., but not by A. or B. In an action brought by A. and B., after the death of C., for breach of the covenant to pay the annuity:—Held, first, that the omission of A. and B. to execute the deed did not disable them from suing upon it; that such omission did not amount to a total failure of consideration for the covenant sued upon, (supposing such total failure to be an answer to the action), and that the covenant to pay the annuity, and those for quiet enjoyment, and for assigning, were not mutual and dependent. Secondly, that at least after C.'s death, A. and B. might sue D.'s executors (D. and E. being also dead) for non-payment of the annuity, though the covenant for such payment was entered into both by and to C. *Rose v. Poulton*, 2 B. and Adol. 822.

#### V. HOW DISCHARGED.

Covenant by defendant, that he was lawfully seized of a good estate of inheritance in fee simple in certain premises conveyed to the plaintiff. Breach, that he was not seized, &c., and issue thereon. Previously to the conveyance, the premises had been confiscated by an act of the state of New York:—Held, that there was no breach of the covenant. *Watkeys v. De Lancey*, 1 Dougl. 354.

If tenant for a term of years lease for a fee term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished. *Webb v. Russell*, 3 T. L. 393.

The plaintiff, as tenant of a farm, covenanted with the defendant as landlord, to fetch and bring all such timber, stone, and other materials, as should, at any time during the continuance of the term, be wanted, about the erecting of a threshing-mill; and the latter covenanted to build and erect the same. The defendant pleaded, first, that he began to provide the necessary materials for erecting the mill, and that whilst he was so doing, the plaintiff desired him not to build the same, but refrain from so doing until he should be requested by the plaintiff; and, secondly, a plea of license:—Held, that both these pleas were bad on special demurrer; assigning for causes, that the covenant of the defendant was an absolute and covenancy covenant under seal, and that the defendant had pleaded only a parol request, alleged to have been made to him by the plaintiff to discharge and to lease him from his covenant before any breach thereof; and that it did not appear that such covenant was suspended, released, or discharged by any deed under seal; on the ground, that such pleas neither amounted to a release nor accord and satisfaction. *Cordwener v. Hunt*, 2 Moore, 688.

G. having by marriage articles covenanted, that if he died in the lifetime of his wife, his executors

tors should, within three months after his decease, pay to her 3000*l.*; and having by his will given all his property to his executors in trust, after payment of his debts at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as should to them appear right, on his death" during the life of his wife; the executors having died or renounced, his property is divisible according to the statute of distribution, and the widow's distributive share, exceeding 3000*l.*, is a performance of the covenant in the marriage articles. *Goldsmid v. Goldsmid*, 1 Swans. 211.

There is a distinction between satisfaction and performance. *Id.*

## VI. ACTION OF COVENANT.

### 1. Between Contracting Parties.

*Generally.*—By 3 & 4 Will. 4, c. 42, c. 3, all actions of covenant must be brought within ten years after the end of the session of 1833, or within twenty years after the cause of action accrued.]

A deed inter partes is only available between those who are parties to it. *Barford v. Stuckey*, 3 Moore, 88; 1 Bing. 225. *And see* 5 Moore, 23; 2 B. & B. 333; 5 D. & R. 118.

Therefore, where two persons by deed agreed with N. P., his executors and administrators, to pay him an annuity for twenty-one years, if they, or the survivor of them, should so long live; and, in case N. P. should die within the term, to his child or children, if any, in such proportions as he should appoint; or, in default of appointment, to all of them equally; and, if there should be no child, to his wife, if she should remain a widow; and N. P. having died within the term, as well as his only child and widow.—Held, that his administrator could not claim payment of the annuity after their respective deaths. *Id.*

Held, also, that the administrator of the daughter could not maintain an action against the defendant on the deed for non-payment of the annuity, on the ground that she was no party to the deed, although she took a beneficial interest under it. *Id.*

Covenant only lies upon a deed inter partes between the parties thereto; therefore where in covenant upon an indenture of lease, it appeared that the landlord by writing, not under seal, authorized his attorney to execute a lease for and in his (landlord's) behalf, and the attorney signed and sealed the lease in his own name.—Held, that the landlord could not maintain covenant against the tenant upon the indenture, although the covenants were expressly stated to have been made by the tenant to and with the landlord. *Berkeley v. Hardy*, 8 D. & R. 102; 5 B. & C. 355.

Where rent was reserved by a lease to a person who was not a party to the lease, and the lessees covenanted with him and the lessors to pay rent, &c.—Held, that covenant would not lie at the suit of him and the lessors. *Southampton (Lord) v. Brown*, 6 B. & C. 718.

Nor will a covenant lie by a person for whose benefit a covenant was entered into with a third person. *Ex parte Richardson*, 14 Ves. jun. 187.

In a lease, the lessor reserved a right to enter and cut timber, making reasonable satisfaction to the lessee for any damage occasioned thereby; covenant does not lie by such lessee for any wrongful act of cutting down by a third person, if without the consent or authority of the lessor, however he may countenance the act afterwards. *Griffiths v. Brome*, 6 T. R. 66.

And where it only appeared that the lessor had promised to make compensation afterwards for such wrongful act, if the wrong-doer himself did not; this was not considered as an adoption of the act, nor as evidence of a prior consent to it whereon to found an action on the covenant. *Id.*

Tenants in common may sue a lessee of a house in covenant for negligence of repairs, who after the demise, but before the breach alleged, became a co-tenant of the plaintiffs in the same house. *Yates v. Cole*, 2 B. & B. 660; *S. C. nom. Gates v. Cole*, 5 Moore, 554.

*Joint or several Covenants.*—Though a covenant be joint in its terms, yet if the interests of the covenantees be several, each may sue separately for a breach. *Withers v. Birchman*, 5 D. & R. 106; 3 B. & C. 254.

In covenant, where the interest of the covenantees is several, although the covenant be joint, yet it shall be taken to be several, and the action is maintainable by one alone: therefore, where A., B., and C., for themselves severally, and not jointly, and for their several, respective, and not joint heirs, executors, &c., covenanted with D. and E., and each of them, their and each of their executors, &c., to deliver an abstract of title of their respective interests in certain premises: in consideration whereof, D. and E., for themselves and their respective heirs, covenanted with A., B., and C., and each of them, their and each of their heirs, &c., to pay in the proportions of one moiety to A., his executors, &c., and the other to B. and C., their executors, &c., by instalments, and to execute to A., B., and C., their heirs, &c., a security by way of mortgage, for payment of such instalments, and, as a collateral security, to give their joint and separate bond:—Held, that on non-payment of the first instalment by D. and E., A. might maintain a separate action against them. *James v. Emery*, 2 Moore, 195; 5 Price, 529.

A covenant with two and every of them is joint, though the two are several parties to the deed. *Southcote v. Hoare*, 3 Taunt. 87.

In a lease of a colliery, the two lessees covenanted "jointly and severally," with the lessor, in manner following, viz. &c.; then followed several other covenants, after which was a covenant that moneys due should be accounted for and paid by the lessees, their executors, &c., not saying, and each of them:—Held, that this, and the former covenants, were several as well as joint. *Northumberland (Duke) v. Errington*, 5 T. R. 522.

If the obligee of a bond covenant not to sue one of two joint and several obligors, and, if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean v. Newhall*, 8 T. R. 168.

A covenant to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life, is a joint covenant to A. and B., in which they have a joint legal interest, although the benefit be for A. only; and therefore, on the death of A., the right of action survives to B., and A.'s administrator cannot sue on the covenant. *Anderson v. Martindale*, 1 East, 497.

One of three joint covenantees for the payment of an annuity to A., cannot sue the executors of B., the covenantor, upon a simple averment that the covenantees did not, at any time, seal or deliver the indenture: for non constat but they may still execute the deed, and joint covenantees who may sue, must sue jointly, unless they have expressly disclaimed the covenant, which it lies upon the party suing to show. *Petrie v. Bury*, 5 D. & R. 152; 3 B. & C. 353.

Quære, whether the declaration would have been sufficient if it had averred that the two covenantees not joined had refused to assent to the deed? *Id.*

Covenant by the master of a vessel with the several part-owners, and their several and respective executors, administrators, and assigns, to pay certain moneys to them, and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names:—Held, a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action. *Servante v. James*, 10 B. & C. 410.

Covenant against A. and B., on a covenant supposed to be implied as incident to a demise by lease: on production of the lease, it appeared that, in point of law, A. only demised, and that B., who had an equitable interest, merely confirmed:—Held, that the action was not maintainable against A. and B. *Smith v. Pocklington*, 1 C. & J. 445; 1 Tyr. 309.

The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern, upon being paid a certain sum of money, and having an indemnity against all claims upon the partnership; the assignment is executed, the money paid, and a joint covenant of indemnity given by the surviving partners:—Held, that the covenant is not to be considered in equity as a joint and several covenant. *Sumner v. Powell*, 1 Turn. & Russ. 423.

## 2. Personal Representatives.

Where the plaintiff, as executrix, declared that the defendant, by deed, conveying to the plain-

tiff's testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with the testator, that he was, at the time of the execution of the deed, seised in fee, and had a right to convey, &c.; and assigned for breach that the defendant was not seised, &c., and had not a right to convey, &c.: this was held ill upon special demurrer, and that the executrix could not maintain an action for such breaches of covenant, without showing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises. Covenant upon request of the testator, his heirs or assigns, to make further assurance to the testator, his heirs or assigns, and breach assigned that the plaintiff, as executrix, requested the defendant to execute a release between the defendant, the plaintiff, and S. A., for further assuring the premises to the uses mentioned in the deed, which the defendant refused, without showing that the plaintiff claimed an interest, or to whom use the lease was to enure, or why S. A. was party to it, was considered ill on special demurrer. *Kingdon v. Nottle*, 1 M. & S. 355.

In an action against executors, in their own right, on a covenant for good title and quiet enjoyment against any person or persons whatever, contained in an assignment of a lease of the testator, (by way of mortgage), the declaration must show a breach by some act of the covenantee. *Noble v. King*, 1 H. Black. 34.

An executor of a lessor, tenant from year to year, may declare for a breach of covenant in a lease, for twenty-one years, granted by the lessor, though the breach was committed after the lessor's death. *Mackay v. Mackrell*, 2 Chit. 451; 4 Dougl. 213.

But such a declaration should state the tenant's interest and title in the premises, and where it was merely stated that A. B. demised premises to the testator of the plaintiff, (viz. the tenant, without stating that A. B. was seised in fee, or of any other estate,) and that the plaintiff's testator demised them to C. D., and stated a breach of covenant after the plaintiff's testator's death: it was held bad. *Id.*

If tenant in tail male demise for a term of ninety-nine years, and his lessee assigns over to another, but, before such assignment, tenant in tail male dies without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it. *Andrew v. Pearce*, 1 N. R. 158.

A covenant by two joint lessees, if it be joint and several, shall bind the executors of the deceased lessee. *Enys v. Donnellan*, 2 Buz. 1190.

By indenture tripartite between A. 1, B. 2, and C. 3, A., tenant for life, demised to C., and C. covenanted with B. (a receiver) and other the receiver or receivers for the time being, and to and with such other person, who, for the time being, should be entitled to the freehold, and to and with every of them. A. died:—Held, that his executrix could not maintain covenant for a

breach in her testator's lifetime, but that the action was joint, and survived to B. *Southcote v. Hoare*, 3 Taunt. 87.

### 3. Heirs and devisees.

On a covenant for further assurance, where the breach happened in the time of the covenantee, but the damage accrued to the heir, the heir has a preferable title to the executor to bring the action of covenant. *King v. Jones*, 1 Marsh. 107; 5 Taunt. 418. And see *Kingdon v. Nottle*, 1 M. & S. 355.

But the ancestor might, if he had pleased, also have sued. *Id.*—Mansfield.

Covenant lies by the heir, upon a covenant made to the ancestor and his heirs, to whom lands are conveyed in fee by husband and wife, that he and his wife will make further assurance upon request of the ancestor and his heirs; and the heir may well assign for breach, that his ancestor requested the husband, that he and his wife would levy a fine to pass the estate of the wife legally to him and his heirs, which they refused to do before their decease, per quod after the death of the ancestor, the devisee of the wife ejected the heir. *Jones v. King*, 4 M. & S. 188.

Where a plaintiff declares as heir-at-law upon a lease granted by his ancestor, he must show how he is heir-at-law; a general averment that the demised premises descended to him as cousin and heir-at-law is not sufficient. *Lidgbird v. Judd*, 7 D. & R. 517.

The devisee of the equity of redemption (the legal fee being in a mortgagee) is not liable in covenant as assignee of all the estate, right, title, and interest of the original covenantor. *Cartishe Mayor, &c. v. Blamire*, 8 East, 487.

An action of covenant does not lie upon the stat. 3 W. & M., c. 14, against the devisee of land, to recover damages for a breach of covenant made by the deviser; but the remedy thereby given is confined to cases where debt lies. *Wilson v. Knusley*, 7 East, 127; 3 Smith, 128.

Covenant lies by devisee of lands in fee, upon a covenant made by defendant to the testator, to whom defendant conveyed the lands in fee, that defendant was lawfully seised, &c., and had a good right to convey, &c.; for such covenant runs with the land, and though broken in the lifetime of testator, it is a continuing breach in the time of the devisee, and it is sufficient to allege or damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously. *Kingdom v. Nottle*, 4 M. & S. 53.

Where there was a devise to trustees and their heirs during the life of A., in trust for A., and, after his decease, to B. in fee; and the trustees recovered, in A.'s lifetime, damages for breach of covenants in a lease granted by the testatrix, and still subsisting. Upon A.'s death, it was held that no damages belonged to her estate. *Noble v. Case*, 2 Sim. 343.

### 4. Assignees.

Devise to the use of H. I. for life, without im-

peachment of waste, &c., remainder to the use of plaintiff for life:—Held, that the plaintiff, after the death of H. I., was an assignee within stat. 32 Hen. 8, c. 34, and might maintain covenant against lessee, for rent in arrear after the death of H. I., and during the continuance of the term. *Isherwood v. Oldknow*, 3 M. & S. 382.

Covenant will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing. *Troynam v. Pickard*, 2 B. & A. 105.

And under an absolute assignment of a term, the assignee may be sued on the covenants, before he has taken actual possession. *Walker v. Reeves*, 2 Dougl. 461, n.

The assignee of a term declared against as such, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute. *Chancellor v. Poole*, 2 Dougl. 764.

A trustee, to whom two leases were assigned in trust for securing an annuity, having said to the occupier of one of the demised houses, "You must pay the rent to me; I am become landlord for my client who has the annuity, and you must pay the ground rents for me:"—Held, that the trustee was liable in covenant to the lessor, as assignee of both leases, for non-payment of rent and not repairing. *Gretton v. Diggles*, 4 Taunt. 766.

Where the assignee of the reversion, who sued the defendant in covenant, alleged that the lessor was seised, (without stating of what estate,) and being so seised, devised to plaintiff in fee:—Held, a sufficient allegation of title after verdict. *Harris v. Beavan*, 4 Bing. 646; 1 M. & P. 633.

Covenant for non-payment of rent lies against an assignee of a lease, to whom an assignment is made by way of mortgage security, although he has never entered, or taken actual possession. *Williams v. Bosanquet*, 3 Moore, 500; 1 B. & B. 238.

L., being seised in fee, demised to B. for twenty-one years, from June, 1814: B. demised to M. for twenty-one years, from June, 1814, wanting twenty-one days; and then by deed pool granted to L. the indenture of lease to M., the premises thereby granted, and the rent reserved, to hold to L., his executors, &c., for the term mentioned in the demise to M.; L. by lease and release conveyed the premises, the reversion and reversions, rents, issues, and profits, and all his interest, in fee to the plaintiff, by way of mortgage; M. assigned his term to defendants by way of mortgage, but defendants never entered:—Held, that plaintiff might sue defendants on the covenants in M.'s lease. *Burton v. Barclay*, 7 Bing. 745; 5 M. & P. 785.

Covenant against the assignee of the lessee for the non-payment of rent; plea, that before the rent became due, the defendants assigned all their estate and interest in the demised premises to A. and B.; replication, that in and by the indenture, the lessee, for himself, his executors,

administrators and assigns, covenanted that he, his executors or administrators, should not assign the premises thereby demised without the consent of the lessor, and that no consent was given:—Held, upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign did not stop the assignee from the setting up the assignment; and secondly, that the action being founded on privity of estate, the liability of the defendant ceased as soon as the privity of estate was destroyed. *Paul v. Nurse*, 8 B. & C. 486.

An assignee who takes from a lessee leasehold premises by indenture indorsed on the lease, "subject to the rent reserved in the lease," is liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. *Steward v. Wolseridge*, 9 Bing. 60; 2 M. & Scott, 75.

### 5. Pleadings.

#### (a) Venue.

Where there are several facts material to the plaintiff's action arising in different counties, an action of covenant may be brought in either. *London (Mayor) v. Cole*, 7 T. R. 583.

In covenant by the assignee of the lessee of a term, the action is local, and the venue must be laid in the county where the lands are situated. *Berwick (Mayor) v. Shanks*, 11 Moore, 372.

#### (b) Statement of Deed.

**Generally.**—In covenant on a lease, it is sufficient if the declaration sets out the legal operation and effect of the demise. *Wilson v. Bramhall*, 1 Y. & J. 2.

A declaration alleging, that by indenture purporting to be made between plaintiff and defendant, it was witnessed that defendant covenanted:—Held, after plea, sufficiently certain. *Baynon v. Bailey*, 8 Bing. 256; 1 M. & Scott, 339.

In covenant by lessor against lessee, on an indenture of demise, it is no variance if the plaintiff in his declaration makes profert of the "said indenture," and at the trial produces the counterpart executed by the lessee. *Pearce v. Morrice*, 3 B. & Adol. 396.

In an action of covenant against a surety in an annuity bond, who had become bound to pay in twenty-eight days from the time specified for payment by the grantor, in case of failure by the latter, the declaration by mistake stated that the payment had become due from the surety on the day on which it had become due only from the principal:—Held, that as the bond and covenant were upon the whole set forth with sufficient certainty to prevent any reasonable mistake as to the ground of action, the inconsistent allegation might be rejected as surplusage. *Heera v. Cole*, 1 Dow, 459, 463.

In covenant, if, after a plea of non est factum, the defendant at the trial admits the due execution of the specialty mentioned in the declaration,

he may still take advantage of a variance. *Goldie v. Shuttleworth*, 1 Camp. 70—Ellenborough.

Omitting a word, where the context supplies it, or inserting a wrong word, where the context corrects the mistake, is no variance. *Loxland v. Knight*, 1 M. & R. 597; 3 C. & P. 106.

Therefore, if on oyer of a bond, the obligee are described as commissioners acting under a act of parliament for the regulation of the duties on assessed taxes, and in the bond the duties are stated to be the duties of assessed taxes, this is no variance. *Id.*

**Time and Consideration.**—One may declare in covenant that the deed was indented, made, and concluded on a day subsequent to the day at which the deed itself is stated on the face of it to have been indented, made and concluded. *Hill v. Cazenove*, 4 East, 477; 1 Smith, 272. *And see Mayleton v. Palmerston (Viscount)*, M. & M. 6; 2 C. & P. 474.

Seemingly, that it is not a misdescription of a lease to state it as commencing on a particular day, when the habendum is from that day. *Widd v. Fisher*, 2 Moore, 378.

The omitting to state the consideration of a bargain and sale cannot be taken advantage of as a general demurrer. *Bolton v. Cartledge (Bishop)*, 2 H. Black. 259.

A declaration alleged a deed to have been made for considerations therein mentioned; the deed itself contained only one (a pecuniary) consideration:—Held, no variance. *Gully v. Easter (M)*, 12 Moore, 591; 4 Bing. 290.

In covenant, where in setting out the deed the declaration stated that "it was witnessed, among other things, that as well in consideration of, &c., and there was no word in the declaration to answer to the phrase "as well," and only part of the consideration was stated:—Held, that this was a fatal variance. *Swallows v. Beaumont*, 11 B. & A. 765; 1 Chit. 518.

In an action of covenant, the declaration stated that by a certain indenture it was witnessed that as well in consideration of certain furnaces to be erected by the plaintiff, T. R. B. did demise, &c. The defendant pleaded non est factum. On producing the deed in evidence, it appeared to be that as well in consideration of the erection of the furnaces, "as also for building certain houses and payment of rent, T. R. B. did demise," &c.:—Held, that this was a fatal variance. *Id.*

**Parties.**—In covenant on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff of the one part, and the defendant of the other. On the production of the lease in evidence, it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other:—Held, that this was no variance, although the premises demised were the property of the wife before marriage. *Arnold v. Rowland*, 4 Moore, 66; 1 B. & B. 433.

A declaration on a lease which stated that the

plaintiffs derived their titles from two lessors only, and that two other lessors, who were also parties to the demise, had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four. *Wood v. Day*, 1 Moore, 389; 7 Taunt. 646.

If, on an action of covenant, the declaration states that the deed was made between the plaintiff of the one part, J. C. of the second part, and A. B. of the third; and the deed, when produced, appear on the face of it to be by the plaintiff as trustee of J. C. of the first part, G. C. of the second, and A. B. of the third part, and the deed be executed by G. C., this is a fatal variance, although the breaches assigned do not in any way affect the party who is intended to be described as of the second part. *Mayelston v. Palmerston (Vicount)*, 2 C. & P. 474; *M. & M. 6*—Abbott.

*Premises.*—Where plaintiff declared in covenant on a demise of lands, and the demise was of all that piece or parcel of ground and premises, containing by estimation one acre:—Held, that this was not a variance, for one piece will satisfy the term lands. *Birch v. Gibbs*, 6 M. & S. 115.

Where plaintiff declared in covenant, that defendant demised to him a wharf and storehouses, &c., the word in the deed being storehouse, it was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only upon a covenant by defendant, not to suffer a wharf to be erected on his estate to the injury of the said wharf, per quod plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, storeroom, &c. *Hoer v. Mill*, 4 M. & S. 470.

Where a declaration in covenant by the reversioner against A., the assignee of a lease for years, (granting license to B. to continue a certain channel open through the bank of a navigable river, upon certain conditions), imported that the grantors had the entire right and absolute possession of the channel, and full power to grant the use of it to B., and it appeared from the indenture that they were described merely as the persons who had the greatest proportion or share in the profits of the navigation, and that they, by virtue of all or any powers and authorities vesting in or enabling them, granted the license to B., his executors, administrators and assigns:—Held, that this was a variance, as the grantors had not the privilege which the deed as set out in the declaration purported to grant. *Portmore Earl v. Bunn*, 3 D. & R. 145; 1 B. & C. 694.

In covenant on a lease, a mistake in the name of a person stated in the demise as the late tenant of the premises is a fatal variance. *Bowditch v. Mauley*, 1 Camp. 195—Ellenborough.

A variance in setting out one of several covenants in a lease, on which breaches were assigned, as the cellar-beer field, instead of the Aller-beer field, being considered as part of the description in the deed declared on, though the plaintiff avowed going for damages on the breach of that covenant, is fatal. *Pitt v. Green*, 9 East, 188.

Declaration against the defendant as assignee "all the estate," &c., in certain premises; evidence.

dence that he is assignee of "part," is a fatal variance. *Hare v. Cator*, Cowp. 766.

In an action of covenant on a lease, "of the veins of coals under certain farms and lands therein described, situate in the parishes of B. and M., then in the several occupations of A., B., and C., with liberty to dig any pits, shafts, levels, soughs," &c., the declaration varied from the deed; 1st, in stating that the land was set out by admeasurement, instead of by reputation; 2ndly, in changing the word "soughs" to "sloughs;" 3dly, in stating the lands to be situate in the parish of B. and M., instead of the parishes of B. and M.; and 4thly, in stating them to be in the occupation of A., B., and C., instead of in the several occupations of A., B., and C.:—Held, that the 1st and 3d variances were fatal; but that the 2nd and 4th were immaterial. *Morgan v. Edwards*, 2 Marsh. 96; 6 Taunt. 695.

*Other Matters.*—In an action of covenant it is no objection under the plea of non est factum that the deed contains material qualifications of the covenants set out, which qualifications are not noticed in the declaration. *Gordon v. Gordon*, 1 Stark. 294—Ellenborough.

In debt for rent, if the reservation is set out, it is a variance to omit the words "except as hereafter mentioned," referring to a subsequent proviso, by which a deduction is to be made on a certain event, but which does not happen. *Vassour v. Ormrod*, 6 B. & C. 430; 9 D. & R. 597.

And in covenant for not repairing, if the covenant to repair contain an exception of "casualties by fire," it is fatal on non est factum to state it in the declaration as a general covenant to repair, omitting the exception. *Brown v. Knill*, 5 Moore, 164; 2 B. & C. 395.

In covenant, in setting out a deed, if the word "an" is written instead of "one;" and the name "Burl" written instead of "Burt;" it is no variance. *Hill v. Saunders*, 1 C. & P. 80—Gifford. And see 7 D. & R. 17; 4 B. & C. 529; 9 Moore, 238; 2 Bing. 112.

Nor is the stating a lease to be for twenty-one years, and proving it to have been granted for that term, determinable, at the option of either party, at the end of seven or fourteen years. *Id.*

A declaration in covenant for the assignment of a share in certain stock, professed to set out the covenant, and described it as a covenant to assign a certain sum of 2000*l.* The defendant, on oyer, set out the deed, and demurred as for a variance, that the covenant was to assign stock, not money:—Held, to be no variance: and even if it were, that the defendant should have pleaded non est factum and not have demurred; on the ground, that where a defendant sets out a deed on oyer, on which the declaration is framed, he cannot on demurrer take advantage of a variance, in an immaterial part, between the deed as stated in the declaration and as set out on oyer. *Ross v. Parker*, 2 D. & R. 662; 1 B. & C. 358.

Held, that in an action of covenant against a mortgagor, a statement that the defendant bound himself, his heirs, executors, &c., was no variance, though the word "heirs" was not mentioned in

the covenant. *Hamborough v. Wilkie*, 1 Chit. 518; 4 M. & S. 474, n.

Where a declaration stated the consideration to be that the plaintiff would assign to the defendant a bill of exchange, and that he did assign it to the defendant, and a promise by the latter accordingly, and it was proved that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds to the plaintiff; and in pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, for the defendant's own use; and the defendant covenanted to pay the plaintiff a sum equal to any money he should receive on account of the bill:—Held, that as the declaration imported that the plaintiff had made an absolute assignment of the bill, and as the assignment in evidence was conditional only, it was a fatal variance. *Van Sandau v. Burt*, 5 B. & A. 42; S. C. not S. P. 1 D. & P. 168.

The reversion of lands demised to the defendant for years is conveyed to A. and B., and the heirs of B., in trust for A. and his heirs: A. declares singly on a covenant contained in the lease, and after setting out the above title, without averring the death of B., states himself to be "thereby seised of the reversion in his demesne as of fee." This is bad on general demurrer. *Scott v. Godwin*, 1 B. & P. 67.

### (c) Breach.

An assignment of a breach of covenant in general words, although in the words of the covenant, was held ill upon a demurrer to the defendant's plea, because the assignment did not show any particular act of the plaintiff, nor in what particular respect he had refused to act, which amounted to a breach of his covenant. And such bad assignment is not cured by pleading over a set-off of a demand (claimed in a different right from that in which the plaintiff, who was an administratrix, sued) to a declaration in covenant for unliquidated damages. *Warr v. Bickford*, 7 Price, 550. And see 9 Price, 43.

In an action for a breach of covenant on the defendant's demise, for not having a good title to demise for the whole of the term demised, whereby the plaintiff's assignee of the lease was evicted, and the plaintiff put to costs in an action against him by such assignee, for such eviction; the plaintiff must show who evicted the assignee, and merely stating that a third person was seised in fee of the premises, and that the assignee was evicted generally, is not sufficient. *Fraser v. Skye*, 2 Chit. 646.

In a declaration of covenant to "save harmless and keep indemnified W., his heirs, &c., and also certain closes, &c., from and against all actions, suits, claims, and demands whatsoever, both in law and equity, which should or might be had, made, commenced, or prosecuted by any person or persons claiming any right, title, or demand, in, to, or upon the said closes, &c., as heir at law of H. P. and others, of and from all costs, charges, and expenses which the said W., &c., should sustain or be put to, for or by reason or

means of such actions, suits, claims, or demands, or otherwise howsoever:" to which the breaches assigned were, first, that on, &c., H. W. P. "made claim and demand, and claimed to have right and title of, in, to, and upon the said closes, &c., and entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use;" and secondly, that he "caused and procured, and offered and permitted, one H. B., who then held and enjoyed the said closes, to attorn to him, and to withhold the payment of the rents, issues, and profits;" and thirdly, that "certain title deeds relating to the said closes, &c., were kept, detained, and withholden by one A. W., at the instance, and through the means, and by and through the claim and demand of T. B. W. P., &c.:"—Held, after the defendant had pleaded over, that these breaches were well assigned in the covenant declared upon. *Forde v. Welch*, 1 D. & R. 133; 1 B. & C. 29. And see *Rankin Palmer*, 5 M. & S. 374.

The defendant by indenture assigned a land to the plaintiff, executed to the former by J. R. and covenanted that he would maintain, ratify, and confirm all actions brought on the bond by the plaintiff, without releasing the same. A declaration on this covenant averred that the plaintiff had brought an action on the bond against J. R.; but in breach of covenant the defendant did not maintain, ratify, and confirm the said action, "although he was afterwards, to wit, on the day and year aforesaid, requested," but, on the contrary thereof, by deed did release J. R. from all actions, &c., whereby the plaintiff was hindered in his action, and sustained the costs thereof: and also of the rule of court to set aside the release: on demurrer to this breach, held first, that it was not necessary to allege a venue to the request stated in the declaration, the request itself being unnecessary; and secondly, that the allegation of special damage, if objectionable, ought to have been demurred to specially, and could not be taken advantage of upon general demurrer to the breach assigned. *Amey v. Brodrick*, 1 D. & R. 361; 5 B. & A. 713; 1 Chit. 329.

The defendant purchased an estate charged with an annuity to M. S., and, as part of the bargain, covenanted to pay the annuity, and to indemnify the vendor against any charge in respect of it. Breach, in a declaration on this covenant, non-payment of the annuity; without adding that the vendor had been thereby damaged:—Held, sufficient on demurrer. *Seward v. Amey*, 2 Bing. 519; 10 Moore, 55.

The defendant covenanted not to stock a hawk, otherwise than with sheep: the plaintiff, in a declaration for the breach of such covenant, averred under a videlicet that he stocked it with other cattle, on the 1st of October, 1816; and on nineteen other days, between that day and the 28th of September, 1817; the defendant pleaded that he did not stock otherwise than with sheep on the several days in the declaration mentioned:—Held, that such plea was bad on special demurrer, as it tendered an immaterial issue; and

that, if the plaintiffs went to trial, they would be obliged to prove a feeding otherwise than with sheep, on all the days mentioned in the declaration, although by the terms of such declaration they were not bound to prove such feeding on any particular day between the two periods mentioned. *Arundel (Corp.) v. Bowman*, 2 Moore, 91; 8 Taunt. 190.

However informally a breach of covenant may be assigned in a declaration, yet, after judgment by default, the court will pronounce such judgment as will meet the justice of the case, notwithstanding the informality. *Brookes v. Heberd*, 8 D. & R. 69.

#### (d) Pleas, &c.

Where in covenant a defendant craves oyer of the deed, sets it out, and pleads non est factum, the deed so set out becomes part of the declaration, and the only question at the trial upon that issue is, whether the deed set out was executed by the defendant. *Snell v. Snell*, 7 D. & R. 294; 4 B. & C. 741.

In covenant issue cannot be taken on a general averment of performance. *Sayre v. Minus*, Cowp. 578.

Performance pleaded otherwise than in the terms of the covenant itself is bad, even on general demurrer. *Scudamere v. Stratton*, 1 B. & P. 455.

Non infregit conventionem cannot be pleaded where the plaintiff assigns a breach without setting forth the particulars of the title of a third person, adding, "and so the defendant did not keep his covenant," &c. *Hodgson v. E. I. Comp.* 3 T. R. 278.

Non infregit conventionem is not an issuable plea to a breach of covenant assigned in the negative. *Bone v. Eyre*, 2 W. Black. 1312; *S. C.* nom. *Boone v. Eyre*, 1 H. Black. 273, n.

Where there are mutual covenants, one cannot be pleaded in bar of the other. *Id.*

If the plaintiff in covenant assigns as a breach that the defendant did not repair, a plea that the defendant did not break his covenant is bad, on special demurrer, although the declaration concludes by averring that so the defendant hath broken his covenant; but it would be good after arrest. *Taylor v. Needham*, 2 Taunt. 278.

If an estate be created by deed-poll, no lease, & grants, no charges, no enfcoffs, no dona, &c., &c. good pleas for a stranger to the deed. *Id.*

In covenant, the plaintiff in his declaration (per proferat) averred that the defendants, for the considerations in the deed contained, covenanted at they would not do certain acts. The defendants pleaded, that, as the performance of the covenants in the indenture mentioned would, for term, prevent them from carrying on their trade, they were in restraint of trade and illegal:—Held, that as the defendants had not sued oyer of the deed, nor demurred to the declaration on account of any supposed insufficiency of consideration in the deed, as set out therein, a court of C. P. (the covenants being reason-

able) would presume that the deed disclosed a sufficient legal consideration. *Horner v. Ashford*, 11 Moore, 91; 3 Bing. 322.

Upon a bare covenant for the payment of money, the defendant may plead a tender. *Jackson v. Clay*, 7 Taunt. 486; 1 Moore, 200.

Quere, whether on a plea of tender the defendant's perpetual readiness to pay be traversable? *Id.*

Where two or three joint covenantors suffer judgment by default on counts on several deeds, and the third defends and succeeds on some counts, the plaintiff cannot hold his judgment on those counts against the other two. *Morgan v. Edwards*, 6 Taunt. 398; 2 Marsh. 201.

#### 6. Evidence.

If a lease describe the demised land as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term. *Birch v. Stevenson*, 3 Taunt. 469.

A lessee, by executing a lease, is stopped from disputing a title of either of his lessors. *Wood v. Day*, 1 Moore, 389; 7 Taunt. 646.

Therefore in an action of covenant, for not repairing, against the assignee of the original lessee, where such assignee was bound to the same covenants as those contained in the original lease:—Held, that a declaration which stated that the plaintiffs derived their titles from two lessors only, and that two other lessors, who were also parties to the demise, had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four. *Id.*

Upon non est factum pleaded in covenant, the lessee in possession shall not controvert the title of the plaintiff, his lessor, to demise. *Friend v. Eastabrook*, 2 W. Black. 1152.

If the breach of a covenant be assigned thus, "that the defendant has not used a farm in a husband-like manner, but on the contrary has committed waste," the plaintiff cannot give evidence of the defendant's using the farm in an unhusband-like manner, if it do not amount to waste. *Harris v. Manille*, 3 T. R. 307.

Plaintiff covenanted to build two houses for 500*l.* by a certain day, and averred, in an action of covenant for the money, that the houses were built in the time: evidence that the time had been enlarged by parol agreement, and the houses finished within the enlarged time, did not support the declaration. *Littler v. Holland*, 3 T. R. 590.

A fraudulent misrepresentation of the legal effect of a deed by which a party is induced to execute, cannot be given in evidence on the plea of non est factum. *Edwards v. Brown*, 1 Tyr. 182.

In an action of covenant, under the general issue, the defendant shall not be allowed to give in evidence what amounts to a license. *Ratcliff v. Pemberton*, 1 Esp. 35—Kenyon.

If a plaintiff produce an original lease for a long term, and prove possession for 70 years, the means assignments shall be presumed. *Eeri d. Goodwin v. Baxter*, 2 W. Black. 1228.



In covenant to indemnify plaintiff from all debts due from the late partnership of plaintiff, defendant, and D. B., and from all suits, &c.: proof of a copy of the proceedings in a foreign court in a suit there, instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer, per quod a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, &c., was held to be conclusive against defendant, and that defendant was not at liberty to show that the proceedings were erroneous. *Tarleton v. Tarleton*, 4 M. & S. 20.

If a plaintiff only set out a part of a deed, he cannot use the remainder without proving it in the usual way. *Williams v. Sills*, 2 Camp. 519—Ellenborough.

Even though a plea of non est factum be not pleaded. *Id.*

In covenant which runs with the land, evidence that the defendant is in as heir will support a declaration charging him as assignee. *Derisley v. Custance*, 4 T. R. 75.

If a person is found on the premises, appearing as the tenant, it is prima facie evidence of an underletting sufficient to maintain a breach of covenant not to assign or underlet. *Doe d. Hindley v. Rikarby*, 5 Esp. 4—Alvanley.

Parol evidence is not admissible to show that a deed, which on the face of it is absolute, is merely conditional. *Anon. Loft*, 457.

But a party may show under a plea of non est factum that it was fraudulent, and so avoid it. *Id.*

Proof that the deed was delivered as an escrow is admissible in evidence, under a plea of non est factum. *Stoytes v. Pearson*, 4 Esp. 255—Ellenborough. And see B. N. P. 172.

So, is evidence of lunacy. *Faulder v. Silk*, 3 Camp. 126—Ellenborough.

So, is evidence of coverture. *Lambert v. Atkins*, 2 Camp. 272—Ellenborough.

Even though the defendant on other occasions has acted as a feme sole. *Davenport v. Nelson*, 4 Camp. 26—Ellenborough.

In covenant, the plaintiffs declared that A., B., C., and D., by indenture, demise to defendant, and made profit of the counterpart.—Plea, non est factum. After proof of the execution of the counterpart by defendant, it is competent to him to produce the demising part to show that only two of the four lessors executed it; and defendant having so done, and thereupon a nonsuit having been directed:—Held, that the nonsuit was well. *Wilson v. Woolfryse*, 6 M. & S. 341.

COVERTURE—See HUSBAND AND WIFE—PLEADING.

CREDIT—See DEBTOR AND CREDITOR—SALE.

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## CRIMINAL LAW.

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Under this title, there are a great number of cases decided on statutes now repealed, but which appear to be equally applicable to the enactments which have been substituted for those contained in such repealed statutes. There are also other cases, which, though not equally applicable to the new enactments, may still be of some use; and there are also many cases which cannot in any way apply to the present state of the law. These last are merely enumerated, without the points decided in them being stated at length.

## I. PERSONS CAPABLE OF COMMITTING CRIMES.

### 1. Infants.

If a child more than seven and under fourteen years of age, is indicted for felony, it will be left to the jury to say whether the offence was committed by the prisoner, and, if so, whether, at the time of the offence, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence. *Res v. Owen*, 4 C. & P. 236—Littledale.

### 2. Insane Persons.

[39 & 40 Geo. 3, c. 94; 56 Geo. 3, c. 117.]

The question of insanity in a prisoner is a question for the jury, and ought to be clearly made out, in order to exempt the party from punishment. *Res v. Arnold*, and other cases, 1 Russ. C. & M. 9, *et seq.*

To justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong; and that, at the time of committing the act, he did not consider that it was an offence against the laws of God and nature. *Res v. Offord*, 5 C. & P. 168—Lyndhurst.

If on a trial the defence is insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are in his judgment symptoms of insanity. *Res v. Wright*, R. & R. C. C. 456.

But *quære*, whether he can be asked whether, from other testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity; which is the very point to be decided by the jury. *Id.*

Where a prisoner's defence is insanity, a medical man who has heard the trial may be asked whether the facts proved show symptoms of insanity. *Res v. Searle*, 2 M. & M. 75—Park.

The 39 & 40 Geo. 3, c. 94, s. 1, is confined to cases of treason, and murder, and felony; and the second section extends to all offences: therefore, if, on a trial for a misdemeanour, the prisoner appears to be insane, and the jury find him so, the court may order him to be confined until his Majesty's pleasure be known. *Res v. Little*, R. & L. C. C. 430; 1 Russ. C. & M. 15.

A commitment of an insane person, under 39 & 40 Geo. 3, c. 94, s. 3, is not a commitment

in execution, and is not to be construed with the same strictness; and therefore a warrant stating that A. B. had been discovered and apprehended, under circumstances that denoted a derangement of mind and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, to wit, an assault, and that the said A. B., being brought before the justice, he committed him, was held sufficient, although it did not appear to be the name of the person whom the prisoner intended to assault, and it did not appear that the committing magistrate received any evidence on oath. *Res v. Gourlay*, 7 B. & C. 669; 1 M. & R. 619.

### 3. Presumed Coercion of Wife.

A wife cannot commit larceny in the company of her husband; for it is deemed his coercion, and not her voluntary act: yet, if she do it in his absence, and by his mere command, she is then punishable as if she were sole, and the husband, it is said, may be accessory to the wife. *Anon.* 2 East, P. C. 559.

A wife, by her husband's order and procurement, but in his absence, knowingly uttered a forged order and certificate for the payment of prize-money:—Held, that the presumption of coercion at the time of uttering did not arise, as the husband was absent, and that the wife might be convicted of the uttering, and the husband of procuring. *Res v. Morris*, R. & R. C. C. 270; 1 Russ. C. & M. 18.

The husband might, under the 43 Geo. 3, c. 113, have been tried in the same county where the principal felony was committed. *Id.* But that stat. is repealed, and this is now regulated by the stat. 7 Geo. 4, c. 64, s. 9.

On an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration:—Held, that she might be guilty, although her husband was with her when she took the oath. *Res v. Dicks*, 1 Russ. C. & M. 16.

But held, that she could not be guilty of any breach of duty, in neglecting to provide an apprentice of her husband's with sufficient food and necessaries, whereby he died, as she was only the servant of her husband. *Res v. Squire*, 1 Russ. C. & M. 16.

When the crime has been completed in his absence, no subsequent act of his can be referred to what was then done. *Res v. Hughes*, 1 Russ. C. & M. 18.

In the case of *Res v. Archer*, R. & M. C. C. R. 143, husband and wife were jointly indicted for receiving stolen goods, and both convicted:—Held, that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of the husband, the conviction of the wife was wrong, though she had been more active than her husband.

If a wife by the incitement of her husband knowingly utters in his absence a forged order and certificate for the reception of prize-money,

under 43 Geo. 3, c. 123, they may be indicted together, she as principal on the statute, he as accessory before the fact at common law. *Res v. Morris*, 2 Leach, C. C. 1096.

Strict evidence of the marriage need not be given, as cohabitation and reputation are sufficient. *Res v. Atkinson*, 1 Russ. C. & M. 20—Bayley.

If a man and woman be jointly indicted for a larceny, the latter as a single woman, it is not sufficient to entitle her to an acquittal, on the ground of coercion, to prove that both jointly committed the offence, and that she had lived with the man two years, and was reputed his wife; but such evidence must be given as to satisfy the jury that the prisoners are in fact married persons, although it is not absolutely necessary to prove the actual marriage of the parties. *Res v. Hassall*, 2 C. & P. 434—Garrow.

#### 4. *Compulsion.*

An apprehension, though ever so well grounded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person, will afford no excuse for joining or continuing with rebels. *Res v. McGrouther*, 1 East, P. C. 71.

But it is otherwise if the party join from fear of death or by compulsion. *Res v. Gordon*, 1 East, P. C. 71.

On an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 4, for breaking a threshing machine, the judge allowed a witness to be asked whether the mob, by whom the machine was broken, did not compel persons to go with them, and then compel each person to give one blow to the machine; and also, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. *Res v. Crutchley*, 5 C. & P. 133.

#### 5. *Drunkenness.*

Although voluntary drunkenness cannot excuse from the commission of crime, yet when, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration. *Res v. Grindley*, 1 Russ. C. & M. 8—Holroyd. *Res v. Barrow*, Law, C. C. 75; *Res v. Rennie*, Law, C. C. 76—Holroyd.

### II. PRINCIPAL AND ACCESSORY.

7 Geo. 4, c. 64, ss. 9, 10, 11; 7 & 8 Geo. 4, c. 29, s. 61; 7 & 8 Geo. 4, c. 30, s. 26; 9 Geo. 4, c. 31, s. 31; 1 Will. 4, c. 66, s. 25; 2 Will. 4, c. 34, s. 18.]—The stat. 7 Geo. 4, c. 64, repeals 2 & 3 Edw. 6, c. 24; and partially repeals 1 Anne, st. 2, c. 9, and 5 Anne, c. 31; and the stat. 9 Geo. 4, c. 31, repeals 43 Geo. 3, c. 113, and 3 Geo. 4, c. 38.

All present at the time of committing an offence are principals, although only one act, if they are confederated and engaged in a common design, of which the offence is part. *Res v. Tattersall*, 1 Russ. C. & M. 29—Bayley. *Res v. Dyson*, *post*, p. 733.

If several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act. *Res v. White*, R. & L. C. C. 99.

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entices the owner away, in order that the party who has obtained possession of the goods may carry them off, all will be guilty of the felony; the receipt by one, under such circumstances, being a felonious taking by all. *Res v. Standley*, 1 Russ. C. & M. 24; R. & R. C. C. 36; 2 Russ. C. & M. 127—Bayley.

Going towards a place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he was at such a distance at the time of the felonious taking as not to be able to assist in it. *Res v. Kelly*, R. & R. C. C. 61; 1 Russ. C. & M. 23; 2 Russ. C. & M. 257.

A person waiting outside of a house to receive goods, which a confederate is stealing in the house, is a principal in the theft. *Res v. Oon*, 1 R. & M. C. C. 96.

H. and S. broke open a warehouse, and stole thereout thirteen firkins of butter, &c., which they carried along the street thirty yards; they then fetched the prisoner, who was apprised of the robbery, and he assisted in carrying away the property; he was indicted for theft.—*Held*, that he was only an accessory, and not a principal. *Res v. King*, R. & R. C. C. 332.

Where the prosecutor left his goods in a cart standing in the street, and one M. came and hid the cart away, and, having taken it a short distance, delivered it to another man, with directions to take it to his, M.'s house. Upon the cart arriving at the house, one S., who was at work in the cellar, having directed a companion to blow out the light, came up and assisted in removing the goods from the cart.—*Held*, that S. could not be indicted as a principal. *Res v. McKinn*, R. & R. C. C. 333, n.—Lawrenson. And see *Res v. Dyer*, 2 East, P. C. 767.

It is not sufficient to make a man a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn where they put up, joined him again in the street after the uttering at a little distance, and ran away when the utterer was apprehended. *Res v. Davis*, 1 Russ. C. & M. 22; R. & R. C. C. 113—Bayley.

For circumstances that will amount to a constructive presence at common law will not be sufficient for the same purpose upon an indictment under a statute. *Id.*

Where three persons agreed to utter a forged note, and one uttered it at Gosport, and the other two, by previous concert, waited at Portsmouth, they were held to be accessories. *Res v. Soares*, 1 Russ. C. & M. 32; 2 East, P. C. 974; R. & R. C. C. 25. And see *Res v. Elze*, R. & R. C. C. 142; 1 Russ. C. & M. 86.

If two persons be indicted for murder, the one as a principal in the first degree, and the other as being present, aiding and assisting to commit it, the jury may find the principal in the first degree not guilty, and convict the principal in the second degree. *Res v. Taylor*, 1 Leach, C. C. 360. *S. C. nom. Shaw's case*, 1 East, P. C. 351.

A person indicted as an accessory before the fact cannot be convicted of that charge upon evidence proving him to have been present, aiding and abetting. *Res v. Gordon*, 1 Leach, C. C. 515; 1 East, P. C. 359.

An accessory may controvert the guilt of the principal, notwithstanding the record of his conviction. *Res v. Smith*, 1 Leach, C. C. 288.

Although a statute which creates a new felony will attach to that felony all the common-law incidents to felony, so that accessories thereon will be included, yet it will go no further; and a receiver of stolen goods, not being a common-law accessory, is not included. *Res v. Sadi*, 1 Leach, C. C. 468; 2 East, P. C. 748.

Therefore, where A. G. was convicted of stealing promissory notes on 2 Geo. 2, c. 25, s. 3, and her husband of receiving them on 3 W. & M. c. 1, s. 4.—Held, that the conviction of the husband was wrong, he not being a common-law accessory. *Res v. Gase*, R. & R. C. C. 384. This is now regulated by the stat. 7 & 8 Geo. 4, c. 29, s. 54.

Persons present, aiding and abetting, are principals in the second degree, and are within the Riot Act, and ousted of clergy. *Res v. Royce*, Burr. 2073.

If a charge against an accessory is, that the principal felony was committed by persons unknown, it is no objection that the same grand jury have found a bill imputing the principal felony to J. S. *Res v. Bush*, R. & R. C. C. 372.

An indictment against an accessory to a felony, committed by a person unknown, cannot be supported, if it appears that the principal felon acknowledged his guilt before the grand jury. *Res Walker*, 3 Camp. 264—Le Blanc.

On an indictment for murder, if the jury find special verdict, it is necessary, in order to bet principals in the second degree, to state her, 1st, that they were actually present; or, 2dly, some acts done by them at the very time, such unavoidably show that they were present; 3rdly, that they were of the same party, on the same pursuit, and under the same engagements and expectation of mutual defence and support, with the person who did the fact. *Res Northwick*, 1 Dougl. 207.

It is not essential that there should have been direct communication between an accessory and the fact and the principal felon. It is enough if the accessory direct an intermediate

agent to procure another to commit the felony; and it will be sufficient even if the accessory does not name the person to be procured, but merely directs the agent to employ some person. *Res v. Cooper*, 5 C. & P. 535—Parke. See *Res v. Morris*, *Res v. Giles*, *Res v. Badcock*, and *Res v. Stewart*, div. Foreman, LXVII., div. 5.

An averment of the conviction of the principal is supported by the production of the record, however erroneous the judgment may be. *Res v. Baldwin*, 3 Camp. 265—Thompson.

On an indictment against an accessory, a confession by the principal is not admissible in evidence to prove the guilt of the principal. *Res v. Turner*, M. C. C. R. 347.

It must be proved aliunde, especially if the principal be alive. *Id.*

Seemingly, that a conviction on a plea of guilty will not be evidence against the accessory to prove the principal guilty. *Id.*

Nor, seemingly, will a conviction on a plea of not guilty. *Id.*

A. and B. were indicted for larceny as principals; A. had been sent by his master to deliver goods to C. He only delivered part, and the rest was stolen, and found in the possession of B.:—Held, that it was a question for the jury whether B. was present at the time when A. separated the stolen portion from the bulk; for that, if he was, both were rightly charged as principals. *Res v. Grove*, 6 C. & P.—Gurney.

### III. TREASON.

#### 1. Offence.

[25 Edw. 3 st 5, c. 2; 1 M. sess. 1, c. 1; 36 Geo. 3, c. 7 (made perpetual by 57 Geo. 3, c. 6). As to Papists, 23 Eliz. c. 1; 3 Jac. 1, c. 4, s. 22; 5 Eliz. 1; 1 Ann. st. 2, c. 17, s. 3; 6 Ann. c. 7.]

It will be treason in a foreigner resident here, or who is himself abroad, if his family reside here, to aid even his own countrymen in acts or purposes, of hostility, whether his own sovereign be at enmity or peace with ours, for it is a breach of the local allegiance due from him. *Res v. Delamotte*, 1 East, P. C. 53.

An apprehension, though ever so well grounded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person, will afford no excuse for joining or continuing with rebels. *Res v. McGrowther*, 1 East, P. C. 71.

But it is otherwise if the party join from fear of death, or by compulsion. *Res v. Gordon*, 1 East, P. C. 71.

And there is no distinction between serving as an officer or private man. *Id.*

An overt act of piracy only may show a traitorous intent against the king, in treason for adhering to the king's enemies, if the indictment allege the intent to be to seize the ships of the king as well as his subjects. *Res v. Evans*, 1 East, P. C. 80; 2 East, P. C. 798.

Indictment for high treason in compassing

the king's death, and adhering to his enemies. Overt act, conspiring with others to send intelligence to the enemy concerning the disposition of the king's subjects in case of an invasion. *Rex v. Stone*, 6 T. R. 527.

Any intelligence sent to the enemy in order to serve them in shaping their attack or defence, though the purport of it may be to dissuade them from an invasion, is high treason. *Id.*

Though the intelligence be intercepted. *Rex v. Henscy*, 2 Ld. Ken. 306; 1 Burr. 642.

It is high treason to attempt, by intimidation and violence, to compel the repeal of a law. *Rex v. Lord George Gordon*, 2 Dougl. 590.

### 2. Indictment, Trial, and Judgment.

[35 Hen. 8, c. 2; 1 Edw. 6, c. 12, s. 22; 5 & 6 Edw. 6, c. 11, s. 12; 1 & 2 P. & M. c. 10. ss. 7 & 8; 7 & 8 Will. 3, c. 3; 7 Ann. c. 21, s. 5; 6 Geo. 3, c. 53, s. 3; 30 Geo. 3, c. 48; 39 & 40 Geo. 3, c. 93; 54 Geo. 3, c. 146; 6 Geo. 4, c. 50, s. 21.]

A letter sent by one of the conspirators in pursuance of the common design with a view of reaching the enemy, is evidence against all engaged in the same conspiracy. *Rex v. Stone*, 6 T. R. 527.

A person indicted for high treason is entitled, under stat. 7 Ann. c. 21, s. 14, to a copy of the indictment, and a list of the witnesses for the crown, and of the jurymen who are to be returned on the panel, ten days before his arraignment. *Rex v. Lord George Gordon*, 2 Dougl. 591.

Such list may properly describe a party as lately of such a place. *Rex v. Watson*, 2 Stark. 116—Ellenborough.

A paper found in the possession of one of the conspirators, containing intelligence proved to have been collected by the prisoner, which paper was in the hand-writing of the prisoner's clerk, is evidence against the prisoner. Aliter, of a paper in the same hand-writing not appearing to have any connexion with the prisoner. *Rex v. Stone*, 6 T. R. 529.

If one overt act be proved by one witness in the county in which the trial is had, which gives the grand jury jurisdiction to inquire, another overt act of the same species of treason proved by another witness in a different county will make two witnesses within stat. 7 Will. 3, c. 3. *Rex v. Jellias*, 1 East, P. C. 130.

A conviction of high treason may be upon the evidence of one witness only, in all cases where there is no corruption of blood. *Rex v. Gahagan*, 1 Leach, C. C. 42; 1 East, P. C. 129.

As to evidence of treason, see *Rex v. Horn Tooke*, 1 East, P. C. 60, 99; 2 Leach. 823, c.

If a true bill be found against a person for high treason, the judge will, on the application of the counsel for the crown, order the sheriff to furnish the solicitor to the treasury with a list of the persons to be summoned on the jury, that a copy of it may be delivered to the prisoner. *Rex v. Collins*, 5 C. & P. 305—Boanquet and Gurney.

Seemle, that counts charging a party with

high treason in "compassing, &c., the main and wounding" of his majesty, and with "compassing, &c., the wounding" of his majesty, are bad. *Id.*

The prisoner, in a case of high treason, has a right to address the jury in addition to the speeches of his counsel; and, seemle, that but the prisoner's counsel have a right to address the jury, although there be no evidence on the part of the defence. *Id.*

## IV. OFFENCES RELATING TO THE COIN.

### 1. Coining.

[2 Will. 4, c. 34, s. 3.]

By the stat. 2 Will. 4, c. 34, the following statutes relating to the coin are either wholly or partially repealed, as under-mentioned, viz.

*Statutes totally repealed.*—Stat. de moneta rego, 21 Edw. 1, stat. 4, 5 & 6; 27 Edw. 1, stat. 1; 9 Edw. 3, stat. 2; 17 Edw. 3; 25 Edw. 3, stat. 5, c. 12 & 13; 3 Hen. 5, stat. 2, c. 6 & 7; 19 Hen. 7, c. 5; 5 & 6 Edw. 6, c. 19; 1 M. stat. 2, c. 6; 1 & 2 Ph. & M. c. 11; 5 Eliz. c. 11; 14 Eliz. 3; 18 Eliz. c. 1; 8 & 9 Will. 3, c. 26; 9 & 10 Will. 3, c. 21; 1 Ann. stat. 1, c. 9; 15 Geo. 2, c. 28; 11 Geo. 3, c. 40; 13 Geo. 3, c. 71; 7 Geo. 4, c. 9.

*Statutes partially repealed.*—18 Edw. 3, stat. 1; 25 Edw. 3, stat. 5, c. 2, (the statute of treasons), only repealed as to the coin; 27 Edw. 1, stat. 2, c. 14; 6 & 7 Will. 3, c. 17; 7 Ann. c. 21; 7 Ann. c. 25; 37 Geo. 3, c. 126; 56 Geo. 3, c. 68, 3 Geo. 4, c. 114, (hard labour act), only repealed as to uttering counterfeit coin.

*By the stat. 2 Will. 4, c. 34, acts relating to the coin passed in the under-mentioned Statute Parliaments are repealed.*—6 Parl. Jac. 2; 3 Parl. Jac. 3; 8 Parl. Jac. 3; 7 Parl. Jac. 6; 7 Parl. Jac. 5; 9 Parl. Mary; 9 Parl. Mary; 1 Parl. Jas. 6; 1 Parl. Jac. 6; 1 Parl. Will. (8).

*And by the stat. 2 Will. 4, c. 34, the under-mentioned Irish statutes are totally repealed.*—1 Edw. 4, c. 3; 28 Eliz. c. 6; 8 Ann. c. 6; 24 Geo. 3, c. 50; 26 Geo. 3, c. 39.

And by the same stat. the Irish statute 1 Geo. 1, c. 9, is partially repealed.

It is not necessary, to constitute the offence of coining, that there should be an impression on the counterfeit, if it resemble the common coin. *Rex v. Welch*, 1 East, P. C. 87, 161; 1 Leach, C. C. 364.

A counterfeit shilling produced in colour, although it is quite smooth, and there is no impression of any sort discernible on it, will support an indictment for counterfeiting to the semblance of the legal coin. *Id.*

To make a round blank like the smooth shillings in circulation, the original impression on which has been effaced by wear, is contributing to the likeness and similitude of the good legal and current coin of the realm called a shilling. *Rex v. Wilson*, 1 Leach, C. C. 285.

Forging the impression of the current coin on a piece of metal so irregular that it will not pass

is not high treason, for the crime is incomplete. *Rex v. Varley*, 1 Leach, C. C. 76; 1 East, P. C. 164; 2 W. Black. 682. This is now regulated by the stat. 1 Will. 4, c. 34, s. 3.

Forging the impression of money on an irregular piece of metal, without finishing it, so as to make it current, is an incomplete crime, and not high treason. *Rex v. Varley*, 2 W. Black. 682.

It is a question of fact whether or not counterfeit coin was made to resemble the real coin. *Rex v. Welch*, 1 East, P. C. 87, 164; 1 Leach, C. C. 364.

Proof that a man occasionally visited coiners; that the rattling of money was occasionally heard with them; that he was seen counting something, as if it was money, when he left them; that on coming to their lodgings just after the apprehension he endeavoured to escape, and was found to have had money about him; is not sufficient evidence to implicate him as counselling, procuring, aiding, and abetting the coining. *Rex v. Isaacs*, 1 Russ. C. & M. 62—Bayley.

## 2. Colouring.

1 Will. c. 34, s. 3.—By this statute the stat. 8 & 9 Will. 3, c. 26, and 15 Geo. 2, c. 28, are wholly repealed.

Preparing blanks with such materials, as when rubbed will make them resemble the real coin, was a colouring within the stat. 8 & 9 Will. 3, c. 26, before the resemblance has been produced by such friction. *Rex v. Case*, 1 East, P. C. 165; 1 Leach, C. C. 154, n.

So, bringing to the surface the latent silver in a blank of mixed metal, by dipping it in aqua-fortis, which corrodes the base metal, was a colouring within that statute. *Rex v. Lavey*, 1 East, P. C. 166; 1 Leach, C. C. 153. And see *Rex v. Harrie*, 1 Leach, C. C. 135.

## 3. Implements.

1 Will. 4, c. 34, s. 10.—By this stat. the stat. 8 & 9 Will. 3, c. 26, is wholly repealed.

A press for coinage was a tool or instrument within that branch of stat. 8 & 9 Will. 3, c. 26, which made it treason to have the same knowingly in the party's custody. *Rex v. Bell*, 1 East, P. C. 169.

Semble, that having such in possession for the purpose of coining foreign gold coin not current here, would be a sufficient excuse to take the case out of the statute. *Id.*

Having knowingly in possession a punchcon for the purpose of coining, was within the stat. 8 & 9 Will. 3, c. 26, though that alone, without the counter punchcon, would not make the figure, &c. *Rex v. Ridgeley*, 1 East, P. C. 171; 1 Leach, C. C. 189.

Though a punchcon for coining had not the letters:—Held, that it was sufficiently described as an indictment as a punchcon which would impress the head side of a shilling. *Id.*

On an indictment for having in possession a die made of iron and steel, proof of a die made of

either material, or of both, will be sufficient; for it is immaterial to the offence of what the die is made. *Rex v. Oxford*, 1 Russ. C. & M. 76; R. & R. C. C. 382; S. P. *Rex v. Phillips*, R. & R. C. C. 369—Bayley.

A collar of iron for graining the edges of counterfeit money, was an instrument within the stat. 8 & 9 Will. 3, c. 26, s. 1, although it was to be used in a coining press. *Rex v. Moore*, 2 C. & P. 235; R. & M. C. C. 122—Burrrough.

A mould of lead, having the stamp of one side of a shilling, held to be a tool or instrument within the 8 & 9 Will. 3, c. 25. *Rex v. Lennard*, 2 W. Black. 807.

A prisoner may be indicted for having the unlawful custody of a mould; for a mould being mentioned in the first clause of the stat. 8 & 9 Will. 3, c. 26, it is to be considered as included in the general words "tool or instrument" in the subsequent clause. *Rex v. Lennard*, 1 Leach, C. C. 90; 1 East, P. C. 170; 2 W. Black. 807.

It is a misdemeanour at common law to have tools for coining in possession with intent to use them. *Rex v. Sutton*, 1 East, P. C. 172—Hardwicke diss.

The cases of *Rex v. Oxford*, 1 Russ. C. & M. 76; R. & R. C. C. 382; S. P. *Rex v. Phillips*, R. & R. C. C. 369; *Rex v. Berker*, 1 Russ. C. & M. 79; S. P. *Rex v. Willace*, 1 East, P. C. 186; related to the time of the commencement of the prosecution, which is now not material, the stat. 8 & 9 Will. 3, c. 26, being repealed by the 2 Will. 4, c. 34.

## 4. Selling counterfeit Coin at less than its Denomination imports.

2 Will. 4, c. 34, s. 6.—By this stat. the stat. 8 & 9 Will. 3, c. 26, is wholly repealed.

An indictment on 8 & 9 Will. 3, c. 26, s. 6, stated that five counterfeit shillings were paid and put off for two shillings; the proof was that five bad shillings were sold for half a crown:—Held, that the variance was fatal, as it was a contract which must be correctly proved as laid. *Rex v. Joyce*, Car. Cr. Law, 164—Thompson and Heath.

In an indictment for putting off counterfeit money at a lower rate than its denomination imports, it was alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings "for the sum of five shillings;" the proof was, that the prisoner said he would let the witness have a bad sovereign at four shillings, and three bad shillings at one shilling, and the witness paid for them with two good half crowns:—Held, that this proof supported the allegation. *Rex v. Hedges*, 3 C. & P. 410—Vaughan.

Where, on a bargain for the sale of counterfeit money, the price had been agreed upon and the prisoner had produced the coin, but the complete transfer was prevented by the appearance of the police officers:—Held, that it did not amount to a putting off within stat. 8 & 9 Will. 3, c. 26. *Rex v. Woodbridge*, 1 Leach, C. C. 307; 1 East, P. C. 179.



An indictment on 8 & 9 Will. 3, c. 26, s. 6, for putting off bad money, must have stated that it was "not cut in pieces." *Rex v. Palmer*, 1 Leach, C. C. 102. *But, semble, that that is not now necessary.*

In an indictment for putting off counterfeit money, the names of the persons to whom it was put off ought to be set out. *Anon.* 1 East, P. C. 180—Holt.

The punishment under statutes 8 & 9 Will. 3, c. 26, and 11 Geo. 3, c. 40, was burning in the hand, and imprisonment not exceeding a year, and that under stat. 18 Eliz. c. 7, s. 30. *Rex v. West*, 1 East, P. C. 181. But it is now regulated by the stat. 2 Will. 4, c. 34.

The case of *Rex v. Bunning*, 1 East, P. C. 180; 2 Leach, C. C. 621; related to the words milled money, which do not, occur in the stat. 2 Will. 4, c. 34.

#### 5. Having base Coin.

2 Will. 4, c. 34, s. 8.—Having counterfeit silver in possession, with intent to utter it as good, was no offence before the stat. 2 Will. 4, c. 34, s. 8. *Rex v. Heath*, R. & R. C. C. 184; *S. P. Rex v. Stewart*, R. & R. C. C. 288.

And the having such silver in possession, knowingly, designedly, and illegally, knowing it to be counterfeit, cannot be considered an act. *Id.*

But getting it into possession with intent to utter it is an offence. *Id.*

Procuring base coin, with intent to utter it as good, is a misdemeanour. *Rex v. Fuller*, R. & R. C. C. 308.

Having in possession a large quantity of base coin is evidence of having procured it with intent to utter it, unless there are other circumstances to induce a belief that the defendant was the maker. *Id.*

Having the possession of counterfeit money, with intention to pay it away as and for good money, was an indictable offence at common law. *Rex v. Parker*, 1 Leach, C. C. 41. *But see the stat. 1 Will. 4, c. 34.*

#### 6. Uttering.

##### (a) After Conviction.

2 Will. 4, c. 34, s. 7.—By this stat. the stat. 15 Geo. 2, c. 28, is wholly repealed.

An indictment on 15 Geo. 2, c. 28, for uttering bad money by the common trick called "ringing the changes," was good, although it did not state that it was uttered in payment as and for good and lawful money: for the words of the statute are in the disjunctive "utter or tender in payment." *Rex v. Franks*, 2 Leach, C. C. 644.

An indictment on stat. 15 Geo. 2, c. 28, s. 3, for uttering after a conviction for a double offence, need not have averred that defendant was adjudged to be a common utterer; it was sufficient if it stated that he was tried and convicted of uttering to A., and of uttering on the same day to B., and adjudged to be imprisoned a year. *Rex v. Booth*, R. & R. C. C. 7.

An indictment on 15 Geo. 2, c. 28, s. 3, for feloniously uttering counterfeit coin after two convictions and judgments for misdemeanours on the same statute, must have set out the former convictions and judgments with a prout patet per recordum. *Rex v. Turner*, 1 R. & M. C. C. 47.

An indictment charging that the defendant was before that time indicted for uttering base coin, knowing it to be false and counterfeit, and having about him at the time in his custody and possession other base coin, on which he was in due form of law tried and convicted, and adjudged by the court to be imprisoned for a year, and find sureties for two years more; and then averring, that, having been so convicted as a common utterer of false money, he afterwards knowingly uttered other base money, is good, without averring that the court before whom he was tried and convicted for the first offence adjudged him to be a common utterer of false money; though the stat. 15 & 16 Geo. 2, c. 28, said, that such a person as is described in the first indictment shall be deemed and taken to be a common utterer, &c. *Rex v. Michael*, 2 Leach, C. C. 988; 1 East, P. C. Add. xix.; R. & R. C. C. 29.

##### (b) Twice within Ten Days.

2 Will. 4, c. 34, s. 7.—By this statute the stat. 15 Geo. 2, c. 28, is wholly repealed.

Charging two utterings on the same day, and in a different count, would not have warranted judgment on 15 Geo. 2, c. 28, s. 3, as for two utterings on the same day, there being no precise averment of that fact. *Rex v. Tandy*, 1 East, P. C. 182; 2 Leach, C. C. 833.

A conviction on 15 Geo. 2, c. 28, for two utterings on the same day, would have warranted judgment of a year's imprisonment, though the indictment charged the first uttering on 14th February, and that on the said 14th February he uttered, &c.; for, being a material averment, it would be taken to have been proved that both utterings were on the same day. *Rex v. Munn*, 2 Leach, C. C. 923; 1 East, P. C. Add. xiii.; Russ. C. & M. 83.

It is not necessary, in an indictment charging the offence of repeated uttering within ten days, to show that in the original indictment the offender was adjudged a common utterer. *Rex v. Michael*, R. & R. C. C. 29; 1 East, P. C. Add. xix.; 2 Leach, C. C. 98.

In an indictment on the 15 Geo. 2, c. 28, s. 3, it was not necessary to aver that the defendant is a common utterer of false money. *Rex v. Smith*, 2 B. & P. 127. *But see the stat. 2 Will. 4, c. 34, s. 7, which relates to this offence.*

##### (c) Uttering while having other Counterfeit Money.

2 Will. 4, c. 34, s. 7.—By this statute the stat. 15 Geo. 2, c. 28, is wholly repealed.

Indictment on that statute charged that defendant uttered a counterfeit half-crown to I. E. and that at the time he so uttered it he had about him another counterfeit half-crown; but it did not conclude by averring that he was a common utterer of false money:—Held, that such an

ment was unnecessary, and that the indictment was sufficient to warrant the greater punishment of the third section of the statute *Rex v. Smith*, R. & R. C. C. 5; 2 Leach, C. C. 858; 1 East, P. C. 183; 2 B. & P. 127.

Seem, that such an averment was a necessary conclusion of law from the facts stated in the indictment, and not necessary to be averred. *Rex v. Smith*, R. & R. C. C. 5; 2 Leach, C. C. 858; 1 East, P. C. 183; 2 B. & P. 127.

If two prisoners are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession, it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of the money are proved to be counterfeit. And if it appear that two prisoners went to a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, both may be convicted; the uttering and the possession being both joint! *Rex v. Skerrett*, 2 C. & P. 427—Garrow.

Where a man and woman were indicted for uttering a bad shilling to M. B., and having in their possession another bad shilling at the time, and the uttering was by the woman alone in the absence of the man:—Held, that the man was not liable to be convicted with the actual utterer, although proved to be the associate of the woman on the day of uttering, and to have had other bad money about him for the purpose of uttering; and, secondly, that the woman could not be convicted of the second offence of having other bad money in her possession, on the evidence of her associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering. *Rex v. Elze*, R. & R. C. C. 142. See *Rex v. Smith*, *supra*.

### 7. Copper Coin.

2 Will. 4, c. 34, s. 12.]—By this statute the act 11 Geo. 3, c. 40, is wholly, and the stat. 37 Geo. 3, c. 126, partially, repealed.

The punishment under 11 Geo. 3, c. 40, for counterfeiting the copper moneys, was only a year's imprisonment, which was founded on the general stat. 18 Eliz. c. 7, s. 3. *Rex v. West*, 1 East, P. C. 162. But it is now regulated by the Will. 4, c. 34, s. 12.

Uttering and tendering in payment counterfeit copper money was not an indictable offence. *Rex v. Cironen*, 1 Russ. C. & M. 79, 82, 1 East, C. 182, before the stat. 2 W. 4, c. 34, but is made so by s. 12 of that act.

### 3. Exchanging Coin at higher than its Value.

The exchanging guineas for bank-notes, taking a guinea in such exchange at a higher value than they were current for by the king's proclamation, is not an offence against the stat. 5 & 6 Geo. 6, c. 19. *Rex v. De Yonge*, 14 East, 402. That statute is repealed, as are sects. 13, 14, 15, 16, of the stat. 56 Geo. 3, c. 68.

### 9. Competency of Witnesses.

The record of the conviction and judgment must be produced before a convict for coining can be a witness. *Rex v. Collins*, 2 Leach, C. C. 829.

### V. OFFENCES RELATIVE TO THE CUSTOMS.

[6 Geo. 4, c. 108; 7 Geo. 4, c. 48; 2 & 3 Will. 4, c. 84; 3 & 4 Will. 4, c. 51, 59.]

To constitute the offence of shooting at a vessel of the customs, and also at an officer of the same on the high seas, under stat. 52 Geo. 3, c. 143, the shooting must be malicious. Therefore, if a custom-house vessel chase a smuggler, and fire upon her without hoisting such a pendant and ensign as the 56 Geo. 3, stat. 2, c. 104, s. 8, requires, the returning of the fire will not be malicious. *Rex v. Reynolds*, R. & R. C. C. 465.

[These statutes, as well as those on which these cases were decided, are now repealed, but it is material to consider whether they are not applicable to the enactments now in force.]

There must have been a deliberate assembling to bring the offenders within the penalty of the Smuggling Statute, 19 Geo. 2, c. 34. *Rex v. Hutchinson*, 1 Leach, C. C. 339; *S. P. Rex v. Spice*, 1 Leach, C. C. 343, n.

To bring offenders within the penalties of that statute they must have been armed with offensive weapons. *Id.*

An information stating that H. was a person employed in the service of the customs, that it was his duty, as such person so employed, to seize certain goods, and that defendant offered to bribe H. to violate such duty:—Held bad in arrest of judgment for not stating the facts out of which the legal duty arose. *Rex v. Everett*, 2 M. & R. 35; 8 B. & C. 114.

A common horsewhip is not an offensive weapon. *Rex v. Fletcher*, 1 Leach, C. C. 23, 342, n.; 2 Str. 1166.

Nor a hatchet caught up accidentally in the heat and hurry of the affray. *Rex v. Rose*, 1 Leach, C. C. 342, n.

Nor large sticks about three feet long with large knobs at the end, with several prongs, the natural growth of the stick arising out of them. *Rex v. Ince*, 1 Leach, C. C. 342, n.

Nor large sticks such as people usually ride with to defend themselves. *Rex v. Cosans*, 1 Leach, C. C. 342, n.

But bludgeons, properly so called, clubs, and anything that is not in common use for any other purpose but a weapon, are clearly offensive weapons within the act. *Id.*

Seem, that bats, which are long poles used by smugglers to carry tubs of spirits, are not offensive weapons within the meaning of 6 Geo. 4, c. 108, s. 56. *Rex v. Noakes*, 5 C. & P. 326—Littledale, Bolland, and Alderson.

It is not necessary to constitute a felony within the act that every individual assembled should

be armed. *Rez v. Franklyn*, 1 Leach, C. C. 255, 343, n.; *Cald*. 244.

An indictment lay to the quarter sessions for lighting fires on the coast, contrary to stat. 47 Geo. 3, sess. 2, c. 66; and if removed, and the defendant be tried and convicted before a judge at Nisi Prius, this court awarded sentence. *Rez v. Cock*, 4 M. & S. 71.

A vessel liable to forfeiture under 6 Geo. 4, c. 108, s. 3, was seized while entering the harbour of A., but within the jurisdiction of the justices of B. A person liable to apprehension under sect. 49 of that act being found on board, was arrested there, and carried to A., and convicted by two justices of that place under sect. 74 of that act:—Held, first, that the person was, in the absence of evidence as to the time of his going on board, properly convicted as having been on board on the high seas; and, secondly, that the justices of A. had jurisdiction. *Rez v. Nunn*, 3 M. & R. 75.

#### VI. OFFENCES RELATIVE TO QUARANTINE, AND EXPOSURE OF INFECTED PERSONS.

6 Geo. 4, c. 78.]—Disobeying the orders of the Privy Council with respect to the performance of quarantine is an offence at common law. *Rez v. Harris*, 2 Leach, C. C. 549.

The 26 Geo. 2, c. 6, s. 1, enacts, that all persons going on board ships coming from infected places shall obey such orders as the king in council shall make, without annexing any particular punishment; the disobedience of such an order is an indictable offence, and punishable as a misdemeanour at common law. *Rez v. Harris*, 4 T. R. 202.

A person may be indicted for unlawfully and injuriously carrying a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects. *Rez v. Vanzindilla*, 4 M. & S. 73.

It is an indictable offence in an apothecary unlawfully and injuriously to inoculate children with the small-pox, and, while they are sick of it, unlawfully and injuriously to cause them to be carried along a public street. *Rez v. Burnett*, 4 M. & S. 272.

#### VII. OFFENCES RELATING TO STAMPS.

##### 1. Forgery.

[10 Ann. c. 97; 12 Geo. 3, c. 48; 13 Geo. 3, cc. 56, 59; 24 Geo. 3, sess. 2, c. 53; 27 Geo. 3, c. 13; 38 Geo. 3, c. 69; 44 Geo. 3, c. 98; 52 Geo. 3, c. 143; 55 Geo. 3, cc. 184, 185; 56 Geo. 3, c. 56; 6 Geo. 4, c. 119; 3 & 4 Will. 4, c. 97.]

Delivering a box, containing, amongst other things, forged stamps, to the party's own servant, that he may carry them to an inn, to be forwarded by the carrier to a customer in the country, is an uttering. *Rez v. Collicot*, R. & R. C. C. 319; 2 Leach, C. C. 1048; 4 Taunt. 300.

The offence of uttering a forged stamp will be complete, although, at the time of uttering, certain parts of the stamp are concealed, but all the parts that are visible are like a genuine stamp, though the part concealed is unlike a genuine stamp. And such an offence is indictable under the 44 Geo. 3, c. 98. *Id*.

Quære, whether a person who takes some of the stamps from a writ, and fixes them to another writ of the same kind, and then sells it for the purpose of its being used by such person as might buy it from his vendee, is within the 12 Geo. 3, c. 48? *Rez v. Field*, 1 Leach, C. C. 33.

An indictment for forging a stamp on foreign muslins, on stat. 27 Geo. 3, c. 13, s. 35, stating the duty to be chargeable, for and in respect of foreign muslins, is sufficient, although the words of the statute imposing the duty are "for or upon" in some clauses, "for" in others, "on" in others, and "upon" in others. *Rez v. Hall*, 1 East, P. C. 895.

Where a person delivers forged stamps to his servant, to convey to a certain inn, and the place of delivery and the inn are in different counties:—Held, that indictments for uttering such forged stamps should be laid in the county where the delivery was. *Rez v. Collicot*, R. & R. C. C. 212; 2 Leach, C. C. 1048; 4 Taunt. 300.

If a person engraves a counterfeit stamp similar in some parts, dissimilar in others, to the legal stamp, and, cutting out the dissimilar parts, alters the similar parts as genuine, concealing the space whence the dissimilar part is cut out; this amounts to a forgery and uttering. *Id*.

In describing the offence of forging a stamp, it is enough to describe it as a stamp provided and used in pursuance of an act of parliament, without setting out the impression or inscription, or naming the amount of duty demanded thereby. *Id*.

An indictment on the 44 Geo. 3, c. 98, for forging stamps, need not aver that the commissioners had provided a certain stamp, nor describe what that stamp is. *Id*.

##### 2. Having false stamped Paper.

Where on an indictment for having in possession certain reams of paper, with counterfeit marks, and impressions of certain stamps used to denote the duty imposed in respect of paper on the covers or wrappers thereof, it was proved that the paper came from the prisoner at Exeter, and was brought from thence by his servant to Topsham, in the county of Devon, and seized by the custom officer on board a vessel at Topsham:—Held, that this was in law a custody and possession in the prisoner in the county of Devon sufficient to maintain the indictment in that county. *Rez v. Pim*, R. & R. C. C. 425.

##### 3. Transposing Stamps.

55 Geo. 3, c. 184, s. 7.]—It was the duty of the prisoner, who was a clerk in the stamp-office, to cut off the corners of parchments which bore the blue paper stamps allowed for as specified by the

commissioners of stamps, and to put the blue paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separated a blue paper stamp from the small piece of parchment to which it had been glued, and glued it to a new skin of parchment, on which the words "This indenture" had been written. The jury found, that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper stamp from the small piece of parchment; and that he then intended to apply the stamp to a parchment intended to be used as an indenture:—Held, that this was a capital offence. And it being uncertain whether the stamp so separated was impressed before or after the passing of the stat. 55 Geo. 3, c. 184, it was held, that the party might be properly convicted on a count stating the stamp to be the impression of a die made and used "in pursuance of the statute made and provided for denoting a certain duty, being one of those under the management of the commissioners of stamps." *Rez v. Smith*, 5 C. & P. 107—Littledale, Vaughan, and Bosanquet; M. C. C. 314.

A variance on the 13 Geo. 3, c. 56, for removing the silver mark from one article to another, between a lion rampant and a lion passant, held fatal. *Rez v. Lee*, 1 Leach, C. C. 416.

#### VIII. OFFENCES RELATING TO THE POST-OFFICE.

[5 Geo. 3, c. 25; 7 Geo. 3, c. 50; 42 Geo. 3, c. 31; 52 Geo. 3, c. 143; 5 Geo. 4, c. 20; 2 Will. 4, c. 4.]

The stat. 7 Geo. 3, c. 50, s. 2, does not extend to servants of the post-office, and therefore a conviction of one of them for stealing out of the post-office a letter sent to be delivered by the post was held wrong. *Rez v. Pooley*, 1 East, P. C. Add. xvii.; 2 Leach, C. C. 887, 901, 904; 1 B. & P. 311; R. & R. C. C. 31.

A draft purporting to be drawn in London, but actually drawn in Maidstone, without any stamp on it, contrary to stat. 31 Geo. 3, c. 25, s. 4, is not such a draft for the payment of money as will make a servant of the post-office, who steals it out of a letter intrusted to his care, liable to the punishment inflicted on servants of the post-office by 7 G. 3, c. 50, s. 1. *Id.*

Such draft is admissible in evidence for the purpose of proving the fact of stealing the letter. *Id.*

It is not necessary, in order to ground a conviction on stat. 7 Geo. 3, c. 50, that the person employed by the post-office should have taken the oath mentioned in stat. 9 Anne, c. 10, s. 41. *Rez v. Clay*, 2 East, P. C. 580.

Quære, whether one indicted as a charger and order of letters may not be convicted as a sorter? *Rez v. Shaw*, 2 East, P. C. 580; 2 W. Black. 789; 1 Leach, C. C. 79.

But if acquitted on the special count, he can-

not be convicted on a general count, as a person employed in the post-office, on evidence that he was no otherwise employed than as a sorter. *Id.*

If an indictment on the 7 Geo. 3, c. 50, s. 1, state the prisoner to have been employed as a post-boy and rider in the business of the post-office, proof that he was employed as post-boy is sufficient. *Rez v. Ellins*, R. & R. C. C. 188.

A bill of exchange may be laid as a warrant for the payment of money within the stat. 7 Geo. 3, c. 50. *Rez v. Willoughby*, 2 East, P. C. 581.

To steal a letter out of the post-office containing money, but no security for money, is not an offence within the 7 Geo. 3, c. 50, if the offender be a servant of the post-office. *Rez v. Scott*, 1 Leach, C. C. 106; 2 East, P. C. 582.

A person employed by the post-office as a stamper or facer of letters, who embezzles letters for the purpose of defrauding the post-office of the postage, is not within 7 Geo. 3, c. 50. *Rez v. Sloper*, 1 Leach, C. C. 81; 2 East, P. C. 583.

A letter-carrier, taking letters out of the office, intending to deliver them to the owners, but to embezzle the postage, cannot be indicted under stat. 7 Geo. 3, c. 50, s. 2. *Rez v. Howatt*, 2 East, P. C. 604; 1 Leach, C. C. 83, n.

If a letter-carrier secretes two letters sent by the post on different days, each letter containing half of the same bank-note, it is a capital offence within stat. 7 Geo. 3, c. 50; and he may be indicted "that he, having the said two letters containing the said bank-note, did secrete the said two letters, &c." *Rez v. Moore*, 2 Leach, C. C. 575; 2 East, P. C. 582.

If in an indictment on the 7 Geo. 3, c. 50, s. 1, the letter embezzled is described as having contained several notes, proof of its having contained any one of them is sufficient. *Id.*

It is felony, in a servant of the post-office to steal a single bank-note from a letter committed to his care. *Rez v. Hassel*, 1 Leach, C. C. 1; 2 East, P. C. 598.

The secreting a letter, containing re-issuable country bank-notes, which had been paid in London, but not re-issued, is an offence within the meaning of 7 Geo. 3, c. 50. By seven against four judges. *Rez v. Ransom*, R. & R. C. C. 232; 2 Leach, C. C. 1090.

A person may be indicted and convicted on stat. 52 Geo. 3, c. 143, s. 3, for stealing a letter, though he has an employment in the post-office. *Rez v. Brown*, R. & R. C. C. 32, n.

A person employed at a receiving-house of the general post-office to clean boots, &c., and to assist in tying up the letter-bag, is not a servant of the post-office within the stat. 52 Geo. 3, c. 143, s. 2. *Rez v. Pearson*, 4 C. & P. 572—Littledale and Bosanquet.

A receiving-house is not a post-office within that statute, but it is "a place for the receipt of letters," and the whole shop is to be considered as the "place for the receipt of letters," and not the mere letter-box; and therefore if a person take a letter and put it on the shop counter of the re-

ceiving-house, or give it to one of the persons belonging to the shop there, that is a putting the letter into the post. *Id.*

In an indictment on this statute it was alleged that the letter was "to be delivered at T." The letter was addressed "T. house," which was a house in the parish of T. :—Held sufficient. *Id.*

To constitute the offence of stealing a letter from a place for the receipt of letters, under sect. 3 of this act, it is essential that the letter should be carried out of the shop which was "the place for the receipt of letters;" and, therefore, if a person take a letter and steal its contents, without taking the letter out of the shop, that is not an offence within this section of this act of parliament. *Id.*

S. was employed by a post-mistress to carry letters from Dursley to Berkeley, at a weekly salary paid him by the post-mistress, but which was re-paid to her by the post-office :—Held, that S. was a person employed by the post-office, within the stat. 52 Geo. 3, c. 143, s. 2. But a letter sent from Cardiff to Dudley, but which, it was alleged, was mis-sent to Dursley, if stolen by S., would not be a letter which came to his hands "in consequence of his employment." Semble, that the words, "whilst employed," in sect. 2 of the stat. 52 Geo. 3, c. 143, relative to stealing letters, merely mean that the party should be then in the employ of the post-office; and not that the letter, when stolen, was in the party's hands in the course of his duty. *Re v. Salisbury*, 5 C. & P. 155—Patteson.

A stamper at the post-office, who purloins a letter for the purpose of delivering it as a mis-sorted letter, with a view of obtaining the postage of it, cannot be capitally convicted of secreting a letter containing bills under 52 Geo. 3, c. 143, s. 2, although the letter may, in fact, contain bills. *Re v. Sharpe*, Car. C. L. 147; R. & M. C. C. 125.

Fraudulently obtaining the mail bags by delivery from one in the post-office to the prisoner, is a stealing out of the post-office. *Re v. Pearce*, 2 East, P. C. 603.

The horse mail bags being left by the mail rider after he had taken possession of them for a temporary purpose for two minutes, were stolen during his absence :—Held, within the stat. 52 Geo. 3, c. 143, s. 3. *Re v. Robinson*, 2 Stark. N. P. C. 485. See *Re v. Thomas*—LARGENT, XXXI. div. 1.

#### IX. SEDUCING SOLDIERS OR SAILORS TO DESERT.

[1 Geo. 1, c. 47; 37 Geo. 3, c. 70, (made perpetual by 57 Geo. 3, c. 7), and the Mutiny Act.]

An indictment on the stat. 37 Geo. 3, c. 70, for seducing soldiers, need not set out the means used for that purpose, nor even that the prisoner knew the person endeavoured to be seduced to be a soldier; and it seems that it may without repugnancy charge the double act, that he endeavoured to incite the soldier to commit mutiny, and also to incite him to commit traitorous prac-

tices. *Re v. Fuller*, 2 Leach, C. C. 790; 1 East, P. C. 92.

A sailor, in a sick hospital, where he had been for thirty days, and therefore not entitled to pay, and only liable for what he then did to a court-martial to the limited extent stated in the 22 Geo. 2, c. 33, s. 4, was held to be a person serving in his majesty's forces by sea, within 37 Geo. 3, c. 70, so as to make the seducing him an offence within that act. *Re v. Tierney*, R. & E. C. 74.

On an indictment against an apprentice for enlisting himself as a soldier, the indentures must be proved by the subscribing witnesses. *Re v. Jones*, 1 Leach, C. C. 174; 2 East, P. C. 622.

#### X. OFFENCES RELATING TO PRISONERS OF WAR.

Indictment lies against a clerk to an agent for French prisoners of war, for taking bribes to procure an exchange out of term. *Re v. Bask*, 1 East, 183.

As to supplying prisoners of war with bad food, see *Re v. Trevor*, post, OMITTING TO GIVE SUFFICIENT FOOD, XXVII.

#### XI. OFFENCES RELATING TO STORES.

One became possessed, on the death of his husband, of canvass stores, which had been purchased by him in his lifetime, at a public sale and had been many years made up into household furniture, but no evidence was given of any certificate of such sale being lawful, as required by stat. 9 & 10 Will. 3, c. 41, or of any excuse allowed by the act; yet the possession being, by act of law, without fraud :—Held, not within the penalty of the statute. *ASON*, 2 East, P. C. 761.

A person convicted of concealing naval stores, or of having them unlawfully in his custody, may receive the corporal punishment directed by the stat. 17 Geo. 2, c. 40, s. 10, although he is ready and offers to pay the penalty of 200*l.* inflicted by the 9 & 10 Will. 3, c. 41. *Re v. Bland*, 3 Leach, C. C. 595; 2 East, P. C. 760.

The fraudulently charging, by a purser, of stores which were never issued, and the making of false entries in the ship's books to cover such charges are an offence punishable "according to the laws and customs in such cases used at sea," amounting under the 22 Geo. 2, c. 33, s. 36, to "a crime not capital, committed by persons in the fleet not before mentioned in this act, and for which no punishment is thereby directed to be inflicted." *MARR v. OWEN*, 4 M. & E. 449; 3 E. & C. 595.

#### XII. PERSONATION OF SEAMEN, &c., AND OFFENCES RELATING TO THE SEA SERVICE.

[See the statutes referred to in 2 R. & M. C. & L. 436 et seq., 480.]

Under stat. 31 Geo. 2, c. 10, the personating must be of some existing person entitled, or who prima facie might be entitled, to receive the

wages: therefore, where it did not appear that there was any such seaman on board a certain ship as the character assumed:—Held, that the indictment could not be supported. *Rex v. Brown*, 3 East, P. C. 1007.

Where the prisoner personated one S. Cuff, who was dead, and whose prize-money had been paid to his mother:—Held, that it did not vary the prisoner's guilt; and that he might be convicted on the 54 Geo. 3, c. 93, s. 89. *Rex v. Cramp*, R. & R. C. C. 327.

The prisoner applied at the Greenwich Hospital for prize-money in the name of J. B.; J. B. was dead, and was supposed to be so at the hospital, and the prisoner did not obtain the money. On an indictment for personating, &c.:—Held, that the stat. 54 Geo. 3, c. 93, s. 89, applied, although the seaman was dead. *Rex v. Martin*, R. & R. C. C. 324.

To constitute the offence of personating the name of a seaman under stat. 57 Geo. 3, c. 127, s. 4, the person entitled, or really supposed to be entitled, to prize-money, must be personated; personating a man who never had any connexion with the ship is not an offence within the act. *Rex v. Tunnat*, R. & R. C. C. 351.

Where there never was such a person belonging to the ship as the person described in the indictment as the person personated, the prisoner cannot be convicted, although there was a person belonging to the ship of nearly the same name, whom the prisoner meant to personate. *Id.*

All persons aiding and abetting the personating a seaman entitled to allowance money are principals, and the offence is not confined to the person only who personates the seaman. *Rex v. Potts*, R. & R. C. C. 353.

On stat. 31 Geo. 2, c. 10, s. 24, for taking a false oath to obtain administration to a seaman's effects in order to receive his wages, it is necessary to prove directly and positively that it was he prisoner who took the oath. *Rex v. Brady*, Leach, C. C. 327.

### XIII. PERSONATING STOCKHOLDERS.

[1 Will. 4, c. 66, s. 7.]

Obtaining and indorsing a dividend warrant at a bank in the name of a stockholder is "personating a proprietor, and thereby endeavouring to receive the dividend," although no attempt whatever is made to receive the money at the ex-office. *Rex v. Parr*, 1 Leach, C. C. 434; East, P. C. 1005.

### XIV. HOMICIDE.

#### 1. Murder.

Geo. 4, c. 31, s. 3; 2 & 3 Will 4, c. 75, s. 16.]

Accidental homicide may be murder, if it happens in the prosecution of any illegal act; as in carrying away furniture to avoid a distress for rent. *Rex v. Hodgson*, 1 Leach, C. C. 6: S. C. 44. *Rex v. Hubson*, 1 East, P. C. 258.

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In a case of death by stabbing, if the jury are of opinion that the wound was inflicted by the prisoner while smarting under a provocation, so recent and so strong that the prisoner may be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there had been after the provocation sufficient time for the blood to cool, for reason to resume its seat before the mortal wound was given, the offence will amount to murder; and if the prisoner display thought, contrivance, and design in the mode of possessing himself of the weapon, and in again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion. *Rex v. Hayward*, 6 C. & P. 157—Tindal.

A person cannot be indicted for murder in procuring another to be executed by falsely charging him with a crime of which he was innocent. *Rex v. Macdaniel*, 1 Leach, C. C. 44; 1 East, P. C. 333.

To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which was born alive, the jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child had breathed in the progress of the birth. *Rex v. Poulton*, 5 C. & P. 329—Littledale.

Where the indictment in such a case states the child to have been born a bastard, the proof that it was so lies on the prosecutor; but evidence that the prisoner told a person that she had only mentioned her being with child to the father of it, who had lately got married, was held to be sufficient proof of the allegation. *Id.*

If a child has breathed before it is born, this is not sufficiently life to make the killing of the child murder. There must be an independent circulation in the child, or the child cannot be considered as alive for this purpose. *Rex v. Enoch*, 5 C. & P. 539—Parke.

An unskilful practitioner of midwifery wounded the head of a child before the child was perfectly born. The child was afterwards born alive, but subsequently died of this injury:—Held, manslaughter, although the child was in ventre matre at the time when the wound was given. *Rex v. Senior*, M. C. C. 344; Lew. C. C. 183, n.

He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. *Rex v. Sawyer*, 1 Russ. C. & M. 424. And see *Rex v. Dyson*, R. & R. C. C. 523; post, p. 738.

Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder. *Rex v. Evans*, 1 Russ. C. & M. 426.

And threats may constitute such force. *Id.*

It is murder to cause the death of an infant of tender years, unable to provide food for and take care of itself, by not providing sufficient food and nourishment, whether such infant be child, apprentice, or servant, whom the party is obliged

by duty or contract to provide for. *Rex v. Squires*, 1 Russ. C. & M. 426.

If a master by premeditated negligence or harsh usage cause the death of his apprentice, it is murder. *Rex v. Self*, 1 Leach, C. C. 137; 1 East, P. C. 226.

Quære, whether, if a mother-in-law, on perceiving a fault committed by her daughter-in-law in some work she was doing, throw a child's stool at her and kill her, and then conceal her death and hide the body, it is murder or manslaughter? *Rex v. Hazel*, 1 Leach, C. C. 368.

If a man encourages another to murder himself, and is present abetting him while he does so, such person is guilty of murder as principal. *Rex v. Dyson*, R. & R. C. C. 523.

If two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other. *Id.*

But if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. *Id.*

Even blows previously received will not extenuate homicide upon deliberate malice and revenge: especially where it is to be collected from the circumstance that the provocation was sought for the purpose of colouring the revenge. *Rex v. Mason*, 1 East, P. C. 239.

If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not; and a person who furnished her with the poison for that purpose, will, if absent when she took it, be an accessory before the fact only; and as he could not have been tried as such before 7 Geo. 4, c. 64, s. 9, he is not triable for a substantive felony under that act. *Rex v. Russell*, M. C. C. 356.

An accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried; and is not now triable under 7 Geo. 4, c. 64, s. 9, for that section is not to be taken to make accessories triable, except in cases in which they might have been tried before. *Id.*

As an assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, when the revenge is disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation. *Rex v. Willoughby*, 1 Russ. C. & M. 437; 1 East, P. C. 288. *And see Rex v. Steadman*, 1 East, P. C. 234; *Rex v. Nailor*, 1 East, P. C. 277; *Rex v. Mitton*, 1 East, P. C. 411.

If gamekeepers attempt to apprehend a gang of night poachers, and one of the gamekeepers be shot by one of the poachers, this will be murder in all the poachers, unless it can be proved that either of them separated himself from the rest, so as to show that he did not join in the act. *Rex v. Edmeads*, 3 C. & P. 390—Vaughan.

Where gamekeepers had secured two poachers, and they, having surrendered, called to a third, who came up and killed one of the gamekeepers, this is murder in all, though the two struck no blow, and though the gamekeepers had not announced in what capacity they had apprehended them. *Rex v. Whithorne*, 3 C. & P. 394—Vaughan.

Under 9 Geo. 4, c. 69, s. 2, a gamekeeper, &c., may apprehend poachers, though there are three or more, and found armed, for though a 2 only authorizes apprehending for what are offences under s. 1, and where there are three or more armed, they are punishable under s. 9; yet what is punishable under s. 9 is nevertheless an offence under s. 1, though the circumstances of aggravation make it liable to a greater punishment; and if the gamekeeper, &c., be killed in the attempt to apprehend, the offender will be guilty of murder, though the gamekeeper had previously struck the offender or any of his party, if he struck in self-defence only, and to diminish the violence illegally used against him, and not individually to punish. *Rex v. William Bell*, 11 C. C. R. 330.

If a gamekeeper attempting lawfully to apprehend a poacher be met with violence, and in opposition to such violence, and in self-defence, strike the poacher, and then is killed by the poacher, it will be murder. *Rex v. James Bell*, M. C. C. 333.

A gamekeeper or other person, lawfully authorized under 9 Geo. 4, c. 69, s. 2, may apprehend persons found offending under that act, without calling on them to surrender, if the circumstances be such as to constitute notice of his purpose. *Rex v. Payne*, M. C. C. R. 378.

If the servant of the owner of property find a party actually committing an offence against sect. 7 & 8 Geo. 4, c. 29, (the Larceny Act), and apprehend him under sect. 63 of that act, and while taking the party to a magistrate, such party kill him, this will be murder; but if the servant either did not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, it will not be murder. *Rex v. Curran*, 3 C. & P. 397—Vaughan.

In order to render the killing of an officer of justice, whether he be authorized in right of his office or by warrant, amount to murder upon his interference in an affray, it is necessary that he should have given some notification of his being an officer, and of the intent with which he interfered. *Rex v. Gordon*, 1 East, P. C. 315, 32.

But a small matter will amount to due notification. *Id.*

Killing an officer will amount to murder though he had no warrant, and was not present when any felony was committed, but takes the party upon a charge only; and though such charge does not in terms specify all the particulars necessary to constitute the felony. *Rex v. Ford*, 1 Russ. C. & M. 504; R. & R. C. C. 329.

Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man has done nothing

by which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though he knows the officer do not notify to him that he has such charge. *Res v. Woolmer*, M. C. C. R. 334.

And the nine judges (four contra) held that a watchman could legally arrest a prisoner without saying that he had a charge of robbery against him, though the prisoner had, in fact, done nothing to warrant the arrest, and that if death ensued it would be murder. *Id.*

And it will be no excuse for killing an officer that he was proceeding to handcuff the party who was in his possession upon a charge of felony. *Id.*

An attachment issued and signed by the county clerk in his own cause is legal process, and if the officer be resisted and killed in the execution of it, such homicide will be murder. *Res v. Baker*, Leach, C. C. 112; 1 East, P. C. 323.

Quære, whether a woman who in a transport of passion kills a peace-officer, who is about to take the man she cohabits with to prison under warrant which turns out to be illegal, is guilty of murder or manslaughter? *Res v. Adey*, 1 Leach, C. C. 206; 1 East, P. C. 329.

If a ship's sentinel shoot a man because he resists in approaching the ship when he has been ordered not to do so, it will be murder unless such an act was necessary for the ship's safety. *Res v. Thomas*, 1 Russ. C. & M. 510.

Semble, that where guns are fired by one vessel at another vessel, and those on board her generally, those guns are to be considered as shot each individual on board her. *Res v. Bailey*, 1 R. & C. C. 1.

If a person be impressed who is not a proper object of impressment; or if the impressment be made without any legal warrant, it is lawful for the party to make resistance, and if the death of any of the parties concerned ensue, it is murder. *Res v. Dixon*, 1 East, P. C. 313; *S. P. Res v. Jebby*, 1 East, P. C. 312.

If A. stands with an offensive weapon in the doorway of a room, wrongfully to prevent J. S. from leaving it and others from entering, and C. who has a right in the room, struggles with him, get his weapon from him, upon which D., a grade of A., stabs C., it will be murder in D. if he dies. *Res v. Longden*, R. & R. C. C. 228; Russ. C. & M. 439.

The case of *Res v. Edwards*, 1 Russ. C. & M., relates to petty treason, which is no longer offence. See 9 Geo. 4, c. 31, s. 2.

## 2. Manslaughter.

Geo. 4, c. 31, s. 9.—By this statute, the statute of stabbing, 1 Jac. 1, c. 8, and 3 Geo. 4, c. 4, are wholly, and the stat. 33 Hen. 1, c. 12, is repealed.

See L. C. J. Tindal's Charge, 5 C. & P. 261, n. The case of *Res v. Jennings*, R. & R. C. C. R., relates to the effects of the benefit of clergy in the case of manslaughter. The benefit of clergy is taken by the stat. 7 & 8 Geo. 3, c. 28, s. 6.

Where one, having had his pocket picked, seiz-

ed the offender, and, being encouraged by a course of people, threw him into an adjoining pond by way of avenging the theft by ducking him, but without any apparent intention of taking away his life, and the pickpocket was drowned:—Held, it only amounted to manslaughter. *Res v. Fray*, 1 East, P. C. 236. And see *Res v. Hazel*, 1 East, P. C. 236.

Attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow. *Res v. Thompson*, 1 R. & M. C. C. 80. And see *Res v. Gillow*, 1 R. & M. C. C. 85.

If a constable take a man without warrant upon a charge which gives him no authority to do so, and the prisoner runs away and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only: because, if the original arrest was illegal, the recapture would have been so likewise. *Res v. Curran*, R. & M. C. C. R. 132.

Where a common soldier stabbed a serjeant in the same regiment who had arrested him for some alleged misdemeanour:—Held, that as the articles of war were not produced, by which the arrest might have been justified, it was only manslaughter, as no authority appeared for the arrest. *Res v. Whithers*, 1 East, P. C. 295, 360.

If, after an interchange of blows on equal terms, one of the parties, on a sudden and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will only amount to manslaughter. *Res v. Anderson*, 1 Russ. C. & M. 447—Bayley.

But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, whom he kills with such weapon; or if at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and accordingly does so and kills the other party; the killing in both these cases will be murder. *Res v. Whiteley*, Lew. C. C. 173.

In a case where there had been mutual blows, and then, upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered only to be manslaughter. *Res v. Ayes*, 1 Russ. C. & M. 496; R. & R. C. C. 166. But in the case of *Res v. Thorpe*, Lew. C. C., Bayley, J., intimated that death caused by up-and-down fighting would be murder.

If two persons quarrel, and begin to fight on equal terms, where one, finding himself not equal to his adversary, runs away, and, being pursued,



draws his knife, and, when overtaken by his adversary, stabs him; if death ensue, this would be only manslaughter; and, therefore, for such stabbing, the party cannot be convicted capitally under Lord Ellenborough's Act; but if, before the conflict began, the party had drawn his knife in cool blood, in case death had ensued, the offence would have been murder. *Rez v. Kessel*, 1 C. & P. 437—Park.

A person set to watch a yard or garden is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's hen-roost; but if, from the conduct of the party, he has fair grounds for believing his own life in actual and immediate danger, he is justified in shooting him. *Rez v. Scully*, 1 C. & P. 319—Garrow.

If a person is driving a cart at an unusually rapid pace, and drives over another, and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication. *Rez v. Walker*, 1 C. & P. 330—Garrow.

Two private watchmen, seeing the prisoner and another person with two carts laden with apples, went up to them, intending, as soon as they could get assistance, to secure them; one of the watchmen walked beside the prisoner, and the other watchman beside the other person, at some distance from the prisoner. The other person wounded the watchman who was near him:—Held, that the prisoner could not be convicted of this wounding, unless the jury should be satisfied that the prisoner and the other person had not only gone out with a common purpose of stealing apples, but also had the common purpose of resisting, with extreme violence, any person who might attempt to apprehend them. *Rez v. Collison*, 4 C. & P. 568—Garrow.

A warrant leaving a blank for the christian name of the person to be apprehended, and giving no reason for omitting it, but describing him only as the son of J. S. L., (it appeared that J. S. L. had four sons all living in his house), and stating the charge to be for assaulting A. B., without particularizing the time, place, or any other circumstances of the assault, is too general and unspecific. A resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder. *Rez v. Hood*, M. C. C. R. 281.

The judges held that if the christian name was omitted in the warrant, it should have assigned some reason for the omission, and have given some distinguishing particulars of the party to be apprehended. *Id.*

A. was fighting with his brother; and, to prevent this, B. laid hold of A., and held him down upon a locker on board the barge in which they were, but struck no blow. A. stabbed B.:—Held, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of this stab, the offence of A. would have been murder; but that if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only. *Rez v. Bourne*, 5 C. & P. 190—Gaselee and Parke.

The killing of a person in an affray, by another who was in a violent heat and passion at the time, will not amount to the crime of murder, but manslaughter. *Rez v. Rankin*, R. & R. C. C. 43.

If, on a sudden quarrel between two parties of keelmen and soldiers, a blow intended for an individual of one party would, if death ensued, have amounted only to manslaughter; it will be only manslaughter though by accident it kill another. *Rez v. Brown*, 1 Leach, C. C. 148; 1 East, P. C. 231, 245, 274.

If, on any sudden quarrel, blows pass without any intention to kill or injure any one materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it is only manslaughter. *Rez v. Snow*, 1 Leach, C. C. 151; 1 East, 244. *And see Rez v. Taylor*, 5 Burr. 2793.

It is not every slight provocation, even by a blow which will, when the party receiving it strikes with a deadly weapon and death ensues, reduce the crime from murder to manslaughter. *Rez v. Lynch*, 5 C. & P. 324.

Where the prisoner, who was a butcher, had employed the deceased, a shepherd boy, to tend some sheep which were penned, and he had negligently suffered some of them to escape through the hurdles; and the prisoner, upon seeing it, ran towards the boy, and, taking up a stake which was lying on the ground, threw it at him, and inflicted an injury of which he died:—Held, that under the circumstances it was a question for the jury whether it was murder or manslaughter; they found the latter. *Rez v. Wiggs*, 1 Leach, C. C. 379.

Where a father beat his son for theft so severely with a rope that he died:—Held, only manslaughter. *Anon.* 1 East, P. C. 261.

A party causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, is guilty of manslaughter. *Rez v. Martin*, 3 C. & P. 211—Vaughan.

It was held to be no excuse for killing a man who was out at night dressed in white as a ghost, for the purpose of frightening the neighbourhood, that he could not otherwise be taken. *Rez v. Smith*, 1 Russ. C. & M. 452.

All persons who even by their presence encourage a fight, from which death ensues to one of the combatants, although they neither say nor do anything, are guilty of manslaughter. But if the death be caused, not by blows given in the fight itself, but by other parties breaking the ring and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence are not answerable. *Rez v. Murphy*, 6 C. & P. 103—Littledale and Bolland.

If a person bona fide and honestly exercising his best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person be a regular surgeon or not, nor whether he has had a regular medical education or not. *Rez v. Van Butchell*, 3 C. & P. 629—Hullock and Littledale.

A person in the habit of acting as a man-midwife tore away part of the prolapsed uterus of

one of his patients, supposing it to be a part of the placenta, by means of which the patient died :—Held, that this person was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. *Rez v. Williamsen*, 3 C. & P. 635—Ellenborough.

A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or gross inattention to his patient's safety. On an indictment for manslaughter, where the death is occasioned by the application of a lotion to the skin, evidence may be given of the effect of the lotion when applied to other patients. *Rez v. St. John Long*, 4 C. & P. 398—Park and Garrow.

Where a person, undertaking the cure of a disease, (whether he has received a medical education or not), is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter. *Rez v. St. John Long*, 4 C. & P. 493—Bayley, Bolland, and Bonquet.

Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is bound to have competent skill; and is bound to treat his or her patients with care, attention, and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter. *Rez v. Spiller*, 5 C. & P. 333—Bolland and Bonquet. See *Rez v. Nimpton*, Lew. C. C. 179—Bayley. *Rez v. Ferguson*, Lew. C. C. 181—Tindal.

An allegation in an indictment, charging that the death of a person was caused by a plaster made and applied by the prisoner, is sufficiently proved by showing that three plasters were applied, and that two of them were applied by the prisoner, and the third made from materials furnished by the prisoner. *Id.*

### 3. Indictment.

If the name of the party killed be not known, may be said to be a certain person to the jurors known. *Rez v. Clark*, 1 Russ. C. & M. 466; & R. C. C. 358.

A bastard must not be described by his mother's name, till he has gained that name by reputation. *Id.*

Where a deceased illegitimate child had not been baptized, but the mother had on two occasions called it Mary Anne, a witness stating that a putative father had said he was a Baptist:—Held that it was rightly described as a female child, whose name was unknown. *Rez v. Smith*, C. & P. 151—Fifteen Judges.

An indictment for murder must set forth particularly the manner of the death, and the means by which it was effected, and an omission in this respect is not aided by a general conclusion that the defendant so murdered, &c. *Rez v. Sharwin*, East, P. C. 341, 421.

And therefore, if a person be indicted for one

species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting. *Id.*

But if the means of death proved agree in substance with that charged, it is sufficient. *Id.*

If the death be occasioned by any weapon, the name and description of that weapon ought to be stated; yet if it appear that the party was killed by a different weapon, the difference is immaterial if they produce the same sort of mischief. *Rez v. Sharwin*, 1 East, P. C. 341, 421.

So, if a death be laid to be by one sort of poisoning, and it turn out to be by another; but some sort or other must be alleged in the indictment, which ought to be as near the truth as possible. *Id.*

In a case where the death proceeded from suffocation, by the swelling up of the passage of the throat, and such swelling proceeded from wounds occasioned by forcing things into the throat:—Held, that the statement might be that the things were forced into the throat, and the deceased thereby suffocated, and that it was not necessary to mention the immediate cause of suffocation; namely, the swelling of the throat. *Rez v. Tye*, 1 Russ. C. & M. 470; R. & R. C. C. 345.

An indictment for murder, which states the death to be by striking and beating the deceased with a piece of brick, is not supported by proof that the prisoner knocked him down with his fist, and that the death was caused by the deceased striking his head by falling on a piece of brick, in consequence of the blow. *Rez v. Kelly*, Car. Cr. Law, 75; R. & M. C. C. 113; Lew. C. C. 193; *Rez v. Wrigley*, Lew. C. C. 127.

So, an indictment charging the death to be by the prisoner striking and beating the deceased upon the head, is not supported by proof that he knocked him down by a blow upon the head, and that he was killed by a mortal wound received by falling on the ground. *Rez v. Thompson*, Car. Cr. Law, 75; R. & M. C. C. 139; Lew. C. C. 194.

Where three persons had been convicted upon an indictment for murder, by striking upon the head with stones, it is not a ground of motion in arrest of judgment, that no number of stones is charged in the indictment; nor is the statement that the stones were "held by the prisoners in their right hands" sufficient ground for such a motion, as being too general and indefinite: and it seems that a sentence to a certain extent, ungrammatically constructed in that part of such an indictment, which stated the manner of the killing, is not a sufficient objection on which to arrest the judgment, if, from the whole tenor of the charge, the statement be sufficiently clear to furnish an intelligible description of the manner of committing the offence. *Rez v. Dale*, 13 Price, 172; 9 Moore, 19; 1 R. & M. C. C. 5.

An inquisition for murder, charging that the prisoner upon a new-born female child did make an assault, and the said new-born child, with "both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which wrapping up and folding the said new-born female child in the piece of flannel aforesaid, she, the said new-born female

child, was then and there suffocated and smothered, of which said suffocation, &c.," she instantly died, is good, although the inquisition does not go on to allege that the flannel was folded over the child's mouth, or inclosed the head, or the like. *Rex v. Huggins*, 3 C. & P. 414—Vaughan.

The indictment must state that the act by which death ensued was done of malice aforethought. *Rex v. Nicholson*, 1 East, P. C. 346.

Nor is it necessary to describe bruises. *Rex v. Turner*, Lew. C. C. 177—Parke.

An indictment for murder, which states wounds as contributing to the death, need not state their length, depth, or breadth. *Rex v. Morley*, 1 R. & M. C. C. 97; Lew. C. C. 189.

An indictment for murder must state that the prisoner gave the deceased a mortal wound. *Rex v. Lad*, 1 Leach, C. C. 96.

It is no objection to a coroner's inquisition for murder, that the offence is stated to have been committed on the 26th day June, omitting the word "of." *Rex v. Huggins*, 3 C. & P. 414—Vaughan.

*Rex v. Edwards*, 1 Russ. C. & M. 482, relates to petit treason, which is no longer a distinct offence. See 9 Geo. 4, c. 31, s. 2.

A. was charged with suffocating B. by placing both her hands about the neck of B.:—Held, that A. might be convicted on this indictment, if B. was suffocated in any manner, either by A. or by any other person in her presence, she being privy to the commission of the offence. The phrase "about the neck," in an indictment for murder, is good, and is not open to the same objection as "about the breast." *Rex v. Culkin*, 5 C. & P. 121—Park, Parke, and Bolland.

A. was indicted for the manslaughter of B. by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or key of a door:—Held, that if it was occasioned by a blow with a hammer, or any other hard substance held in the hand, it was sufficient to support an indictment; but otherwise, if it was the result of a push against the door. *Rex v. Martin*, 5 C. & P. 128—Park and Parke.

Indictment on stat. 43 Geo. 3, c. 58. The first count stated that A., with a certain pistol, feloniously, wilfully, maliciously, and unlawfully, did shoot at D., with intent feloniously, wilfully, and of his malice aforethought, to kill and murder him; and that B. and C. were aiding and abetting A. Another count stated that an unknown person feloniously, wilfully, maliciously, and unlawfully, did shoot at D., with intent feloniously, wilfully, and of his malice aforethought, to kill and murder him; and that A., B., and C., were aiding and abetting the said unknown person felony aforesaid, in manner and form aforesaid, to do and commit; and were then and there knowing of and privy to the committing of the said felony; without alleging that they were feloniously present, aiding, &c. The jury acquitted B. and C., and found A. guilty generally; but afterwards added that he was not

the person who fired the pistol:—Held, that A. was well convicted on this indictment. *Rex v. Thole*, 2 Marsh. 466; 3 Price, 145.

An indictment for manslaughter, charging that the prisoner "did compel and force" A. B. and C. D., who were working at a certain windlass, to leave the said windlass, and by such compulsion and force, &c., the deceased was killed, is not supported by evidence that the prisoner was working the windlass with A. B. and C. D., and that, by his going away, they were not strong enough to work it, in consequence of which they let it go; as the words "compel and force" must be taken to mean active force. *Rex v. Lloyd*, 1 C. & P. 301—Garrow.

#### 4. Evidence and Witnesses.

On an indictment for the murder of a constable, in the execution of his office, it is not necessary to produce his appointment: it is sufficient if it be proved that he was known to act as constable. *Rex v. Gordon*, 1 Leach, C. C. 5, 15; 1 East, P. C. 312.

In order to negative malice in a case where death has ensued from a blow not likely to have produced death or mortal disease, all circumstances of aggravation, (though not sufficient to warrant giving a deadly blow) will be material. *Rex v. Freeman*, 1 Russ. C. & M. 439.

On the trial of an indictment for murder, an examination of the party wounded, taken by a magistrate at an infirmary, to which the deceased had been taken for the purpose of receiving medical assistance, but in the absence of the prisoner, could not be read in evidence as an examination, pursuant to the statute, 2 & 3 Phil. & Mary, c. 10. *Rex v. Dingler*, 2 Leach, C. C. 561.

But quære, if the party was in apprehension of approaching dissolution, whether it may be read as a dying declaration in extremis? *M.*

On the trial of an indictment for murder, the death of the person charged to have been killed may be collected from the circumstances, if incapable of being proved by other evidence. *Rex v. Hindmarsh*, 2 Leach, C. C. 569.

As where the deceased was thrown overboard into the sea, and never heard of afterwards. *M.*

*Rex v. Norwood*, 1 East, P. C. 337, relates to petit treason, which is no longer a distinct offence. See 9 Geo. 4, c. 31, s. 2.

An indictment for manslaughter charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him; whereupon the deceased spurred his horse, which then winced, and threw him, whereby he was killed:—Held, that this evidence sufficiently supported the indictment. *Rex v. Hickman*, 5 C. & P. 151—Park.

A. was indicted for the murder of H. It was

opened, that A., having malice against P., had hired H. to murder him, and that H. did so; but that H. being detected, A. had murdered H. to prevent a discovery of his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P.; and it was held that the prosecutor might also give evidence to show that H. was in fact the person by whom P. had been murdered. *Rex v. Clewes*, 4 C. & P. 221—Littledale.

#### 5. Declarations in *Articulo Mortis*.

Nothing can be evidence in a declaration in *articulo mortis* which would not be so if the party were examined. *Rex v. Sellers*, Car. C. L. 233.

Therefore, anything the murdered person says as to facts is admissible; but not what he says as matter of opinion. *Id.*

To render the declaration of the deceased admissible on a trial for manslaughter, it must have been made by him under an impression of almost immediate dissolution; and it is not enough that the deceased should have thought that he should ultimately never recover. *Rex v. Van Butchell*, 3 C. & P. 629—Hullock and Littledale.

Before the declaration of a deceased person is received as a declaration in *articulo mortis*, the judge will hear all that the deceased said respecting the danger in which he considered himself to be; and it will, upon this, be for the judge to decide whether the deceased then had that impression on his mind which would render his declaration admissible. *Id.*

Whether or not dying declarations were made under an apprehension of danger, must be determined by the judge, in order to receive or reject the evidence; and not by the jury after the evidence is received. *Rex v. John*, 1 East, P. C. 57; *S. P. Rex v. Wellbourn*, 1 East, P. C. 358; *S. P. Rex v. Hucks*, 1 Stark. 523.

The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the state of the wound, or illness, or other circumstances indicating the same. *Id.*

If the deceased thought she should recover at the time the declarations were made, they ought not to be received in evidence. *Rex v. Wellbourn*, 1 East, P. C. 358; 1 Leach, C. C. 503, n.

In murder, the declarations of the deceased, after the mortal wound is given, may be received in evidence, though the party did not express any apprehension of approaching dissolution; but the examination of such a person taken by a magistrate extrajudicially cannot be received. *Rex v. Woodcock*, 1 Leach, C. C. 500; 1 East, P. C. 354; *S. P. Rex v. Dingler*, 1 Leach, C. C. 504, n.; 1 East, P. C. 357.

The declarations of a deceased person are evidence, though at the time they were made the deceased thought herself better, where she had uniformly said, both before and after they were made, and up to the time of her death, that she now she should die. *Rex v. Tinkler*, 1 East, C. C. 354.

Where the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied," and after this he made a statement:—Held, that it was not admissible as a declaration in *articulo mortis*, as it did not appear that the deceased thought himself at the point of death, for, being told that the wound was not necessarily mortal, he might still have a hope of recovery. *Rex v. Christie*, Car. C. L. 232—Abbott and Park.

The declarations of the deceased made on the day he was wounded, and when he believed he should not recover:—Held admissible, though he did not die until eleven days afterwards; and though the surgeon did not think his case hopeless, and continued to tell him so until the day of his death. *Rex v. Mosley*, 1 R. & M. C. C. 97; Lew. C. C. 79.

A person who was told by the surgeon that she would never recover, said that she "hoped he would do what he could for her, for the sake of her family." He again told her that there was no chance of her recovery:—Held, that this showed such a degree of hope in her mind, as to render a statement she then made inadmissible as a declaration in *articulo mortis*. *Rex v. Crockett*, 4 C. & P. 544—Bosanquet.

Any hope of recovery, however slight, existing in the mind of a deceased at the time of his making a declaration, will render it inadmissible as a declaration in *articulo mortis*; but where a deceased knew that he must die, and the magistrate, previous to his making the declaration, desired him, as a dying man, to tell the truth, and he replied that he would:—Held, that his declaration was admissible. *Rex v. Hayward*, 6 C. & P. 157—Tindal.

A declaration in *articulo mortis*, made by a child only four years old, is not admissible in evidence on the trial of an indictment for the murder of such child; because a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible. *Rex v. Pike*, 3 C. & P. 598—Park.

Parol evidence of dying declarations which have been reduced into writing cannot be received. *Rex v. Trowter*, 1 East, P. C. 356.

It is a general rule in criminal cases, that dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; therefore, where a defendant had been convicted of perjury, and obtained a rule nisi for a new trial, pending which he shot the prosecutor, and on showing cause against the rule for a new trial, an affidavit of the dying declarations of the prosecutor, relating to the transaction out of which the prosecution for perjury arose, was produced:—Held, that it was inadmissible. *Rex v. Mead*, 4 D. & R. 120; 2 B. & C. 605.

In trials for robbery, the dying declarations of the party robbed have been held to be inadmissible. *Anon. Phil. Evid.* 225; *S. P. Rex v. Lloyd*, 4 C. & P. 233.

Declarations in articulo mortis are not admissible on an indictment for administering medicine to procure abortion. *Rex v. Hutchinson*, 2 B. & C. 608, n.

Nor on an indictment for perjury. *Rex v. Mead*, 4 D. & R. 120.

The declaration of a convict at the moment of execution, cannot be given in evidence as the declaration of a dying man, for being attainted, his testimony could not have been received on oath. *Rex v. Drummond*, 1 Leach, C. C. 337; 1 East, P. C. 353, n.

#### 6. Trial, Judgment, and Execution in Murder.

9 Geo. 4, c. 31, s. 4, 5, & 6; 2 & 3 Will. 4, c. 75, s. 16.—By this statute the stat. 25 Geo. 3, c. 37, is repealed, so far as relates to this subject.

If a stroke be given at sea, and the party dies in Ireland, quære where shall the murder be tried? *Rex v. Farrell*, 1 W. Black. 456. This is now regulated by the stat. 9 Geo. 4, c. 31, s. 8.

The case of *Rex v. Radbourne*. 1 Leach, C. C. 459; 1 East, P. C. 339, 356, relates to petty treason, which is not now a distinct offence.

A special verdict in murder must find that the fact was committed in the same county as that in which it was laid in the indictment, or no judgment can be given thereon. *Rex v. Hazel*, 1 Leach, C. C. 368.

But if not, it may be amended by the minutes taken at the trial. *Id.*

A trial for murder began on a Tuesday afternoon, and was concluded an hour after midnight; sentence was passed immediately after conviction, and the prisoner ordered for execution on the Friday. *Rex v. Edwards*, Car. Cr. Law, 88—Bayley.

A judge may, if he see fit, order a person convicted of murder to be executed immediately, or at any time within 48 hours after the conviction, as he may do in any other capital felony. *Rex v. Wyatt*, R. & R. C. C. 230; 1 Russ. C. & M. 479.

And it was not essential to award the day of execution in the sentence, the stat. 25 Geo. 2, c. 37, being in that respect only directory; and if a wrong day was awarded, it would not vitiate the sentence, if the mistake be discovered and set right during the assizes. By six judges against three. *Id.*

The bodies of executed murderers were by the common law at the king's disposal, and therefore the court could not direct them to be hung in chains; but by 2 & 3 Will. 4, c. 75, s. 16, the judge may, after sentence pronounced, order the body to be hung in chains. *Rex v. Hall*, 1 Leach, C. C. 21.

Quære, whether on passing sentence of death on a conviction for murder, the award of dissection and anatomizing, in pursuance of 25 Geo. 3, c. 37, was an essential part of the sentence to be pronounced by the judge? *Rex v. Fletcher*, R. & R. C. C. 58; 1 Russ. C. & M. 479.

The omission of it may be remedied by the judge going again into court after adjournment, from his lodgings, and ordering the prisoner to be again brought up, and then passing the proper judgment, as the sentence may be corrected or altered at any time during the assizes. *Id.*

#### 7. Murder and Manslaughter abroad.

9 Geo. 4, c. 31, s. 7.—By this statute, the stats. 33 H. 8, c. 23, and 43 Geo. 3, c. 113, are wholly repealed.

A manslaughter committed in China by an alien enemy who had been a prisoner of war, and was then acting as a mariner on board an English merchant ship, could not be tried here under a commission issued in pursuance of the statute 33 Hen. 8, c. 23, and 43 Geo. 3, c. 113, s. 1. *Rex v. Depardo*, 1 Taunt. 26. But see 9 Geo. 4, c. 31, s. 7.

The statute 33 Hen. 8, c. 23, extended to murders committed out of the realm, and within foreign dominions. *Rex v. Ealing*, Car. Cr. Law, 105; *S. P. Rex v. Sawyer*, Car. Cr. Law, 106; R. & R. C. C. 174.

A British subject was indictable under the 33 Hen. 8, c. 23, for the murder of another British subject, though the murder was committed within the dominion of a foreign state. *Rex v. Sawyer*, R. & R. C. C. 294; Russ. C. & M. 463.

If a prisoner of war abroad entered on board an English merchant ship, and whilst in that capacity killed an Englishman in a foreign country, he could not be tried for it here under the 33 Hen. 8, c. 23, and the 43 Geo. 3, c. 113. *Rex v. Depardo*, R. & R. C. C. 134; 1 Taunt. 26.

An indictment for a common law felony committed abroad, but made triable under the 33 Hen. 8, c. 23, need not conclude contra factum statuti. *Rex v. Sawyer*, R. & R. C. C. 294; 1 Russ. C. & M. 465.

An indictment on 33 Hen. 8, c. 23, for the murder of one British subject by another in a foreign state, stating that the person murdered was at the time in the king's peace, was sufficient to show that he was a British subject. *Rex v. Sawyer*, R. & R. C. C. 294; 1 Russ. C. & M. 465.

So, the conclusion in the indictment, that the offence was against the king's peace, showed sufficiently that the prisoner was a British subject. *Id.*

In an indictment on the stat. 9 Geo. 4, c. 31, s. 7, for murder committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of his Majesty. To prove the allegation that the prisoner was a subject of his Majesty, his own declaration is evidence to go to the jury, and it will be for them to say, whether they are satisfied that he is in fact a British-born subject. A bill of indictment for this offence ought not to state it to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-Bow, &c.," and it being so stated, the court directed the London venue to be struck out before the bill was found by the grand jury. *Rex v. Bisham*, 4 C. & P. 394—Bayley and Bonaparte.

XV. SHOOTING, STABBING, WOUNDING, ADMINISTERING POISON, &c., WITH INTENT TO MURDER, &c.

9 Geo. 4, c. 31, s. 11 & 12.]—By this statute the stat. 43 Geo. 3, c. 58, (Lord Ellenborough's Act), and 22 & 23 Car. 2, c. 1, the Coventry Act, are wholly repealed; and by the stat. 7 & 8 Geo. 4, c. 37, the Black Act, 9 Geo. 1, c. 22, is also wholly repealed.

1. Shooting.

[As to the statutes, see *supra*.]

[See *Title*, HOMICIDE, *ante*, p. 737.]

The cases of *Rez v. Gastineaux*, 1 East, P. C. 412, 1 Leach, C. C. 417; *Rez v. Empson*, 1 East, P. C. 412, 1 Leach, C. C. 224; *Rez v. Harris*, 3 Leach, C. C. 929, 1 East, P. C. Add. xviii.; *Rez v. Granger*, 1 Leach, C. C. 64, 1 East, P. C. 14, S. P.; *Rez v. Wells*, 1 East, P. C. 44; *Rez v. Davis*, 1 Leach, C. C. 493, 1 East, P. C. 414; *Rez v. Durore*, 1 Leach, C. C. 351, 1 East, P. C. 415; *Rez v. Gibson*, 1 Leach, C. C. 859, 2 East, P. C. 508, are cases of shooting under the provisions of the Black Act, 9 Geo. 1, c. 22, which is repealed.

In order to constitute the offence of attempting to discharge loaded fire-arms, within stat. 43 Geo. 3, c. 58, they must have been so loaded as to be capable of doing the mischief intended. *Rez v. Cerr*, R. & R. C. C. 377; 1 Russ. C. & M. 597; *Rez v. Whitley*, Lew. C. C. 123.

Where on an indictment on 43 Geo. 3, c. 58, for maliciously shooting at a person, it appeared that the instrument was fired so near, and in such a direction, as to be likely to kill or do other grievous bodily harm to such person, and with an intent that it should do so, the case was within that act, although it were loaded with powder and paper only. *Rez v. Kitchen*, R. & R. C. C. 35; 1 Russ. C. & M. 596.

If a pistol be loaded with gunpowder and balls, but its touch-hole be plugged, so that it cannot possibly be fired, this is not "loaded arms," within the stat. 9 Geo. 4, c. 31, s. 11, 12. *Rez v. Harris*, 5 C. & P. 159.—Patteson.

If an indictment for shooting another, with intent to murder, &c., in all the counts aver that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal. *Rez v. Hughes*, 5 C. & P. 156. *ark*, Parke, and Bolland.

Evidence of a wound having been made by the contents of a pistol, although no ball was found, and of its having made a loud report, with reference to its size, is sufficient to go to a jury if its having been loaded with ball. *Rez v. Veston*, 1 Leach, C. C. 247.

In an indictment on the 43 Geo. 3, c. 58, the intent laid in several counts of the indictment as to murder, to disable, or to do some grievous bodily harm; the intent found by the jury was prevent being apprehended:—Held, that the conviction was bad, for that, if the intent was to prevent the lawful apprehension of the prisoner,

it should be laid so. *Rez v. Duffin*, R. & R. C. C. 365. 1 Russ. C. & M. 598.

If a person shoots at another who is endeavouring to apprehend him, he might have been convicted on the usual indictment for shooting with intent to murder, under the statute 43 Geo. 3, c. 58, although shooting at a person with intent to prevent his apprehending the person shooting is a distinct and capital offence. *Rez v. Davis*, 1 C. & P. 306—Garrow.

On an indictment on 43 Geo. 3, c. 58, the three first counts alleged, in the usual form, that J. S. did shoot at A. B., and went on to state that M. and N. were present, aiding and abetting; the second and third counts varying from the first only in the intent; the three last counts, varying in like manner as to the intent, stated that an unknown person, &c., did shoot at A. B., &c., and that J. S. and M. and N. were present, aiding and abetting the said unknown person the felony aforesaid, in manner and form aforesaid, to do and commit, and were then and there knowing and privy to the committing of the said felony, against the statute, &c.; but omitted to charge them with being feloniously present, &c.:—Held, that J. S. might be convicted on this indictment, although the jury negatived his being the person who fired the pistol at A. B. *Rez v. Toole*, R. & R. C. C. 314. 2 Marsh. 466.

Where an indictment on 43 Geo. 3, c. 58, contained counts both for actually shooting at, &c., and being present, aiding and abetting, &c., and there was evidence to go to the jury upon both modes in which the offence is charged, the prosecutor was not obliged to elect whether he will proceed on the counts for actually shooting, &c., or aiding and abetting, &c., but he may proceed on the whole indictment. *Id*.

Upon an indictment for maliciously shooting, it appeared that there were two shootings; but it being questionable whether the first shooting was by accident or design:—Held, that proof of the prisoner having intentionally shot at the person the second time, was evidence to show that the first was wilful. *Rez v. Voke*, R. & R. C. C. 531.

An indictment for maliciously shooting, containing several counts, need not refer distinctly to the shootings in the respective counts as by "last aforesaid," if such count concludes with the words "with intent in so doing, that is to say, in so shooting at the said T. P. as aforesaid," such words being grammatically and legally referable to the last antecedent matter. *Id*.

2. Stabbing, Cutting, and Wounding.

[As to the statute, see *supra*.]

[See *tit*, HOMICIDE, *ante*, p. 737.]

The cases of *Rez v. Mills*, 1 Leach, C. C. 959, 1 East, P. C. 397; *Rez v. Carroll*, 1 Leach, C. C. 55, 1 East, P. C. 394; *Rez v. Tinkner*, 1 Leach, C. C. 187, 1 East, P. C. 398; *Rez v. Lee*, 1 Leach, C. C. 51; *Rez v. Mackey*, 1 East, P. C. 399, are all decided on the Coventry Act, 22 & 23 Car. 2, c. 1, which is repealed.

On an indictment for maliciously cutting, ma-

lice against the individual cut is not essential; general malice is sufficient. *Rex v. Hunt*, 1 R. & M. C. C. 93.

An intent to do grievous bodily harm is sufficient, though the cut is slight, and not in a vital part. *Id.*

The question is not what the wound is, but what wound was intended. *Id.*

By the case of *Rex v. Akenhead*, Holt, 469, *cor.* Bayley, it seemed that the words "other grievous bodily harm" apply only to wounds in a vital part, inflicted under circumstances which, in case of death, would have amounted to murder.

But in the case of *Rex v. Griffith*, 1 C. & P. 298, *cor.* Park, it was held, that, to constitute the offence of cutting with intent to murder, it is not necessary that the wound should be near a vital part, or of such a nature as to be likely to cause death.

The offence of "maliciously cutting, with intent to resist lawful apprehension," is not committed where the party has no notice of the purpose of the officers. *Rex v. Ricketts*, 3 Camp. 68—Lawrence.

On an indictment for stabbing, with intent to resist lawful apprehension, it must be shown that the officer was either present or came armed with a warrant. *Rex v. Dyson*, 1 Stark. 246—Le Blanc.

On an indictment for cutting, it appeared that the prisoner was seen in the night entering an outhouse with intent to commit a felony, by a person who went and informed the prosecutor of it. The latter in about a quarter of an hour went in search of the prisoner, to apprehend him. The prisoner had left the prosecutor's premises, and was found in a neighbouring garden, crouched down under a tree, with a drawn sword in his hand. The prosecutor apprehended the prisoner, who cut and wounded him. It was objected that the prosecutor had no right to apprehend the prisoner, and that, if death had ensued, it would have been manslaughter only. The prisoner was convicted, and the judges held the conviction right. The 4th and 6th sections of the Vagrant Act, 5 Geo. 4, c. 83, which relate to the apprehending of persons armed with any offensive weapon, with intent to commit any felonious act, were cited in the argument. *Rex v. Howarth*, Carr. Supp. 231. S. C. R. & M. C. C. 267.

A gamekeeper, accompanied by his assistant, met four poachers on the highway, one carrying a gun, another a gun-barrel, and the other two, bludgeons. There had been previously two shots fired. The gamekeeper said to his assistant, "mind the gun," and the assistant laid hold of it, and then the gamekeeper called to another person; upon this three of the poachers knocked him down and stunned him, and when he came to himself he saw all of them near, and one said as they passed him, "d—n them, we have done them both," and one turned back and cut him on the left leg, and all then ran away. It was objected, first, that the wounding of the leg was the act of one alone, and there was no evidence to show

which of them it was;—secondly, that, from the expressions used, it was evident that both were thought to be dead, and there could be no intent to murder, &c.;—thirdly, that the prisoner being on the highway, the gamekeeper and his assistant had no right to interfere with them. The prisoners were convicted, and the judges held the conviction right. *Rex v. Warner*, 5 C. & P. 525; M. C. C. 380.

On an indictment for cutting and maiming with intent to do grievous bodily harm, a prisoner may be convicted whose main and principal intent was to prevent his lawful apprehension, if, in order to effect the latter intent, he also intended to murder, or do grievous bodily harm, &c. *Rex v. Gillois*, 1 R. & M. C. C. 85; *Lex. C. 57*. See *Rex v. Thompson*, 1 R. & M. C. C. 88; *Rex v. Duffin*, and *Rex v. Davis*, *ante*, p. 745.

An indictment under 43 Geo. 3, c. 58, for cutting and maiming with intent to murder and disable, was not supported by evidence of a cutting with intent to produce a temporary disability in a person lawfully apprehending the prisoner and he could effect his own escape. *Rex v. Bugey*, 1 R. & M. C. C. 29. 1 Russ. C. & M. 599.

Cutting a female child's private parts, so as to enlarge them for the time, may be considered as doing her grievous bodily harm, within the act 43 Geo. 3, c. 58, and done with that intent, although the hymen is not injured, the incision is not deep, and the wound eventually is not dangerous. *Rex v. Cox*, R. & R. C. C. 362. 1 Russ. C. & M. 598.

A blow with a square iron bar, which inflicted a contused or lacerated wound, has been held not to be a cutting within Lord Ellenborough's act, 43 Geo. 3, c. 58. *Rex v. Adams*, 1 Russ. C. & M. 597—Lawrence.

And where a similar wound was given on the head by a blow with the metal scabbard of a sword, which was sheathed at the time, it was held not to be a cutting. *Rex v. Whigfield*, 1 Russ. C. & M. 597—Bayley.

But if a cutting be inflicted, the case is within the statute, though the instrument (an iron crow) is not intended for cutting, nor ordinarily used to cut, but generally used to force doors, &c., and though the intention was not to cut, but to inflict some other mischief. *Rex v. Heywood*, 1 Russ. C. & M. 598. R. & R. C. C. 18.

And a blow with the handle of a window is not a cutting, though it make an incision. *Ann.* 1 Russ. C. & M. 597—Dallas.

An indictment on 43 Geo. 3, c. 58, for cutting J. S., was not supported by evidence that the wounds were inflicted by stabbing, and not by cutting. *Rex v. McDermott*, R. & R. C. C. 55; 1 Russ. C. & M. 597.

As the statute used the words stab or cut as the alternative, so as to distinguish them, the distinction should be attended to. *Id.*

A striking over the face and head with the sharp or claw part of a hammer was a sufficient cutting within the statute. *Rex v. Atkinson*, 1 R. & R. C. C. 104. 1 Russ. C. & M. 597.

Breaking a person's collar bone, and bruising him, is not a wounding within the stat. 9 Geo. 4, c. 31, s. 12. *Rez v. Wood*, 4 C. & P. 381—Fifteen Judges.

Inflicting a wound on a person by throwing a sledge-hammer at him, is a wounding within the stat. 9 Geo. 4, c. 31, s. 11, 12, although the sledge-hammer, from being blunt, was not an instrument calculated to inflict a wound. *Rez v. Withers*, 4 C. & P. 446; *M. C. C. R.* 294—Vaughan and Alderson.

If a person strike another with a bludgeon, and break the skin and draw blood, this is a sufficient wounding to be within the stat. 9 Geo. 4, c. 31, s. 11 & 12. Under that stat. it is not at all material what the instrument is with which the party is wounded. *Rez v. Payne*, 4 C. & P. 558—Patteson.

If a person, for the purpose of accomplishing a robbery, wound, by means of kicking, the skin of the party whom he is endeavouring to rob, he is punishable under the stat. 9 Geo. 4, c. 31, s. 12, if the jury find that his intent was either to disable or do grievous bodily harm. *Rez v. Shadwell*, 5 C. & P. 504—Denman and Vaughan.

On an indictment for wounding with intent to murder, &c., the instrument or means by which he wound was inflicted need not be stated, and, if stated, do not confine the prosecutor to prove a wound by such means. *Rez v. Briggs*, *M. C. C. R.* 318; *Lew. C. C.* 61.

A wound from a kick with a shoe will be within the 9 Geo. 4, c. 31, s. 12. *Id.*

On an indictment which charges the wound to have been inflicted by striking with a stick, and kicking with the feet, proof that the wound was caused either by a blow from a stick, or a kick, will be sufficient, though it be uncertain by which of the two it was. *Id.*

A. was indicted for stabbing B., there being another indictment against him for stabbing C.:—Held, that on the trial of the indictment for stabbing B., both C. and the surgeon may be asked to what kind of wound C. received, with a view to identifying the instrument used. *Rez v. Furry*, 6 C. & P.—Gaselee and Parke.

The case of *Rez v. Amarro*, *R. & R. C. C.* 286, related to this offence if committed at sea, but that now regulated by the stat. 9 Geo. 4, c. 31, s. 32.

### 3. Administering Poison.

[As to the stat. see ante, p. 745.]

It is not an administering of poison unless the poison be taken into the stomach. Therefore were a prisoner was indicted for administering poison to E. D., with intent to murder her; and proof was that he gave her a bit of a cake which contained arsenic and sulphate of copper, which she put into her mouth, but which she spit again without having swallowed any part of.—Held, by the twelve judges, that it was not sufficient to convict. *Rez v. Cadman*, *Car. Cr. w.* 237.

If a servant put poison into a coffee-pot which stains coffee, and, when her mistress comes

down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and the mistress drink the poisoned coffee—This is a "causing the poison to be taken," within the stat. 9 Geo. 4, c. 31, s. 11, and the servant is therefore indictable under that act. Semble, that this is also an "administering," within that act; as, to constitute an administering, it is not necessary that the poison should be delivered by the hand of the party. *Rez v. Harley*, 4 C. & P. 369—Park.

If A. sends poison intending it for B., and with intent to kill B., and it comes into the possession of C., who takes it, A. may be indicted on the stat. 9 Geo. 4, c. 31, s. 11, for "administering" it to C. *Rez v. Celia Davis*, 6 C. & P.—Gurney.

A prisoner was indicted for mixing sponge with milk, and administering it with intent to poison. The indictment was held insufficient, because it did not aver that the sponge was of a deleterious or poisonous nature. *Rez v. Elizabeth Powles*, 4 C. & P. 571.

### XVI. ADMINISTERING TO PROCURE ABORTION.

9 Geo. 4, c. 31, s. 13.]—By this stat. the stat. 43 Geo. 3, c. 58, (Lord Ellenborough's Act), is wholly repealed.

The expression "quick with child," in the statute 43 Geo. 3, c. 58, s. 1, meant when the woman has felt the child move within her. *Goldsmith's case*, 3 Camp. 76—Lawrence.

Upon an indictment on that statute charging that the prisoner administered a mixture for the purpose of procuring abortion, it was unnecessary to prove that the mixture was noxious or destructive, or even that the woman was actually with child. *Id.*

The interpretation to be put upon the words "quick with child," in stat. 43 Geo. 3, c. 58, s. 1, must be feeling the child alive and quick within, at whatever time the fetus may have a separate existence. *Rez v. Phillips*, 1 Russ. C. & M. 554; 3 Camp. 77.

On an indictment for administering a drug to a woman to procure abortion, she not being quick with child; if it appear that the woman was not with child at all, the prisoner must be acquitted, although it appear that the prisoner thought that she was with child, and gave her the drug with an intent to destroy such child. *Rez v. Scudder*, 3 C. & P. 605; *Id. R. & M. C. C.* 216.

### XVII. CONCEALMENT OF BIRTH OF DEAD CHILDREN.

9 Geo. 4, c. 31, s. 14.]—By the stat. 9 Geo. 4, c. 31, the stat. 43 Geo. 3, c. 58, (Lord Ellenborough's Act), is wholly repealed.

The cases of *Rez v. Prat*, 1 East, P. C. 229, and *Rez v. Jeffard*, *Id.*, relate to offences under the stat. 21 Jac. 1, c. 27, which was repealed by 43 Geo. 3, c. 58.

The act of throwing a bastard child down the privy, by its mother, was evidence of an endeavour to conceal the birth, within the 43 Geo. 3, c. 58,



a. 3. *Rex v. Cornwall*, R. & R. C. C. 337; 1 Russ. C. & M. 477.

A woman may be found guilty of concealment, although from appearances it is probable that the child was still-born, and although the birth was probably known to an accomplice. *Rex v. Cornwall*, 1 Russ. C. & M. 477; 1 R. & R. C. C. 336.

If a mother, who had communicated her pregnancy to persons not implicated with her in the concealment, or, to the knowledge of any other persons, make preparations for her confinement, it would have been an answer to a charge of concealment, under statute 43 Geo. 3, c. 58; *Rex v. Southern*, 1 Russ. C. & M. 476—Bayley.

A woman was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the learned judge directed an acquittal on the charge of endeavouring to conceal the birth. *Rex v. Higley*, 4 C. & P. 366—Park.

Whether a prisoner be charged with the murder of her bastard child by the coroner's inquisition, or by a bill of indictment returned by the grand jury, she might have been found guilty under 43 Geo. 3, c. 58, of endeavouring to conceal the birth. *Rex v. Maynard*, 1 Russ. C. & M. 477; R. & M. C. C. 240; S. P. *Rex v. Cole*, 2 Leach, C. C. 1955; S. P. 3 Camp. 371; S. P. *Rex v. Dobson*, Lew. C. C. 43.

The stat. 43 Geo. 3, c. 58, only empowered a jury to find the prisoner guilty of the concealment of the birth of a bastard child when she was tried upon an indictment for the murder of such child, and did not make the concealment an offence for which an indictment could be preferred. *Rex v. Parkinson*, 1 Russ. C. & M. 475—Bayley. But that is now altered by the stat. 9 Geo. 4, c. 31, s. 14.

On all inquests held on the body of dead bastard children, it is the bounden duty of the coroner to tell the jury, in all cases where there is not the most clear and decisive proof that the child was born alive, that they ought never to think of returning a verdict of wilful murder against the mother. *Rex v. Bayley*, Car. Cr. Law, 243—Vaughan.

#### XVIII. SODOMY.

9 Geo. 4, c. 31, s. 15, 18.]—By this stat. the stat. 25 Hen. 8, c. 6, and 5 Eliz. c. 17, are wholly repealed.

To constitute the offence of sodomy, the act must be in that part where sodomy is usually committed; for, the act in a child's mouth does not constitute the offence. *Rex v. Jacobs*, 1 Russ. C. & M. 568; R. & R. C. C. 331.

A person forced open a child's mouth, and put in his private parts, and proceeded to a completion of his lust:—Held, that this did not constitute the offence of sodomy. *Id.*

An unnatural connexion with an animal of the fowl kind was not sodomy, before the stat. 9 Geo. 4, c. 31, s. 15, a fowl not coming under the term "beast," [the words of the stat. 9 Geo. 4, c. 31, s. 15, are "any animal"]; and it was agreed clearly not to be sodomy when the fowl was so small that its private parts would not admit those of a man, and were torn in the attempt. *Rex v. Mulready*, 1 Russ. C. & M. 568.

Proof of injectio seminis, as well as penetration, were essential in an indictment for sodomy. *Rex v. Parker*, 1 Russ. C. & M. 560; S. P. *Rex v. Duffin*, 1 East, P. C. 437.

And, therefore, proof of penetration, but emission out of the body, was not sufficient. *Id.*

But since the stat. 9 Geo. 4, c. 31, s. 18, the crime is complete, if the jury be satisfied that penetration took place. *Rex v. Reckless*, R. C. C. R. 342. See the case of *Rex v. Cox*, post, p. 749.

#### XIX. RAPE AND ABUSE OF CHILDREN.

9 Geo. 4, c. 31 ss. 16, 17, 18.]—By this statute the stat. 3 Edw. 1, c. 13; 13 Edw. 1, c. 34; 6 Ric. 2, c. 6; and 18 Eliz. c. 7, are repealed.

A boy under the age of fourteen cannot be convicted of an assault with intent to commit a rape. *Rex v. Eldershaw*, 3 C. & P. 396—Vaugh.

Having carnal knowledge of a married woman under circumstances which induced her to suppose it is her husband:—Held, by eight against four judges, not to amount to a rape. *Rex v. Jackson*, R. & R. C. C. 487.

A prisoner may be convicted of rape upon the unsupported evidence of an infant under years of discretion, if the jury are satisfied that the evidence is such as to leave no reasonable doubt of the prisoner's guilt. *Anon.* 1 Russ. C. & M. 566—Rooke.

In cases of carnal knowledge of children, the infant witness, though under seven years of age, if apprized of the nature of an oath, must be sworn. *Rex v. Brasier*, 1 Leach, C. C. 193; 1 East, P. C. 443. And see *Rex v. Darnall*, 1 East, P. C. 442.

In an indictment for a rape, the deposition of the girl taken before the committing magistrate, and signed by him, may, after her death, be read in evidence at the trial of the prisoner, although it was not signed by her, and she was under twelve years of age, provided she was sworn, and appeared competent to take an oath; and all the facts necessary to complete the crime may be collected from her testimony so given in evidence. *Rex v. Flemming*, 2 Leach, C. C. 564; 1 East, P. C. 440.

Proof of injectio seminis, as well as penetration, was essential in an indictment for rape before the stat. 9 Geo. 4, c. 31. *Rex v. Hill*, 1 East, P. C. 439; S. P. *Rex v. Cave*, 1 East, P. C. 438; but see *Rex v. Sheridan*, 1 East, P. C. 438; *Rex v. Harmwood*, 1 East, P. C. 440.

Before the stat. 9 Geo. 4, c. 31, s. 18, if anything occurred to create an alarm to a party while he was perpetrating the offence of a rape,

it was left to the jury to say whether he left the body re infected, because of the alarm, or whether he left it because his purpose was accomplished. *Rex v. Burrows*, R. & R. C. C. 519; 1 Russ. C. & M. 561.

Since the stat. 9 Geo. 4, c. 31, the offence of rape is made out by proof of penetration only; and in such case a prisoner must be found guilty, although there was no emission, and although he did not withdraw himself merely because he was satisfied. *Rex v. Jennings*, 4 C. & P. 249—Hullock. Lew. C. C. 93.

The 9 Geo. 4, c. 31, s. 18, does not make emission unnecessary to complete the offence of rape. *Rex v. Russell*, 2 M. & M. 122—Taunt. See *Rex v. Coulthart*, Lew. C. C. 94.

But in the case of *Rex v. Cox*, 5 P. & C. 297; M. C. C. 337, which is subsequent to all these cases, the jury found that there had been penetration, but that there had not been any emission from the prisoner; and the fifteen judges held that the prisoner was rightly convicted of rape. See *Rex v. Reekpear*, ante, p. 748.

Any the slightest penetration is sufficient, even though it do not break the hymen. *Rex v. Russen*, 1 East, P. C. 438.

If, in a case of rape, there has not been sufficient penetration to rupture the hymen, the offence is not complete. *Rex v. Gammon*, 5 C. & P. 321.

Upon an indictment for a rape, the woman is not compellable to answer whether she has not had connection with other men, or with a particular person named. *Rex v. Hodgson*, R. & R. C. 211—Gurney.

Nor is evidence of her having had such connection admissible. *Id.*

A general conviction of a prisoner charged oath as principal in the first degree, and as an aider and abettor of other men in rape, is valid in the count charging him as principal. *Rex v. Tolkes*, M. C. C. R. 354.

On such an indictment, evidence may be given of several rapes on the same woman, at the same time, by the prisoner and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Id.*

But the character of the prosecutrix as to general chastity may be impeached by general evidence. *Rex v. Clarke*, 2 Stark. 241—Holroyd.

A defendant will be acquitted in an indictment for an assault with intent to ravish, if the evidence amounts to proof of an actual rape. *Rex v. Harwood*, 1 Russ. C. & M. 560, 564. 1 East, C. 411.

Under an indictment for an assault to commit rape, the defendant may impeach the prosecutrix's character for chastity by general, but not particular evidence. *Rex v. Clarke*, 2 Stark. 241—Holroyd.

The fact of her making complaint of the outrage, and the state in which she was at the time making the complaint, are evidence. *Id.*

On a trial for rape, the prisoner may give evidence that the woman bore a notoriously bad

character, for want of chastity and common decency, or that she had before been criminally connected with the prisoner; but he cannot show that she had a criminal connection with other persons. *Hodgson's case*, 1 Phil. Evid. 165.

Nor is the woman obliged to answer as to the latter fact. *Id.*

On the trial of an indictment for a rape, it was held, that the prisoner's counsel might ask the prosecutrix the following questions, with a view to contradict her: "Were you not, on ———, (since the time of the alleged offence), walking in the High street at Oxford to look out for men?" "Were you not, on ———, (since the time of the alleged offence), walking in the High street with a woman reported to be a common prostitute?"—Held, also, that evidence might be adduced by the prisoner, to show the general light character of the prosecutrix, and that general evidence might be given of her being a street-walker; but semble, that evidence of specific acts of criminality by her would not be admissible. *Rex v. Barker*, 3 C. & P. 569—Park and Parke.

A prisoner was charged with carnally abusing a child under ten years old, on Feb. 5, 1832. To prove the child under ten years old, an examined copy of the register of her baptism on Feb. 9, 1822, was put in, and the child's father stated, that he left his house about a week before the 9th of Feb., 1822, his wife not being then confined; and that on his return on that day he found this child, and was told by his wife's mother that it had been born on the day before:—Held, that this was not sufficient evidence of the child's being under ten years old. *Rex v. Wedge*, 5 C. & P. 298—Littledale and Taunton.

The first count of an indictment charged an assault with intent to ravish; the second, a common assault. The record went on to state, that the jury found the defendant guilty of the misdemeanour and offence in the said indictment specified, in manner and form as by the said indictment is alleged against him, and the judgment was, imprisonment and hard labour:—Held, on writ of error, that the word misdemeanour was nomen collectivum, and that the finding of the jury was in effect, that the defendant was guilty of the whole matter charged, and that the judgment was therefore warranted by the verdict. *Rex v. Powell*, 2 B. & Adol. 75.

#### XX. ABDUCTION.

9 Geo. 4, c. 31, s. 19 & 20.—By this stat., 3 Edw. 1, c. 13; 3 Hen. 7, c. 2; 39 Eliz. c. 9; 4 & 5 Ph. & M. c. 8; and 1 Geo. 4, c. 115, are repealed; and also so much of the stat. 6 Ric. 2, s. 1, c. 6, as relates to this subject.

On a prosecution on the stat. 3 Hen. 7, c. 2, it was essential that there should be a continuance of the force into the county where the defilement took place. *Rex v. Gordon*, 1 Russ. C. & M. 572.

In cases of this kind the wife is a witness as well for as against her husband, although she has

cohabited with him from the day of the marriage. *Res v. Perry*, 1 Russ. C. & M. 577.

Where several defendants were indicted for a misdemeanour in conspiring to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants:—Held, that assuming the young lady to be at the time the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. *Res v. Wakefield*, 2 Russ. C. & M. 605.

Although the woman is taken away as well as married with her own consent; yet, if this be effected by means of any fraud practised upon her to induce her to go with the offender, and to consent to marry him:—Sembles, that he is equally within the act, for her mind being in a state of delusion by means of the fraud, she cannot be considered as a free agent to give any consent. *Res v. Wakefield*, Dea. C. L. 4.

#### XXI. BIGAMY.

9 Geo. 4, c. 31, s. 22; 3 Geo. 4, c. 75; 4 Geo. 4, c. 76.—By the stat. 9 Geo. 4, c. 31, the stats. 1 Jac. 1, c. 11, and 35 Geo. 3, c. 67, are repealed; and so much of 4 Ed. 1, s. 3, and 18 Ed. 3, s. 3, and 1 Ed. 6, c. 12, as relates to this subject.

The age of consent within the provision of s. 3, 1 Jac. 1, c. 11, was fourteen years in a man, and twelve in a woman. *Res v. Gordon*, R. & R. C. C. 48.

No divorce of an ecclesiastical court was within the third exception of the stat. 1 Jac. 1, c. 1, unless it is a divorce of a court within the limits to which the statute extends. *Res v. Lolly*, 1 Russ. C. & M. 190; R. & R. C. C. 237.

Therefore, it was no defence to prove a divorce a vinculo matrimonii before the second marriage, if such divorce were out of England, unless upon a ground which by the law of England would warrant such a divorce. *Id.*

Where a prisoner, having been apprehended for larceny, is detained in the same county for bigamy, the detainer is such an apprehension as would warrant the indicting him in that county, under 1 Jac. 1, c. 11. *Res v. Gordon*, R. & R. C. C. 48.

On the trial of an indictment for bigamy in the county where the party was apprehended, and not where the second marriage was had, the apprehension in the county, if a warrant has issued, must be proved by the production of the warrant, in order to give the court jurisdiction. *Res v. Forsyth*, 2 Leach, C. C. 826.

A sentence of jactitation is not conclusive evidence against an indictment of bigamy; for its validity may be impeached as having been obtained by fraud. *Duchess of Kingston's case*, 1 Leach, C. C. 146; 1 East, P. C. 468.

By Irish stat. 9 Geo. 2, c. 11, "the marriage of a minor without consent is void: but if no suit

be commenced within one year after the marriage, it shall be good." Therefore where it appeared in a case of bigamy that the first marriage was celebrated in Ireland by license, when the prisoner was a minor, without his father's consent:—Held, that it was no defence, as more than a year had elapsed from the time of the marriage. *Res v. Jacobs*, Car. Cr. Law, 255; R. & M. C. C. 14; S. P. *Res v. Riordan*. *Id.*

Sembles, that assuming a fictitious name upon the second marriage will not prevent the offence from being complete. *Res v. Allison*, 1 Russ. C. & M. 201, 207; R. & R. C. C. 109.

And if the marriages are proved by a person present at them, it is not necessary to prove the registration, or license, or banns. *Id.*

And if the prisoner has written down the names for the publication of the banns, he is precluded from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. *Res v. Edwards*, 1 Russ. C. & M. 201; R. & R. C. C. 283.

On an indictment against a man for bigamy, it appeared that, for the purpose of concealment, the second wife was married by a name by which she had never been known:—Held, that this was no answer to the charge, although, if the first marriage had taken place under such circumstances, that would have been thereby rendered void. *Res v. Penson*, 5 C. & P. 412—Gurney.

On an indictment for bigamy, if the first marriage was by banns, it is no objection that the parties did not reside in the parish where the banns were published, and the marriage celebrated. *Res v. Hind*, R. & R. C. C. 253.

Sembles, that an acknowledgment alone by the prisoner of the fact of the first marriage would not be sufficient evidence of that fact. *Res v. Trueman*, 1 Russ. C. & M. 207; 1 East, P. C. 470.

But proof of such an acknowledgment, together with evidence of cohabitation, and that the prisoner backed his assertion by producing to the witness a copy of a proceeding in a Scotch court for having improperly contracted the marriage (but which was a nullity), was held to be sufficient evidence of the first marriage. *Id.*

On a trial for bigamy, the registry of the first marriage stated it to be by license generally, without saying by consent of parents or guardians; the prisoner proved that he was an infant at the time, and that his parents were never known to have been in England:—Held, that this was *prima facie* evidence that the first marriage was without consent of parents or guardians, and that the jury might have acquitted the prisoner if such evidence was unanswered. *Res v. Jones*, R. & R. C. C. 17; 1 Russ. C. & M. 301.

Sembles, that on such trial the prisoner ought not to be called on to prove a negative, it being sufficient for the prisoner to prove himself under age at the time of the first marriage, and that it then rested with the prosecutor to show that the marriage was with the consent of parents or

guardians. *Id.* *S. P. Rex v. Morton, R. & R. C.* 19, n.; 1 Russ. C. & M. 201.

Where, on an indictment for bigamy, the first marriage was proved to have been by license, and that the party was under age at the time of such marriage, but it did not appear that the marriage was with consent of parents or guardians:—Held, that it lies on the part of the prosecutor to prove such consent given. *Rex v. Butler, R. & C. C. 61*; 1 Russ. C. & M. 202.

The marriage of a minor by license without the consent required by the Marriage Act, 4 Geo. 2, c. 75, s. 16, is valid. *Rex v. Birmingham, 2 B. & R. 230*; 8 B. & C. 29.

The marriage of an infant by license, without the consent of parent or guardians, solemnized in the interval between July 22, 1822, (when 3 Geo. 2, c. 75, received the royal assent, by which s. 11 of 26 Geo. 2, c. 33, is repealed), and Sept. 1, 1822, when 3 Geo. 4, c. 75, began to operate generally, is valid. *Rex v. Waully, R. & M. C. C. 163*; *Lew. C. C. 23*.

In the publication of banns in 1817, a woman named Mary Hodgkinson was called White, a surname entered by mistake in the register of her baptism, but which she had never gone by or been entitled to. The false name was given to the officiating clergyman without any intention to mislead; nor did any individual having an interest in the marriage appear to have been deceived:—Held, that the marriage was void. It might have been otherwise, if (without any fraudulent intent) there had been only a partial variation of the name, or the addition or suppression of one christian name, or the name had been one which no party had ever used or been known by. *Rex v. The Inhabitants of Tisbury, 1 B. & Adol. 190*.

A marriage which would have been void by 26 Geo. 2, c. 33, and had once been rendered valid by sect. 2 of 3 Geo. 4, c. 75, cannot be subsequently rendered invalid by the marriage of either of the parties, during the life of the other, with a third person. *Rex v. Delpike, 2 B. & Ad. 16*.

## XXII. RIOT AND UNLAWFUL ASSEMBLY.

### 1. Where Capital.

1 Geo. 1, stat. 2, c. 5.]—If, in reading the proclamation from the Riot Act, the magistrate omit to read the words "God save the King," at the end of it, persons remaining together for an hour after such reading of the proclamation cannot be legally convicted under sect. 1 of that act. 1 Geo. 1, stat. 2, c. 5, s. 1. *Rex v. Child and others, 2 C. & P. 442*—Vaughan and Alderson.

If an indictment on the Riot Act, 1 Geo. 1, stat. 2, c. 5, s. 1, for remaining assembled one hour after proclamation, in setting out the proclamation omit the words "of the reign of," which were contained in the proclamation read by the magistrate—this is a fatal variance. *Rex v. Woolcock, 5 C. & P. 516*—Patteson.

If the proclamation be read several times, the

hour is to be computed from the first reading. *Id.*

If there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, this is within the statute; and whether there was a cessation or not, is a question for the jury. *Id.*

An indictment on the Riot Act, 1 Geo. 1, stat. 2, c. 5, s. 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been in *terrorem populi*. *Rex v. Warren James, 5 C. & P. 153*—Patteson.

### 2. Where a Misdemeanour.

3 Geo. 4, s. 114.]—A justice called upon to suppress a riot, is required by law to do all he knows to be in his power that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty. *Rex v. Finney, 3 B. & Adol. 946*.

Nor will it be a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law. *Id.*

In suppressing a riot, he is not bound to head the special constables, or to arrange and marshal them; this is the duty of the chief constables. *Id.*

Magistrates are not criminally answerable for not having called out special constables, and compelled them to act pursuant to the 1 & 2 W. 4, c. 41, unless it be proved that information was laid before them, on oath, of a riot, &c., having occurred or being expected. *Id.*

A magistrate is not chargeable with neglect of duty for not having called out the posse comitatus in case of a riot, if he has given the king's subjects reasonable and timely warning to come to his assistance. *Id.*

Applying personally to some of the inhabitants of a city, calling at the houses of others, employing other persons to do the same, sending others to the churchwardens, &c., (on a Sunday,) to be published at the places of worship, requiring the people to meet the magistrates at a stated time and place in aid of the civil power and for the protection of the city, and posting and distributing other notices to the like effect, is reasonable warning, the riot having recently broken out. *Id.*

A magistrate who calls upon soldiers to attack a mob and suppress a riot is not bound to go with them; it is enough if he gives them his authority. *Id.*

The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and all the king's subjects are bound to do so, upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so. *Rex v. Finney, 5 C. & P. 255*. At bar in *K. B.*

It is no part of the duty of a magistrate to go out and head the constables, neither is it any part of his duty to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men, as a reserve, to act as occasion may require. Neither is he bound to call out the Chelsea pensioners, any more than the rest of the king's subjects; nor is it any part of his duty to give any orders respecting the fire-arms in the gunsmiths' shops. Nor is a magistrate bound to ride with the military; if he gives the military officer orders to act, that is all that is required of him. *Id.*

Mere good feeling and upright intention in a magistrate will be no defence, if he has been guilty of a neglect of his duty. Nor will the fact of his having acted under the advice of others be any defence for him. The question is, whether he did all that he knew was in his power, and which could be expected from a man of ordinary prudence, firmness, and activity. *Id.*

On the trial of a magistrate, for neglect of duty, he ought not to be found guilty, unless all the jury are satisfied that he has been guilty of the same act of neglect; and if four jurors think him guilty of one act of neglect, and eight think him guilty of another act of neglect, that is not sufficient. *Id.*

A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act. *Rex v. Kennett*, 5 C. & P. 282, n.

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect. *Id.*

An assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful. *Rex v. Hunt*, 1 Russ. C. & M. 254—Bayley and Holroyd. See *Rex v. Hunt*, tit. CONSPIRACY, LXIX., 3.

And all persons who join an assembly of this kind, disregarding its probable effect, and the alarm and consternation that are likely to ensue, and all who give countenance and support to it, are criminal parties. *Id.*

A riot is not the less a riot, nor is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but if that proclamation be not read the common-law offence remains, which is a misdemeanour, and all magistrates, con-

stable, and even private individuals are justified in dispersing the offenders, and, if they cannot otherwise succeed in doing so, they may use force. *Rex v. Furzey*, 6 C. P.—Gaselee and Parke.

Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. *Id.*

A meeting called "to adopt preparatory measures for holding a national convention" is an illegal meeting. *Id.*

If four are indicted for a riot, and two die before trial, and two be found guilty, judgment shall not be arrested. *Rex v. Scott*, 3 Burr. 1202; 1 W. Black. 359.

Although a man may arm himself and his friends for the defence of the possession of his house against such as threaten to make an unlawful entry, he cannot lawfully do the same in defence of his close. *Rex v. Bangor (Bishop)*, 1 Russ. C. & M. 255—Heath.

A rising to quell a treasonable riot is lawful; and no information is to be granted for perjury in regularity in so doing. *Rex v. Wigen (John)*, 1 W. Black. 47.

Seemingly, that under 33 Hen. 8, c. 12, a riot committed in a court of justice, for the purpose of rescuing a prisoner, in the course of which, and in order to accomplish the rescue, an assault was committed, subjects the party to the punishment of amputation awarded by the statute. *Rex v. Thanet (Lord)*, 1 East, P. C. 408.

[By the stat. 9 Geo. 4, c. 31, so much of the stat. 33 Hen. 8, c. 12, as relates to the punishment of manslaughter and of malicious striking, by reason whereof blood shall be shed, is repealed.]

Twelve persons were indicted for a riot and assaulting J. W. The indictment did not conclude in *terrorem populi*. Several of the defendants had been convicted, and, at an evening session, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault except the words "po. ac." and "guilty," written on the indictment, over the names of the convicted defendants:—Held, that this was no proof of an assault as against the present defendants, and that the present defendants could not be convicted of the riot only, as the indictment did not conclude in *terrorem populi*. *Rex v. Hagen*, 1 C. & P. 373—Parke.

If persons be charged with a riot, and cutting down fences, and the indictment do not conclude in *terrorem populi*, they cannot on that indictment be convicted of a riot, but may be convicted of an unlawful assembly. *Rex v. Cox*, 4 C. & P. 538—Parke.

If parties assemble together for a purpose which, if executed, would make them rioters, but, having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly. *Rex v. Nut*, 5 C. & P. 154—Patteson.

#### XXIII. PRIZE FIGHT.

Persons who are present at a prize fight, and

who have gone thither for the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants, and it is not at all material, which of the combatants struck the first blow. *Rex v. Perkins*, 4 C. & P. 597—Patteson.

All persons present countenancing a prize-fight are guilty of an offence. *Rex v. Billingham*, 2 C. & P. 234—Per Burrough.

Where a prize-fight is expected the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they refuse to enter into such securities to commit them. *Id.*

#### XXIV. ASSAULT AND INDECENT EXPOSURE.

(As to Assault with intent to rob, see post, ASSAULT WITH INTENT TO ROB.)

[9 Geo. 4, c. 31.]

##### 1. Offence.

It is an indictable offence to expose a person to the inclemency of the weather. *Rex v. Ridley*, 1 Russ. C. & M. 605; 2 Camp. 650, 653—Lawrence.

If one has his idiot brother, who is helpless, as an inmate in his house, and omits to supply him with proper food, warmth, &c., he is not indictable for the omission. *Rex v. Smith*, 2 C. & P. 449—Burrough.

If one has an idiot brother who is bed-ridden in his house, and keeps him in a dark room without sufficient warmth or clothing, this will not be an assault or an imprisonment, nor will proof of this support an indictment for an assault or an imprisonment. *Id.*

Making a female patient strip naked, under the pretence that the defendant, a medical man, cannot otherwise judge of her illness, is, if he himself takes off her clothes, an assault. *Rex v. Zosinski*, 1 R. & M. C. C. 19; 1 Russ. C. & M. 406.

If a schoolmaster take indecent liberties with female scholar, without her consent, though she cannot resist, he is liable to be punished as for a common assault. *Rex v. Nichol*, R. & R. C. C. 30; 1 Russ. C. & M. 606.

If one of two persons, fighting unintentionally strikes a third, he is answerable in an action for an assault, and the absence of intention can only be urged in mitigation of damages. *James v. Campbell*, 5 C. & P. 372—Bosanquet.

If parish officers cut off the hair of a pauper in the poor-house by force, and against the will of such pauper, this is an assault; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. *Forde v. Skinner*, 4 C. & P. 239—Bayley.

A medical man is not warranted, merely on statements made by the relations of a person

supposed to be insane, in sending men to take him into custody and confine him, unless he is satisfied, from those statements, that such a step is necessary to prevent some immediate injury from being done by the individual, either to himself or to other persons; and, if access cannot be had for the purpose of examination, application should be made to the Lord Chancellor, that the party may be taken up under his authority. *Anderton v. Burrows*, 4 C. & P. 210—Tenterden.

A. was advancing in a threatening attitude, with an intention to strike B., so that his blow would have almost immediately reached B., if he had not been stopped:—Held, that it was an assault in point of law, though, at the particular moment when A. was stopped, he was not near enough for his blow to take effect. *Stephens v. Myers*, 4 C. & P. 349—Tindal.

An excise officer gave defendant a search warrant to look at, who then refused to deliver it up, and a scuffle ensued: on an indictment for an assault the question left to the jury was, whether the officer had used more force than was necessary to recover possession of the warrant. *Rex v. Milton*, 1 M. & M. 107; S. C. nom. *Rex v. Milton*, 3 C. & P. 31—Tenterden.

A constable and his assistants who take a bailiff into custody during an affray to rescue his prisoner, in which the bailiff struck one of the assailants, and the prisoner was rescued, are guilty of an assault and rescue, as the bailiff was authorized by his warrant. *Anon.* 1 East, P. C. 305—Heath.

If a party be turning towards the wall in the street, at night, for a particular occasion, a watchman is not justified in collaring him to prevent his so doing. *Booth v. Hanley*, 2 C. & P. 286.

A person may, under particular circumstances, justify laying hands on another in order to serve him with process. *Harrison v. Hodgson*, 10 B. & C. 445.

One of the marshals of the city of London, whose duty it was, on the day of a public meeting at Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—Held, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way. *Inason v. Cope*, 5 C. & P. 193—Tindal.

A police constable is not justified under the stat. 10 Geo. 4, c. 44, s. 7, in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing is known to be a reputed thief. *Stacken v. Carter*, 4 C. & P. 477—Gaselee.

A police officer, hearing a noise in a public house at one o'clock in the night, entered the

house, the door being open:—Held, that this was not a trespass. *Rex v. Smith*, 6 C. & P.—Tindal.

The case of *Rex v. Williams*, 1 Leach, C. C. 529, and 1 East, P. C. 424, is a decision on stat. 6 Geo. 1, c. 23, (now repealed), respecting assaults to destroy clothes. The case of *Rex v. Randall*, 1 East, P. C. 423, is a decision on the stat. 9 Anno, c. 15, s. 8, (now repealed), respecting assaults on account of money won at play. [Both those statutes are repealed by the stat. 9 Geo. 4, c. 31.]

## 2. Indictment.

An indictment for an assault, false imprisonment, and rescue, stated that the judges of the court of record of the town and county, &c., of P., issued their writ, directed to T. B., one of the sergeants at mace to the said town and county, to arrest W., by virtue of which T. B. was proceeding to arrest W., within the jurisdiction of the said court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest:—Held, that such an indictment was bad, it not appearing that T. B. was an officer of the court; and that there could not be judgment after a general verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment were for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught that appeared, have lawfully interfered to prevent it. *Rex v. Osmer*, 5 East, 304; 1 Smith, 555.

Where an indictment charged the defendant with an assault and an intent to abuse and carnally know a female child:—Held, that he might be convicted of an assault to abuse her simply, as the averment of such intention is divisible. *Rex v. Dawson*, 3 Stark. 62—Holroyd.

On an indictment for an assault on A. B. it is sufficient to prove that an assault was committed on a person bearing that name, although two persons bore the same name, viz. A. B. the elder, and A. B. the younger, and the assault had been committed on the latter only. *Rex v. Peace*, 3 B. & A. 579.

An indictment against two for an assault on two, bad. *Anon*, Lofft, 271. And see *Rex v. Burfield*, 2 Burr. 983.

An indictment, stating that the defendant, late of W., with force and arms, at the parish aforesaid, did make an assault, &c. is bad, if it is not stated in what place the offence was committed. *Rex v. Matthews*, Nolan, 202; 2 Leach, C. C. 585.

[This is now regulated by the stat. 7 Geo. 4, c. 64, s. 20.]

On an indictment for an assault the words "against the form of the statute" are surplusage. *Rex v. Matthews*, 2 Leach, C. C. 585.

## 3. Summary Conviction.

[9 Geo. 4, c. 31.]

A party was convicted summarily by two jus-

tices for an assault. The act appeared to have been done with an intent to commit an unusual offence, or to solicit such offence, but not to have been attended with violence. A certiorari was moved for, on the ground that the offence, if committed, was within the sect. 29 of the stat. 9 Geo. 4, c. 31, which prevents justices from convicting where an attempt to commit felony appears. The court refused to interfere, as no excess of jurisdiction appeared on the face of the conviction, and the evidence, of which the magistrates were the judges, did not clearly show an intention to commit felony. *Anon*. 1 B. & Adol. 382.

Semble, that even if the intent had appeared by the deposition, and the conviction had been consequently illegal, the court would not have interposed by certiorari. *Id*.

## XXV. CHALLENGES TO FIGHT DUEL.

An endeavour to provoke another to commit the misdemeanour of sending a challenge to fight is itself a misdemeanour indictable, particularly where such provocation was given by a writing containing libellous matter, and alleged in the prefatory part of the indictment to have been done with the intent to do the party bodily harm, and to break the king's peace; the sending such writing being an act done towards procuring the commission of the misdemeanour meant to be accomplished. *Rex v. Phillips*, 6 East, 461; 1 Smith, 550.

If one kill another in a deliberate duel, under provocation of charges against his character and conduct, however grievous, it is murder in him and his second, and therefore the bare incitement to fight, though under such provocation, is itself a very high misdemeanour, though no consequence ensue thereon against the peace. *Rex v. Rice*, 3 East, 581. See also *Rex v. Evans*, 1 B. & A. 462.

## XXVI. BRAWLING IN CHURCHYARDS.

Semble, that brawling was not made an offence by stat. 5 & 6 Ed. 6, c. 4, but was previously cognizable by the spiritual courts. *Ex parte Williams*, 6 D. & R. 373; 4 B. & C. 311.

## XXVII. OMITTING TO GIVE SUFFICIENT FOOD AND ILL-TREATMENT OF, SERVANTS, PAUPERS, OR HELPLESS PERSONS.

An indictment lies against a master for not providing sufficient food and maintenance for a servant, whereby she became sick and emaciated. *Rex v. Ridley*, 2 Camp. 650—Lawrence.

In an indictment for criminal misconduct towards the poor, a general description of them without setting out their names, seems sufficient. *Rex v. Wetherill*, Cald. 432. See *Ford v. Skinner*, ante, p. 753.

An indictment charging the defendant, a man covert, living separately and apart from his

band, with neglecting and refusing to provide necessary meat and drink for her servant, and keeping her without sufficient warmth, whereby she became sick and emaciated, was held insufficient, in not alleging that the servant was of tender years, and under the dominion and control of the defendant. *Rez v. Ridley*, 2 Camp. 650—Lawrence. See *Rez v. Squires*, ante, p. 737.

It is an indictable offence, in the nature of a misdemeanour, to refuse or neglect to provide sufficient food or other necessities for any infant of tender years unable to provide for and take care of itself, (whether such infant be child, apprentice, or servant, whom the party is obliged by duty or contract to provide for,) so as thereby to injure his health. *Rez v. Friend*, 1 Russ. C. & M. 44; R. & R.-C. C. 20—Bayley. And see *Rez v. Squires*, 1 Russ. C. & M. 16.

An indictment against a master for not providing necessities for his apprentice ought to state that the apprentice was of tender years, and unable to provide for himself. *Id.*

Seem, that where the charge is that the prisoner received a child as an apprentice, an indictment, importing that a former master, with the child's consent, bound the child to the prisoner, will be sufficient evidence of the receiving as an apprentice, though such indenture is executed by a stranger as trustee for the former master, and not in the former master's name. *Id.*

It is an indictable offence in an overseer to neglect to supply medical assistance, when required, to a pauper labouring under dangerous illness, although he was not in the workhouse, nor had, previously to his illness, received or took in need of parochial relief. *Rez v. Warren*, Russ. C. & M. 142; R. & R.-C. C. 48, n.—Holroyd. And see *Hays v. Bryant*, 1 H. Black. 255.

But an overseer is not indictable for not relieving a pauper, unless there is an order for his relief; except in case of immediate emergency, when there is not time to get an order—By six edges against five. *Rez v. Meredith*, R. & R.-C. C. 46. But see, contra, *Rez v. Booth*, R. & R.-C. C. 47, n. See *Rez v. Smith*, ante, p. 753.

It is an indictable offence wilfully and maliciously to supply prisoners of war with unwholesome food not fit to be eaten by man. *Rez v. Reeve*, 2 East, P. C. 821.

#### XXVIII. OFFENCES RELATING TO LUNATICS.

*Geo. 4, c. 41; 10 Geo. 4, c. 18; 2 & 3 Will. 4, c. 107; 3 & 4 Will. 4, c. 54.]*

The act 9 Geo. 4, c. 41, provided that no person not a parish patient shall be taken into any house for the reception of lunatics, without a certificate of two medical practitioners, containing certain particulars. Sect. 30 enacts, that any person who shall knowingly, and with intent to deceive, sign any such certificate, untruly setting forth such particulars, shall be guilty of a misdemeanour; and that any physician, sur-

geon, &c., who shall sign any such certificate, without having visited and personally examined the patient, shall be guilty of a misdemeanour. An indictment charged that the defendant, a surgeon, knowingly, and with intention to deceive, signed a certificate required by the act, without having visited and personally examined the patient, contrary to the statute: the jury negatived the intention to deceive, and found the defendant guilty, subject to the opinion of the court upon the case:—Held, that in the description of the offence the averment of intention was surplusage, and that such unnecessary matter might be rejected, as well in an indictment on a penal statute as at common law. *Rez v. Jones*, 2 B. & Adol. 611. See *Anderson v. Burrows*, ante, p. 753.

#### XXIX. PERSONS MAIMING THEMSELVES.

A party who maims himself, or procures another to do it for him, so that he may be better enabled to beg, or to prevent himself from being pressed for a soldier, is liable to fine or imprisonment at common law. *Rez v. Wright*, 1 East, P. C. 396.

So is the party by whom it is effected at the other's desire. *Id.*

#### XXX. FORCIBLE ENTRY.

[15 R. 2, c. 2; 8 Hen. 6, c. 9; 21 Jac. 1, c. 15.]

In an indictment for a forcible entry upon the possession of a lessee for years, proof of the force and of such possession is sufficient, although the indictment also allege that the premises were his freehold, and such allegation is not proved. *Rez v. Lloyd*, Cald. 415.

An indictment for a forcible entry, which does not show sufficient actual force, violence, unlawful assembly, riot, or other circumstances, will be quashed even upon motion. *Rez v. Bake*, 3 Burr. 1731.

An indictment at common law, charging the defendants with having unlawfully and with a strong hand entered the prosecutor's mill, and expelled him from the possession, is good. *Rez v. Wilson*, 8 T. R. 357.

An averment in an indictment for a forcible entry that the prosecutor was "seised," is sufficient to found an application for a writ of restitution; and it need not be shown by the prosecutor that he still continued to be seised. *Rez v. Dillon*, 2 Chit. 314.

Indictment will lie for a forcible entry in a close. *Rez v. Nicholls*, 2 Ld. Ken. 512.

On an indictment for forcible entry and detainer, under the statutes of Ric. 2 and Jac. 1, the party aggrieved is not a competent witness. *Rez v. Beavan*, 1 R. & M. 242—Littledale.

To constitute a forcible entry, or a forcible detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer



should be with such numbers of persons, and show of force, as is calculated to deter the rightful owner from sending the persons away, and resuming his own possession. *Milner v. Maclean*, 2 C. & P. 17—Abbott.

Upon the trial of an indictment for a forcible entry or detainer, under the 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15, the party dispossessed is not a competent witness for the prosecution. *Rex v. Williams*, 4 M. & R. 471; 9 B. & C. 549.

Where such an indictment is brought before K. B. by certiorari, that court is bound, upon conviction, to award restitution. *Id.*

On the trial of such an indictment, the defendant cannot impeach the title of the party dispossessed. *Id.*

For the mode of proceeding to obtain restitution on application to a judge, after indictment found, but before trial, see *Rex v. Hake*, 4 M. & R. 483—Burrough.

An indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least such show of force, as is calculated to prevent any resistance. *Rex v. Smyth*, 5 C. & P. 201.

A wife separated from her husband took a house, of which the husband, with the landlord's consent, obtained possession. Semble, that if the wife came with others, and made a forcible entry into this house, she might be convicted on an indictment for a forcible entry, stating it to be the house of the husband. *Id.*

A constable entered a house with a warrant in his hand, and searched the house; and for such entering and searching was indicted for a forcible entry:—Held, that his counsel might ask the witnesses for the prosecution what the constable said, at the time, as to whom he was searching for. *Id.*

If a tenant of a house, after regular notice to quit, abandon it, and lock it up, leaving some articles of furniture in it, and the landlord break it open and take possession, the tenant cannot maintain trespass: his remedy, if any, is by indictment for forcible entry. *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158.

The stat. 8 Hen. 6, c. 9, s. 6, which gives treble damages to the party grieved by a forcible entry and expulsion, applies only to persons having the freehold, for the remedy is given against the disseisor. *Cole v. Eagle*, 8 B. & C. 409.

The stat. 8 Hen. 6, c. 9, recites that the stat. 15 E. 2, c. 2, does not extend to entries in tenements in peaceable manner, and after holden with force, and then enacts that the statute shall be duly executed; and if from thenceforth any doth make a forcible entry in lands, &c., or them to hold forcibly after complaint thereof, made within the same county where such entry is made to the justices of the peace, they shall cause the statute duly to be executed:—Held, that the statute 8 Hen. 6, was intended to give a summary jurisdiction in case of forcible detainer after an unlawful entry; and that a conviction by justices on that statute, merely stating an entry and a for-

cible detainer, was insufficient. *Rex v. Odley*, 4 B. & Adol. 307.

The statute 15 E. 2, c. 2, gave justices a summary jurisdiction to convict, on their own view, for a forcible detainer after a forcible entry. *Id.*

### XXXI. SIMPLE LARCENY.

[7 & 8 Geo. 4, c. 23.]

#### 1. The Taking.

A, in consequence of seeing an advertisement, applied to B. to raise money for him. B. said he would procure him 5000*l.*, and produced from his pocket-book ten blank 6*s.* bill stamps, seven each of which A. wrote, "Accepted, payable at Messrs. P. & Co., 189, F. Street, London," and signed his name. B., who was present, took up the stamps, and nothing was said as to what was to be done with them. Afterwards bills of exchange for 500*l.* each were drawn on these stamps, and B. put them into circulation:—Held, that these stamps, with the acceptances thus written upon them, were neither "bills of exchange," "orders for the payment of money," or "mercantiles for money;" and held also, that a charge of larceny against B. for stealing the stamps, and for stealing the paper on which the stamps were, would not be sustained, as this was no larceny. *Rex v. Minter Hott*, 6 C. & P. 106—Lush, Bolland, and Bosanquet.

To constitute felony, breach of trust is not sufficient, there must be a felonious taking; but that is satisfied by an act not warranted by the purpose for which the property was delivered. *Cartwright v. Green*, 8 Ves. jun. 409.

Stealing, by the wife of a member of a friendly society, money of the society deposited in a box in the husband's custody, kept locked by the stewards, is not larceny. *Rex v. Willis*, 11 C. C. R. 375.

If a larceny be committed out of the kingdom, though within the king's dominions, (e. g. in Jersey,) bringing the things stolen into this kingdom will not make it larceny here. *Rex v. French*, M. C. C. R. 349. [*As to Scotland and Ireland, see s. 76 of the stat. 7 & 8 Geo. 4, c. 23.*]

It is not an indictable offence to take away a chattel, unless such a degree of force be used as will make it an offence against the public; and the indictment must show that fact. *Rex v. Gardner*, 1 Russ. C. & M. 52.

A. delivered his watch to B. to be repaired; instead of repairing it he sold it, and A., being informed of this, told B. that he would either have his watch back, or the money:—Held no felony. *Rex v. Levy*, 4 C. & P. 241—Vaughan.

A. went to the shop of B., and asked for shawl for Mrs. D. to look at; B. gave her five; she paid two, and three were found at her lodgings. Mrs. D. was not called as a witness:—Held, that A., on this evidence, could not be convicted of larceny in stealing the goods of B. *Rex v. Shugg*, 5 C. & P. 143—Paterson.

To obtain property by fraud, and under a preconcerted plan to rob, is felony, but the animus furandi must be found by the jury. *Res v. Horner*, 1 Leach, C. C. 270.

A banker's clerk enters a fictitious sum in the ledger to the credit of a customer, and tells him he has paid that sum to his account; and on the faith of it obtains from the customer his check on the bankers, which the prisoner pays to himself by bank notes from the till, and enters in the waste-book a true account of the check, drawer, and notes, as paid to "a man." This was held a felonious taking of the notes from the till. *Res v. Hemmon*, 5 Taunt. 304.

Where a person gave his servant a 5*l.* note to get changed, and he got the note changed, and made off with the change:—Held to be no larceny, but an embezzlement. *Res v. Sullens*, Carr. C. L. 319; R. & M. C. C. 129.

The assent of a prosecutor to give facility to the commission of a larceny, for the purpose of detecting the offenders, does not do away the felony, although the property was not taken against his will. *Res v. Egginton*, 2 Leach, C. C. 913; 2 East, P. C. 494, 666; 2 B. & P. 508.

The owner of goods knowing of an intention in the prisoners to steal them, they having plotted to do with his servant, desired the servant to carry on the business with a view to the detection of the thieves; in consequence of which, the servant, with the consent of his master, agreed with the prisoners to open the outer door to them, and let them into the house, when they broke open inner apartments, and took the goods:—Held by a majority of the judges to be larceny, one doubting because of the owner's assent and partial encouragement of the felony by means of his servant. *Res v. Egginton*, 2 Leach, C. C. 913; 2 East, P. C. 494, 666; 2 B. & P. 408.

If a man steal goods in one county, and carry them into another, it will be larceny in the latter, though the goods are not carried into the latter county until long after the original theft. *Res v. Parkin*, 1 R. & M. C. C. 45; 2 Russ. C. & M. 74.

An indictment for robbing a mail-bag of letters must be laid in the county where the mail was actually taken, in order to bring the case within the statute; and cannot be laid in the county where the prisoner was in possession of it only; the jury finding that the letters had been taken from the bag in some other county through which the mail had passed. *Res v. Thomas*, 2 East, P. C. 65; 2 Leach, C. C. 634.

To make a taking felonious it is not necessary that it should be done *lucri causa*; taking with an intent to destroy will be sufficient to constitute the offence of larceny, if done to serve the prisoner, or another person, though not in a pecuniary way. By six against five judges. *Res v.abbage*, R. & R. C. C. 292; 2 Russ. C. & M. 4.

Clandestinely taking away articles to induce the owner (a girl) to fetch them, and thereby to give the prisoner an opportunity to solicit her to com-

mit fornication with him, is not felonious. *Res v. Dickinson*, R. & R. C. C. 420; 2 Russ. C. & M. 98.

A. had consigned three trusses of hay to B., and had sent them by the prisoner's cart; the prisoner took away one of the trusses, which was found in his stable, but not broken up:—Held no larceny, as the prisoner did not break up the truss. *Res v. Pralley*, 5 C. & P. 533—Parke.

If a poacher take a gun by force from a gamekeeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of. *Res v. Holloway*, 5 C. & P. 524—Vaughan.

To obtain from a person his note of hand by threatening with a knife held to his throat to take away his life, was not a felonious stealing of the note within stat. 2 Geo. 2, c. 25, for it never was of value to, or in the peaceable possession of, such person. *Res v. Philipoe*, 2 Leach, C. C. 673; 2 East, P. C. 599.

If a person be induced to play at hiding under the hat, and stake down his money voluntarily on the event, meaning to receive the stake if he wins, and to pay it if he loses, the taking up of the stake so deposited by him on the table is not a felonious taking, although the taker was made to appear to win the money by fraudulent conspiracy and collusion. *Res v. Nicholson*, 2 Leach, C. C. 610; 2 East, P. C. 669.

Where the prisoner stopped the prosecutor, who was carrying a bed on his shoulders, and told him to lay it down, or he would shoot him, and he laid it down on the ground, but before the prisoner could take it up he was apprehended:—Held, that the offence was not completed. *Res v. Farrell*, 1 Leach, C. C. 322, n.

Although stat. 22 Car. 2, c. 5, makes the stealing of the king's stores to the value of 20*s.* only felony, an officer may be convicted of larceny at common law, though the value be under 20*s.* *Res v. Thorne*, 2 East, P. C. 622.

Where a prisoner took a packet of diamonds to a pawnbroker, with whom he had previously pledged a brooch; and, having agreed with the shopman for the amount of the loan on the diamonds, sealed them up and received the amount, deducting the amount for which the brooch was pledged; but, instead of giving the packet of diamonds to the shopman, gave him a packet of similar appearance, containing only glass:—Held, that it was not a larceny, but only a fraud. *Res v. Meilheim*, Car. C. L. 281.

If a pawnbroker's servant, who has a general authority from his master to act in his business, delivers up a pledge to the pawner, on receiving a parcel from the pawner, which he supposes contains valuables he has just seen in the pawner's possession in a similar parcel, the receipt of the pledges by the pawner is not a larceny. *Res v. Jackson*, R. & M. C. C. R. 119.

Where a letter, inclosing a check, was directed to James Mucklow, St. Martin's Lane, Birmingham, and no person of that name lived there, but

the prisoner lived about ten yards from St. Martin's Lane, and another James Mucklow lived in New Hall Street, and the prisoner, in consequence of a message left by the postman, got the letter from the post-office, and appropriated the check to his own use:—Held, that it was not a felonious taking. *Res v. Mucklow*, Car. C. L. 280; R. & M. C. C. 160.

If a man steal his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet if the bailee had an interest in the possession, and could have withheld it from the owner, the taking is a larceny. By seven against four judges. *Res v. Wilkinson*, R. & R. C. C. 470; 2 Russ. C. & M. 156.

If a part owner of property steal it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny. *Res v. Bramley*, R. & R. C. C. 478; 2 Russ. C. & M. 155.

A prisoner cannot be found guilty of stealing goods, if it appear that he could not otherwise get them than by the delivery of the prosecutor's wife, in which case it may be presumed that he received them from her. *Res v. Harrison*, 1 Leach, C. C. 47; 2 East, P. C. 559.

If a man and the owner's wife jointly take away the husband's goods, it may be larceny in the man, though he was acting jointly with the wife. *Res v. Tolfree*, R. & M. C. C. R. 243.

To constitute larceny, the felonious intention must exist in the mind at the time the property is obtained; for if it be obtained by fair contract, and afterwards fraudulently converted, it is no felony. *Res v. Charlewood*, 1 Leach, C. C. 409; 2 East, P. C. 689.

If, however, a fraudulent conversion take place after the privy of contract is determined, it is felony. *Id.*

Obtaining a postchaise by hiring, with a felonious intent to convert it to the use of the hirer, is felony, although the contract of hiring was not for any definite time. *Res v. Semple*, 1 Leach, C. C. 430; 2 East, P. C. 691.

Where the jury found that one who assisted in taking another's goods from a fire in his presence, but without his desire, and who afterwards concealed and denied having them, yet took them honestly at first, and that the evil intention to convert them came on the takeo afterwards, it was held no larceny. *Res v. Leigh*, 2 East, P. C. 694; 1 Leach, C. C. 411, n.

If the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return them, and afterwards disposes of them; if he had not a felonious intention when he originally took them, his subsequent withholding and disposing of them will not constitute a new felonious taking, or make him guilty of felony. *Res v. Banks*, R. & R. C. C. 441; 2 Russ. C. & M. 132.

If a man who is hired to drive cattle sell them it is larceny: for he has the custody only, and not the right to the possession; his possession is the owner's possession, though he is a general drover,

at least if he is paid by the day. *Res v. Fleming*, M. C. C. R. 368.

Semble, that if the master of a foreign vessel captured by a British ship, and carried into port, takes goods from the vessel after she has been condemned as a prize, it is not larceny, unless there is evidence that he took them for the purpose of converting them to his own private use. *Res v. Van Mayen*, R. & R. C. C. 118; 2 Russ. C. & M. 199.

The prisoner went into a shop in London and purchased jewellery, and said that he would pay in cash, and the seller agreed to deliver the goods at a coach-office belonging to an inn, where the prisoner stated that he lodged. The seller made out an invoice and took the goods there, when the prisoner said he had been disappointed in receiving some money he expected by letter. Just afterwards a two-penny post letter was put into his hands, which he opened in the presence of the seller, and said he had to meet a friend at Tom's Coffee-house at seven, who would supply the money. The goods were left at the coach-office, and the seller went home. The prisoner had taken a place in the mail, but he countermanded that, and absconded with the goods. The seller swore that he considered the goods sold if he got his cash, but not before. It was left to the jury to say whether the prisoner had any intention of paying and paying for the goods, or whether he gave the order merely to get possession of them to convert them to his own use. The jury found the latter, and the prisoner was convicted, and the conviction was held right by the twelve judges. *Res v. Campbell*, Car. C. L. 280; 1 M. & P. 33; R. & M. C. C. 179.

Getting goods delivered into a hired cart, on the express condition that the price shall be paid for them before they are taken from the cart, and then getting them from the cart without paying the price, will be larceny, if the prisoner never had any intention of paying, but had, ab initio, the intention to defraud. *Res v. Pratt*, R. & M. C. C. 221.

Taking goods, though prisoner had bargained to buy, is felonious, if by the usage the price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner when he bargained for them did not intend to pay for them, but meant to get them into his possession, and dispose of them for his own benefit, without paying for them. *Res v. Gilbert*, R. & M. C. C. 185.

If a tradesman sell a stranger goods, enter them to his debit, and make out a bill of parcels for them as goods sold, and the goods are delivered to the purchaser by the servant of the seller, who receives bills for them, it is not felony, although the tradesman sold them for ready money, never intending to give the stranger credit, and it appears that he had taken the apartments to which he ordered them to be sent for the purpose of obtaining them fraudulently. *Res v. Parker*, 1 Leach, C. C. 614; 2 East, P. C. 671.

If a person, having ordered a tradesman to bring goods to his house, look out a certain quantity, ask the price of them, separate them from the rest, and then, by sending the tradesman home as

pretence of wanting other articles, take the opportunity of running away with the goods so looked out, with intent to steal them, it is larceny; for, as the sale was not completed, the possession of the property still remained in the tradesman. *Rez v. Sharpless*, 1 Leach, C. C. 92; 2 East, P. C. 675.

Where property, which the prosecutor had sought, was weighed out in the presence of his clerk, and delivered to his carman's servant to cart, who let other persons take away the cart and dispose of the property for his benefit jointly with that of the others, the carman's servant, as well as the others, are guilty of larceny at common law. *Rez v. Harding*, R. & R. C. C. 125; 2 Russ. & M. 200.

Where the owner sends goods by his servant to be delivered to A., but B. fraudulently procures the delivery to himself by pretending to be A., he is guilty of felony. *Rez v. Wilkins*, 2 East, P. C. 673.

Getting a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it be taken animo furandi it is a larceny; for the servant has no authority to part with it but to the right person. *Rez v. Longstreet*, R. & M. C. C. 137.

If a party finding property knows the owner, and if there be any mark upon it by which the owner can be ascertained, and instead of returning it converts it to his own use, such conversion will constitute a felonious taking. *Anon.* 2 Russ. & M. 102—Lawrence. *Rez v. James*, 2 Russ. & M. 102—Gibbs.

Where the prisoner obtained possession of a rat from the maker, which had been ordered by a third person, by sending a boy for it in the name of such third person:—Held, it did not amount to larceny. *Rez v. Adams*, 2 Russ. C. & M. 113; R. & R. C. C. 225.

Fraudulently obtaining a chest of tea from the India House, though by means of a regular receipt note and permit, was holden to be larceny. *Rez v. Hench*, 2 Russ. C. & M. 120; R. & R. C. C. 163.

Where the prisoner having offered to accommodate the prosecutor with gold for notes, the latter put down a number of bank notes for the purpose of their being exchanged, which the prisoner took up and ran away with:—Held a larceny, if the jury believed that he intended to run away with them at the time, and not to return the gold. *Rez v. Oliver*, 2 Russ. C. & M. 122—Good.

To obtain a bill of exchange from an indorsee, under a pretence of getting it discounted, is felony, if the jury find that the indorsee did not intend to leave the bill in the prisoner's possession without the money, and that he undertook to discount it with a preconceived design to convert its proceeds to his own use. *Rez v. Aickles*, 1 Leach, C. 294; 2 East, P. C. 675.

Where two planned to rob the prosecutrix of her coats, and one got her to go with him that might get some money to buy them of her, and she left the coats with the other, who imme-

diately absconded with them:—Held, that the receipt by the one amounted to a felonious taking of the coats by both. *Rez v. County*, 2 Russ. C. & M. 127, 175.

If a bureau be delivered to a carpenter to repair, and he discover money in a secret drawer of it, which he unnecessarily as to its repairs breaks open, and converts the money to his own use, it is a felonious taking of the property, unless it appear that he did it with intention to restore it to its right owner. *Cartwright v. Green*, 2 Leach, C. C. 952; 8 Ves. jun. 405.

If a parcel be accidentally left in a hackney-coach, and the coachman, instead of restoring it to the owner, detain it, open it, destroy part of its contents, and borrow money on the rest, he is guilty of felony. *Rez v. Wynne*, 1 Leach, C. C. 413; 2 East, P. C. 664, 697; S. P. *Rez v. Sears*, 1 Leach, C. C. 415, n.

A servant clandestinely taking his master's corn, though to give to his master's horses, is guilty of larceny. *Rez v. Morfit*, R. & R. C. C. 307; 2 Russ. C. & M. 94.

Pulling wool from the bodies of live sheep and lambs, animo furandi, is larceny. *Rez v. Martin*, 1 Leach, C. C. 171; 2 East, P. C. 618.

So, it is larceny to take the milk from a cow. *Id.*

Where goods in a shop were tied to a string which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them away towards the door as far as the string would permit:—Held, that being no severance, there was no asportation, and consequently that it was not a felony. *Anon.* 2 East, P. C. 556; 1 Leach, C. C. 321, n.

The prisoner, having lifted up a bag from the boot of a coach, was detected before he had got it out, and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied:—Held, that it was a complete asportation. *Rez v. Walsh*, 1 R. & M. C. C. 14; 2 Russ. C. & M. 96.

To remove a package from the head to the tail of a wagon, with a felonious intent to take it away, is a sufficient asportation to constitute a larceny; but merely to alter the position of a package on the spot where it lies is not. *Rez v. Coslet*, 1 Leach, C. C. 236; 2 East, P. C. 556.

Where the prisoner set up a long bale upon end in a wagon, and cut the wrapper all the way down with intent to remove the contents, but was apprehended before he had taken anything out of it:—Held, that there was not a sufficient asportation to constitute a larceny. *Rez v. Cherry*, 1 Leach, C. C. 236, n; 2 East, P. C. 556.

If the master and owner of a ship steal some of the goods delivered to him to carry, it is not larceny in him, unless he take the goods out of their packages. *Rez v. Madox*, R. & R. C. C. 92; 2 Russ. C. & M. 135.

Nor, if larceny, would it be a capital offence within stat. 24 Geo. 2, c. 45. *Id.*

If a warehouseman has several bags of wheat delivered to him for safe custody, and he take the whole of the wheat out of one bag, it is no less a larceny than if he had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the bag. *Rex v. Brazier*, R. & R. C. C. 337; 2 Russ. C. & M. 134.

If one employed to carry goods for hire appropriate them to his own use, but does not break bulk, this is no larceny, although the person so employed were not a common carrier, but was only employed in this particular instance. *Rex v. Fletcher*, 4 C. & P. 545—Patteson.

Where a person received a check from Sir T. P. to buy Exchequer bills, and he carried it to the bankers, got the cash, and embezzled part; on being indicted for stealing:—Held, first, that as there was no fraud to induce Sir T. P. to deliver the check, it was not larceny, although the prisoner intended to misapply the property when he took it, and misapplied it accordingly: secondly, that as Sir T. P. never had possession of the money received at the banker's, but by the hands of the prisoner, the indictment could not be supported. *Rex v. Walsh*, R. & R. C. C. 215; 2 Leach, C. C. 1054; 4 Taunt. 258. But see stat. 7 & 8 Geo. 4, c. 29.

The cases of *Rex v. Petrie*, 1 Leach, C. C. 294, 2 East, P. C. 740, and *Rex v. Farley*, 2 East, P. C. 740, relate to petty larceny, which is not now a distinct offence.

## 2. The Thing Taken.

[7 & 8 Geo. 4, c. 29.]

Semble, that bank-notes were not chattels within the meaning of stat. 3 Will. & M. c. 9, and 5 Anne, c. 31. *Rex v. Morris*, 1 Leach, C. C. 468; 2 East, P. C. 748.

A check on a banker's, written on unstamped paper, payable to D. F. J., and not made payable to bearer, is not a valuable security within 7 & 8 Geo. 4, c. 29, s. 5. *Rex v. Yates*, Car. Cr. L. 273, 333.

Money was not within the meaning of the words "goods and chattels," in the statutes 3 Will. & M. c. 9, and 5 Anne, c. 31. *Rex v. Guy*, 1 Leach, C. C. 241; 2 East, P. C. 748. *Rex v. Davidson*, 1 Leach, C. C. 242, n.

Held not to be felony within 2 Geo. 2, c. 25, to steal bankers' notes completely executed, but which have never been put into circulation, on the ground that no money was due upon them. *Anon.* 2 Russ. C. & M. 147; 2 Leach, C. C. 1061, n.

Stealing re-issuable notes after they have been paid, and before they have been re-issued, did not subject the party to an indictment on the 2 Geo. 2, c. 25, for stealing notes; but he may be indicted for stealing paper with valuable stamps upon it. *Rex v. Clark*, R. & R. C. C. 181; 2 Leach, C. C. 1036.

Country bankers' notes, which had been paid by the bankers in London at whose house they were made payable, and by them sent down to the

country bankers' to be re-issued, on the way there were stolen, and the prisoner was indicted for receiving them. The indictment in new counts charged the notes to be valuable securities, and in others as pieces of paper of the goods and chattels of the country bankers. The prisoner was convicted, and the conviction held right. Some of the judges doubted whether these notes were to be considered as valuable securities, but if not, they all thought they were goods and chattels. *Rex v. Vyse*, R. & M. C. C. 218.

Exchequer bills, although signed by a person not authorized to do so, are securities and chattels within the statute 15 Geo. 2, c. 13, s. 12. *Rex v. Aslett*, 2 Leach, C. C. 958; 1 N. R. 1.

The halves of country bank-notes, sent in a letter, are goods and chattels, and a person who steals them is indictable for larceny. *Rex v. Mead*, 4 C. & P. 535—Bosanquet.

Dollars, or Portugal money, not current by proclamation, are not goods within the meaning of the 24 Geo. 2, c. 45. *Rex v. Leigh*, 1 Leach, C. C. 52; S. P. *Rex v. Grimes*, 2 East, P. C. 646.

A larceny may be committed of window mashes, which are neither hung nor beaded into the frame, but merely fastened by laths nailed across the frames to prevent their shaking out; as they are not fixed to the freehold. *Rex v. Hodgkin*, 1 Leach, C. C. 201; 2 East, P. C. 590, n.

Piratically stealing a ship's anchor and cable is a capital offence by the marine laws, and triable under the 28 Hen. 8, c. 15; 39 Geo. 3, c. 3, not extending to this case. *Rex v. Carling*, R. & R. C. C. 123. Indictment stated.

And the stealing is equally an offence, although the master of the vessel concur in it, and although the object is to defraud the underwriters for the benefit of the owners. *Id.*

If pigeons are so far tame that they come home every night to roost in the wooden barn, hanging on the outside of the house of their owner, and a party come in the night and steal them out of those boxes, this is a larceny. *Rex v. Smith*, 1 C. & P. 131—Taddy.

## 3. The Ownership.

Property cannot be laid in a person who has never had either actual or constructive possession. *Rex v. Adams*, R. & R. C. C. 225; 3 Russ. C. & M. 113.

In an indictment for larceny, the property stolen may be described as the real owner's, although it never was actually in his possession, but in the possession of his agent only. *Rex v. Remond*, R. & R. C. C. 136; 3 Russ. C. & M. 160.

If goods seized under a writ of *fi. fa.* are stolen, they may be described as the goods of the party against whom the writ issued; for, although they are in *custodia legis*, the original owner continues to have a property in them until they are sold. *Rex v. Eastall*, 3 Russ. C. & M. 121, 197.

An indictment for stealing the wearing apparel of a son, who is an apprentice to his father,

and furnished with his clothes in pursuance of his indentures, must lay them to be the property of the son, and not of the father. *Res v. Forgate*, 1 Leach, C. C. 463.

Where two had jointly stock upon a farm, and one died, leaving several children:—Held, that the property in sheep stolen was properly alleged to be in the survivor and the children, the former swearing that he considered himself to hold one moiety for the benefit of the latter. *Res v. Scott*, 2 East, P. C. 655; R. & R. C. C. 13.

Seemly, that the property might have been laid in the survivor alone, as he was in possession of the children's moiety as their agent. *Id.*

D. and C. were partners; C. died intestate, leaving a widow and children; from the time of his death the widow acted as partner with D., and attended the business of the shop; three weeks after C.'s death part of the goods were stolen; they were described in the indictment as the goods of D. and the widow:—Held, that the description was right. *Res v. Gaby*, R. & R. C. C. 178; 2 Russ. C. & M. 161.

The goods in a dissenting chapel, vested in trustees, cannot be described in an indictment as the goods of a servant who has merely the custody of the chapel and things in it, to clean and keep in order, although he has the key of the chapel, and no other person but the minister has another key. *Res v. Hutchinson*, R. & R. C. C. 112; 2 Russ. C. & M. 158.

A Bible had been given to a society of Wesleyans; and it had been bound at the expense of the society. B. stated that he was one of the trustees of the chapel, and also a member of the society. No trust-deed was produced:—Held, that, in an indictment for stealing the Bible, the property was rightly laid in B. and others. *Res v. Boulton*, 5 C. & P. 537—Parke.

An unqualified person may have a sufficient legal possession of game to support an indictment for stealing it from him. *Arson*, 2 Russ. C. & M. 2—Grose.

A box belonging to a benefit society was stolen from a room in a public-house. Two of the stewards had keys of this box; and, by the rules of the society, the landlord ought to have had a key, but in fact he had not:—Held, that the prisoner might be convicted on a count laying the property in the landlord alone. *Res v. Wymer*, 4 C. & P. 391—Parke.

An indictment for stealing goods may, under 55 Geo. 3, c. 137, state them to be the goods of the overseers of the poor, for the time being, of the parish of A.; for this will import that they were, at the time of the theft, to the persons who were then overseers. *Res v. Went*, R. & R. C. C. 359; 2 Russ. C. & M. 167.

On stealing from the Invalid office at Chelsea, property must be laid in the house of the king. *Res v. Peyton*, 1 Leach, C. C. 324; 2 East, P. C.

keeper or the guest. *Res v. Todd*, 1 Leach, C. C. 357, n.

So, goods stolen from a washerwoman may be laid to be her property. *Res v. Parker*, 1 Leach, C. C. 357, n.

So, in the case of an agister, who takes in sheep to agist for another, they may be laid to be his property. *Res v. Woodward*, 1 Leach, C. C. 357, n.; 2 East, P. C. 653.

The coach-glass of a gentleman's coach, standing in the coachmaster's yard, may be laid to be the property of the coachmaster. *Res v. Taylor*, 1 Leach, C. C. 356; 2 East, P. C. 653.

In larceny, the goods of a furnished lodging must be described as the lodger's goods, not as the goods of the original owner. *Res v. Belstead*, R. & R. C. C. 411; 2 Russ. C. & M. 154; *Res v. Brunswick*, 1 R. & M. C. C. 26; 2 Russ. C. & M. 154.

The property in goods stolen held to be properly alleged to be in the driver of a coach, from the boot of which they were taken. *Res v. Deakin*, 2 East, P. C. 653; 2 Leach, C. C. 862.

If a cornfactor purchase a ship laden with corn, and send his lighter to fetch it from the ship to his wharf, a delivery of the corn on board the lighter puts it into the possession of the cornfactor, although the lighter man never delivers it at the factor's wharf. *Res v. Spears*, 2 Leach, C. C. 825; 2 East, P. C. 568.

If a cornfactor purchase the cargo of a vessel laden with corn, and send his servant with a lighter to fetch it from the ship in loose bulk, and the servant contrive to have a certain portion of it put into sacks by the meters on board the ship, and take the corn so sacked feloniously away in the lighter immediately from the ship, he may be indicted for stealing the property of the cornfactor, although it was never put into his lighter, or otherwise reduced into the cornfactor's possession. *Res v. Abraham*, 2 Leach, C. C. 824; 2 East, P. C. 569.

An indictment for larceny, laying the goods stolen to be the property of Victory Baroness Turkheim, is good, although her name is Selinda Victoire. *Res v. Sulle*, 2 Leach, C. C. 861.

An indictment for the larceny of property belonging to trustees who are not incorporated must lay the property to be in them by name as individuals, subjoining a description of the character in which they are authorized to act. *Res v. Sherington*, 1 Leach, C. C. 513.

#### 4. Indictment.

An indictment for stealing a bank-note did not conclude contra formam statuti:—Held, by the fifteen judges, that it was bad. *Res v. Pearson*, 5 C. & P. 121.

An indictment on 2 Geo. 2, c. 25, alleged the stealing of a bill of exchange in L., whereon the names of A. & B. were indorsed, which was the

an indorsee when negotiated at L.:—Held, no variance. *Rex v. Austin*, 2 East, P. C. 602.

An indictment for larceny of a promissory note may describe it generally as "one promissory note for the payment of one guinea," without setting the note forth. *Rex v. Milnes*, 2 East, P. C. 602.

In an indictment for larceny, if the thing stolen be described as a bank post-bill, and be not set out, the court cannot take judicial notice that it is a promissory note, or that it is such an instrument as, under stat. 2 Geo. 2, c. 25, may be the subject of larceny, although it be described as made for the payment of money. *Rex v. Chard*, R. & R. C. C. 488.

Where an indictment described a bank-note as signed by A. H. for the Governor and Company of the Bank of England, and a prisoner was convicted; such conviction was held bad, there being no evidence of A. H.'s signature. *Rex v. Craven*, R. & R. C. C. 14; 2 East, P. C. 601.

Describing a bank-note "as a certain note, commonly called a bank-note," was not such a description as will warrant a conviction on 2 Geo. 2, c. 25, for stealing it. *Id.*

An indictment for stealing 10*l.* in moneys numbered is not sufficient; some of the pieces of which that money consisted should be specified. *Rex v. Fry*, R. & R. C. C. 482; 2 Russ. C. & M. 169.

An indictment on stat. 2 Geo. 2, c. 25, should have concluded against the form of the statute, and not statutes, although that statute had once expired and been revived by stat. 9 Geo. 2, c. 18. *Rex v. Morgan*, 2 East, P. C. 601.

In an indictment on stat. 2 Geo. 2, c. 25, it was improper to lay bank-notes as chattels, but that word might have been rejected as surplusage, if the indictment be in other respects sufficient. *Rex v. Sadi*, 2 East, P. C. 601.

A set of new handkerchiefs in a piece may be described as so many handkerchiefs, though they are not separated one from another, if the pattern designates each, and they are described in the trade as so many handkerchiefs. *Rex v. Nibbs*, 1 R. & M. C. C. 25; 2 Russ. C. & M. 169.

Where an indictment for stealing in a dwelling-house alleged it to be the dwelling-house of Sarah Lunna, and it appeared in evidence that her name was Sarah London:—Held, that the variance was fatal to the capital part of the indictment. *Rex v. Woodward*, 1 Leach, C. C. 253, n.

In cases of larceny of animals *fera natura*, the indictment must show that they were either dead, tame, or confined, otherwise they must be presumed to be in their original state. *Rex v. Rough*, 2 East, P. C. 607. *And see Rex v. Hudson*, 2 East, P. C. 611.

Ferrets, though tame and saleable, cannot be the subject of larceny. *Rex v. Seering*, R. & R. C. C. 351; 2 Russ. C. & M. 153.

An indictment for stealing a dead animal should state that it was dead; for, upon a general statement that a party stole the animal, it is to be intended that he stole it alive. *Rex v. Edwards*, R. & R. C. C. 497—Holroyd; 2 Russ. C. & M. 171.

Upon an indictment for stealing a live animal, evidence cannot be given of stealing a dead one. *Id.*

But in the case of *Rex v. Puckering*, M. C. C. R. 242, A. was indicted for receiving a "lamb," when he received the lamb it was dead, and it was held by the fifteen judges that the indictment was sufficient, it being immaterial, as to the prisoner's offence, whether the lamb was alive or dead, his offence, and the punishment for it, being in both cases the same. *This case appears to overrule the case of Rex v. Edwards.*

An indictment for stealing four live tame keys was laid in the county of H.; it appeared that the prisoner stole them alive in the county of C., and killed them there, and then brought them into the county of H.:—Held, that as the prisoner had not the turkeys in a live state in the county of H., the charge as laid was not proved, and that the word "live" in the description could not be rejected as surplusage, and therefore that the indictment was bad. *Rex v. Holloway*, 1 C. & P. 128.

If a parish be partly situate in the county of W. and partly in the county of S., it is sufficient, in an indictment for larceny, to state the offence to have been committed at the parish of S., in the county of W. *Rex v. Perkins*, 4 C. & P. 363—Park.

### 5. Evidence and Trial.

A prisoner was indicted for stealing three articles. It appeared, that, having taken the first article, he returned in about two minutes and took the second, and then returned in half an hour and took the third:—Held, that the last taking was a distinct felony, and could not be given in evidence with the other two; but, that the interval of time between the first and second taking was so short, that they must be considered as parts of the same transaction. *Rex v. Bole*, 4 C. & P. 386—Littledale.

If the only evidence against a prisoner indicted for larceny be, that the goods were found in his possession sixteen months after they had been stolen, the judge will direct an acquittal, without calling on him for his defence. *Rex v. —*, 1 C. & P. 459—Bayley.

A prisoner was indicted for stealing carpenter's tools, and the only evidence against him was

an acquittal was directed. *Res v. Adams*, 3 C. & P. 600—Parks.

Non-delivery upon request is evidence of a tortious conversation. *Res v. Semple*, 1 Leach, C. C. 494.

On an indictment for larceny, the wife of a receiver, who is not indicted, cannot be compelled to give her evidence against the prisoner. *Res v. Ast*, Car. C. L. 66—Macdonald and Lawrence.

If it is probable that all the goods stolen were not stolen at one time, but still it is possible that they might have been so, the judge will not put the prosecutor to elect to go upon the stealing of some particular article or articles. *Res v. Dunn*, Car. C. L. 82.

Larceny must be tried in the county where committed; but the offence is considered as committed in every county into which the thief carries the goods. *Res v. Thomson*, 2 Russ. C. & M. 174.

Therefore, if a man steal goods in the county of A., and carry them into the county of B., he may be indicted for the larceny in the latter county. *Id.*

But if a compound larceny be committed in one county, and the offender carry the property into another, though he may be convicted in the latter county of the simple larceny, he cannot be there convicted of the compound larceny. *Id.*

Where four stole goods in the county of G., and divided them in that county, and then carried their shares into the county of W. in their separate bags:—Held, that it was not a joint larceny in W., but separate larcenies in that county, and the subject of distinct prosecutions. *Res v. Barnett*, 2 Russ. C. & M. 175—Holroyd. *And see Res v. County*, 2 Russ. C. & M. 127, 175.

On an indictment for the larceny of a bill of exchange obtained from the prosecutor, under a retence of discounting it, parol evidence of the bill may be given after proof of a subpoena duces tecum given to the person in whose possession it was shown to be shortly previous to the trial, but who did not attend. *Res v. Aickles*, 1 Leach, C. C. 294; 2 East, P. C. 675.

The case of *Res v. Herling*, 1 R. & M. C. C. 9, relates to the punishment of larceny, which is now regulated by the stat. 7 & 8 Geo. 4, c. 29, s. 3.

### XXXII. ROBBERY.

7 & 8 Geo. 4, c. 29, ss. 6 & 7.—By the stat. 7 & 8 Geo. 4, c. 27, the stats. 23 Hen. 8, c. 1, and 3 R. & M. c. 9, are repealed, as is the stat. 1 Edw. c. 12, so far as relates to this subject.

*See C. J. Tindal's Charge*, 5 C. & P. 267, n.

#### 1. The Offence.

If a robber take a purse of money from a person and restore it to him immediately, saying, "if you value your purse take it back and give me the contents," but is apprehended before the money is delivered to him, yet the crime is com-

pleted. *Res v. Post*, 1 Leach, C. C. 228; 2 East, P. C. 557.

Taking money from a woman at the time of an attempt to commit a rape amounts to robbery, although there was no demand of money made by the prisoner, and it was clearly his original intent only to commit a rape. *Res v. Blackhem*, 2 East, P. C. 711.

Where money was given to one of the mob during the riots in London, in 1780, upon a knocking at the prosecutor's door in a menacing manner:—Held, that it was robbery. *Res v. Tuplin*, 2 East, P. C. 712.

Where the prisoners threatened to bring a mob from Birmingham, (then in a state of riot and disturbance), and burn the prosecutor's house if he did not give them money, and he did so under fear of that threat:—Held, a robbery. *Res v. Astley*, 2 East, P. C. 729; *Res v. Brown*, 2 East, P. C. 731.

So it was held in the case of a threat to tear down corn, and level the house. *Res v. Simons*, 2 East, P. C. 731.

If persons who had formed part of a mob obtain money from a party by advising him to give money to the mob, and be indicted for this as a robbery, the prosecutor, to show that this was not *bona fide* advice, may give evidence of demands of money made by the same mob at other places, before and afterwards, in the course of the same day, if any of the prisoners were present on those occasions. *Res v. Winkworth and others*, 4 C. & P. 414—Parks.

If a person by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer, less than the value, it is robbery. *Res v. Simons*, 2 East, P. C. 712. *S. P. Res v. Spencer*, 2 East, P. C. 712.

Where persons under pretence of an auction got a woman into a house, and compelled her, by threats of carrying her before a magistrate and to prison for not paying for a lot pretended to have been bid for by her, to pay them one shilling through fear of prison, and for the purpose of obtaining her liberation, but without any fear of any other personal violence:—Held, not robbery, but only duress. *Res v. Wood*, 2 East, P. C. 732.

A woman went into a mock auction shop, and it was pretended that she bid for certain articles, and the prisoner threatened to take her to Bow-street, and have her sent to Newgate, unless she paid earnest for the articles, to avoid which she paid one shilling:—Held, that this was not a sufficient restraint to make this a robbery. *Res v. Newton*, Car. Cr. Law, 285.

If the property be not taken by violence, nor parted with through fear, it is no robbery; though there were sufficient legal and reasonable ground for fear, as upon a threat to charge one with an unnatural crime. *Res v. Rosne*, 2 East, P. C. 734.

Snatching an article from a man will constitute robbery, if it is so attached to his person or clothes as to afford resistance. *Res v. Mason*, R. & R. C. C. 419; 2 Russ. C. & M. 69.



Snatching property from the hand of another is not a sufficient force to constitute a highway robbery. *Rez v. Baker*, 1 Leach, C. C. 290; 2 East, P. C. 702.

Suddenly snatching a bundle from the hands of a boy as the prisoner ran past him:—Held, only larceny, as there was not a sufficient degree of force and terror to constitute robbery. *Rez v. Macauley*, 1 Leach, C. C. 287; *S. P. Rez v. Robins*, 1 Leach, C. C. 290, n., and cases there cited.

To force an ear-ring from the ear of a lady, with a felonious intent to steal it, is a sufficient degree of violence to constitute a robbery; and to remove it from the ear to the curls of her hair, where it accidentally remained, is a sufficient carrying away. *Rez v. Lapier*, 1 Leach, C. C. 320; 2 East, P. C. 557, 708.

To snatch a diamond-pin from the head-dress of a lady, with such force as to remove it with part of the hair from the place in which it was fixed, is a sufficient violence to constitute robbery. *Rez v. Moore*, 1 Leach, C. C. 335.

To constitute the crime of highway robbery, the force used must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property of the party attacked, it is not highway robbery. *Rez v. Gnosi*, 1 C. & P. 304—Garrow.

The crime of robbery may be committed by obtaining money from a man, by threatening to charge him with having been guilty of sodomitical practices. *Rez v. Jones*, 1 Leach, C. C. 139.

To obtain money from a person against his will, by threatening to carry him before a magistrate, and to accuse him of unnatural practices, amounts to robbery, though no actual or personal violence be used. *Rez v. Donnelly*, 1 Leach, C. C. 193; 2 East, P. C. 713, 715, 783.

It is equally a robbery to extort money from a person, by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not. *Rez v. Gardner*, 1 C. & P. 479—Littledale.

If a man obtain property from another by accusing him of having been guilty of an unnatural crime, it will amount to robbery, although the party was under no apprehension of personal danger, and felt no other fear than that of losing his character. *Rez v. Hickman*, 1 Leach, C. C. 278; 2 East, P. C. 728.

To constitute robbery by taking money from another upon a threat of charging him with an unnatural crime, the money must be taken immediately upon the threat made, and not after the parties have separated, and there has been time for the prosecutor to deliberate and procure assistance; and especially, after he had consulted a friend, who was even present at the time when the money was paid, though the prosecutor parted with his money from fear of losing his character. *Rez v. Jackson*, 1 East, P. C. Add. xxi.; 1 Leach, C. C. 193, n.; 2 Leach, C. C. 618, n. And see *Rez v. Hickman*, 2 East, P. C. 728; 1 Leach, C. C. 278. And see *Rez v. Cannon*, post, p. 766.

Parting with property upon the charge of an unnatural crime will not make the taking a robbery, if it is parted with, not from fear of loss of character, but for the purpose of procuring. *Rez v. Fuller*, R. & R. C. C. 408; 2 Rom. C. & M. 88.

Where money was obtained by calling a man a sodomite and threatening him, but the money was parted with by the prosecutor, not so much from fear of losing his character, as from fear of losing his place:—Held, by a majority of the judges, that it was sufficient to constitute a robbery. *Rez v. Elmetoad*, 2 Rom. C. & M. 68.

The parting with money or goods through fear of loss of character and service, upon a charge of sodomitical practices, is sufficient to constitute robbery, although the party has no fear of being taken into custody, nor any dread of punishment. *Rez v. Egerton*, R. & R. C. C. 375; 2 Rom. C. & M. 87.

Obtaining money from a woman by threatening to accuse her husband of an indecent assault is not robbery. *Rez v. Edwards*, 5 C. & P. 518—Littledale. *S. C. nom. Rez v. Edward*, 1 M. & Rob. 257.

If a bailiff handcuff a prisoner, under pretence of carrying him to prison with greater safety, and by means of this violence extort money, he is guilty of robbery. *Rez v. Gascoigne*, 1 Leach, C. C. 280; 2 East, P. C. 709.

If a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them return and steal his money, &c.:—Held, that one only can be convicted of the robbery, as it was not in pursuance of any common intent. *Rez v. Hawkins*, 3 C. & P. 392—Park.

A. had set wires in which game was caught; B., a gamekeeper, found them and took them, with the game caught in them, for the use of the lord of the manor: A. demanded them with menaces, and B. gave them up. The jury found that A. acted under a bona fide impression that the wires and game were his property:—Held, that it was no robbery. *Rez v. Hall*, 3 C. & P. 40—Vaughan.

The cases of *Rez v. Pyc*, R. & R. C. C. 2, n.; and *Rez v. Johnstone*, R. & R. C. C. 10, n., were for robbery in a dwelling-house, which is not now a distinct offence.

If a prosecutor declare, on an indictment of robbery, that he parted with his property without any fear of violence to his person, or injury to his character, the prisoner cannot be convicted. *Rez v. Reame*, 2 Leach, C. C. 616; 2 East, P. C. 734.

A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A.: B. threw down the bundle, and ran to the assistance of A., when C. took it up and made off with it. C. and D. were indicted for robbery, A. being the prosecutor:—Held, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of A. *Rez v. Fulmore*, 5 C. & P. 508—Vaughan.

A. was attacked by robbers, who, after using very great violence towards him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him:—Held, robbery. *Rex v. Bingley*, 5 C. & P. 602—Gurney.

### 2. Indictment.

An indictment for robbery need not have the word "violently;" but it must appear upon the whole statement that violence was used. *Rex v. Smith*, 2 East, P. C. 784.

An indictment for a robbery on an unmarried woman in her maiden name is good, although she marry before the indictment is found. *Rex v. Turner*, 1 Leach, C. C. 536.

An indictment for a highway robbery must state that the assault was feloniously made with an offensive weapon. *Rex v. Pelfryman*, 2 Leach, C. C. 563; 2 East, P. C. 783.

The case of *Rex v. Wardle*, R. & R. C. C. 9; 2 East, P. C. 785, was for robbing near a highway, which is not now a distinct offence.

### 3. Evidence.

On an indictment for robbery, the declaration in articulo mortis of the party robbed is not admissible in evidence. *Rex v. Lloyd*, 4 C. & P. 232—Bolland.

## XXXIII. LARCENY FROM THE PERSON.

7 & 8 Geo. 4, c. 29, s. 6.]—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 48 Geo. 3, c. 129, is wholly repealed.

The cases *Rex v. Brown*, 2 East, P. C. 704, 1 Leach, C. C. 241, n.; *Rex v. Kennedy*, 2 Leach, C. C. 788; 2 East, P. C. 706; *Rex v. Huckle*, 2 Leach, C. C. 789, n.; *Rex v. Thompson*, 1 Leach, C. C. 443; 2 East, P. C. 705; *Rex v. Willen*, 1 Leach, C. C. 495; 2 East, P. C. 705; *Rex v. Sterne*, 1 Leach, C. C. 473; 2 East, P. C. 701; *Rex v. Murphy*, 1 Leach, C. C. 266; 2 East, P. C. 701; and *Rex v. Baynes*, 1 Leach, C. C. 7; 2 East, P. C. 700, are all cases turning on what is a privately stealing, which is not now material.

To constitute a stealing from the person, the thing must be completely removed from the person; removal from the place where it was, if it remain throughout with the person, is not sufficient. *Rex v. Thompson*, 1 R. & M. C. C. 78.

But such removal would be sufficient to constitute a simple larceny. *Id.*

An indictment on the 48 Geo. 3, c. 129, need not have negatived the force or fear necessary to constitute robbery; and if it does not, though it may appear that there was such force or fear, the punishment imposed by the 48 Geo. 3 might have been inflicted. *Rex v. Pearce*, R. & R. C. C. 174; 2 Leach, C. C. 1046; 2 Russ. C. & M. 182; S. P. *Rex v. Robinson*, R. & R. C. C. 321.

The stat. 48 Geo. 3, c. 129, s. 2, which repealed the 8 Eliz. c. 4, was not intended to alter the offence of robbery at common law; but merely to

## XXXIV. ASSAULT WITH INTENT TO ROB.

7 & 8 Geo. 4, c. 29, s. 6.]—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 4 Geo. 4, c. 54, is repealed, except so far as it relates to letters threatening to murder, burn, or destroy, and as to accessories to such offences, and rescue of such offenders.

An indictment on 7 Geo. 2, c. 21, for an assault with intent to rob, must have charged the assault to be unlawful and malicious, as well as felonious, unless it also laid a felonious demand of goods in a forcible and violent manner. *Rex v. Pegge*, 1 East, P. C. 420.

It must also charge that the prisoner made the assault with intent to rob, and not merely with intent to steal the goods of the prosecutor. *Rex v. Monteth*, 2 Leach, C. C. 703; 1 East, P. C. 420.

It must state that the assault was made with an offensive weapon, or that a demand was made of money or goods. *Rex v. Jackson*, 1 Leach, C. C. 267; 1 East, P. C. 419.

On an indictment on 7 Geo. 2, c. 21, for assaulting with an offensive weapon, with intent to steal, it appeared that the assault was made with a stick, although it was not of any extraordinary size:—Held, that the stick was an offensive weapon within the statute, although it might in general be used as a walking stick. *Rex v. Johnson*, R. & R. C. C. 492.

[The stat. 4 Geo. 4, c. 54, s. 5, repeals the 7 Geo. 2, c. 21, and the 4 Geo. 4, c. 54, is repealed as above mentioned. It is now an offence under the stat. 7 & 8 Geo. 4, c. 29, s. 6, and does not require that the assault should have been made with any weapon.]

It must be proved that the assault was made on the person intended to be robbed. *Rex v. Thomas*, 1 Leach, C. C. 330; 1 East, P. C. 417. And see *Rex v. Trusty*, 1 East, P. C. 418.

Therefore an assault on a post-boy, with intent to rob the traveller, is not sufficient. *Id.*

There must be a demand of money or other property, as well as an assault, to constitute the offence. *Rex v. Parfait*, 1 Leach, C. C. 19; 1 East, P. C. 416.

The defendant, who had been committed for having "with force and arms made an assault upon the prosecutor with intent feloniously to steal, take, and carry away from the person," &c., was bailed, because he was not charged with any offence within the statute 7 Geo. 2, c. 21, which enacted, "that if any person shall make an assault with an offensive weapon, or by menaces, or in a forcible manner, demand money, &c., from any other person, with a felonious intent to rob such person, he shall be guilty of felony." *Rex v. Remnant*, 5 T. R. 169.

## XXXV. THREATENING LETTERS AND THREATS OF ACCUSATION.

4 Geo. 4, c. 54, 7 & 8 Geo. 4, c. 29, s. 7.]—The

Geo. 2, c. 15, and of 30 Geo. 2, c. 24, as related to this subject; but the stat. 52 Geo. 3, c. 64, does not appear to be repealed; and by the stat. 7 & 8 Geo. 4, c. 27, the stat. 4 Geo. 4, c. 54, is repealed so far as it relates to letters threatening to kill, murder, burn, and destroy, and to accessories to such offences, and rescue of such offenders.

The stat. 8 Geo. 1, c. 22, respecting threatening letters, was not repealed by the stat. 30 Geo. 2, c. 24, upon the same subject. *Rex v. Robinson*, 2 Leach, C. C. 749; 2 East, P. C. 1110. But it is by the stat. 7 & 8 Geo. 4, c. 27, and 9 Geo. 4, c. 31.

A bank-note was a valuable thing within the meaning of the stat. 9 Geo. 1, c. 22, and 30 Geo. 2, c. 24; and is sufficiently demanded by signifying an intention to impute the crime of murder to the party from whom it is attempted to be obtained. *Id.*

A letter, signed by two initials, as R. R., was a letter without a name subscribed thereto, within the meaning of the Black Act, 9 Geo. 1, c. 22. *Id.*

An indictment on 4 Geo. 4, c. 54, s. 5, for demanding money, &c., must have distinctly shown by whom it was demanded. *Rex v. Dunkley*, 1 R. & M. C. C. 90.

And an indictment on the same statute, by threatening to accuse, &c., must have positively shown who was threatened. *Id.*

In a threatening letter, the threat must be direct and plain. *Rex v. Girdwood*, 1 Leach, C. C. 142; 2 East, P. C. 1120.

The bare delivery of the letter, though sealed, is evidence of a knowledge of its contents. *Id.*

If the terms of a threatening letter are doubtful as to the exact accusations the prisoner meant to threaten, his declarations subsequently made, on being asked what he meant to impute, are evidence to explain the meaning of the letter. *Rex v. Tucker*, Car. C. L. 288; R. & M. C. C. 134. [In the marginal note of the report of R. & M. C. C. 134, it is said that an indictment on 4 Geo. 4, c. 54, for sending a threatening letter to accuse of an infamous crime need not specify the crime, for the specific crime the prisoner intended to charge might be intentionally left in doubt; however, in the case itself, nothing of the kind appears.]

Obtaining money by threatening to charge a man with an unnatural crime, and carry him before a magistrate, is robbery, if there is any constraint upon his person. Therefore, where the prisoners call a coach to carry the parties before a magistrate, and the prosecutor gets into it, this is a constraint on his person sufficient to constitute a robbery. *Rex v. Cannon*, R. & R. C. C. 146; 2 Russ. C. & M. 87. And see *Rex v. Egerton*, R. & R. C. C. 375; 2 Russ. C. & M. 87.

Seemle, that the mere apprehension of danger to the party's character will not be sufficient to constitute the offence. *Id.*

A letter was signed, "I am your Cut-throat," and stated, that if the person to whom it was sent

and if he made light of it, the writer would make light of him and his:—Held, that this letter plainly conveyed a threat to kill and murder, as to render it unnecessary to insert either innuendoes or prefatory allegations in the indictment to explain its meaning. *Rex v. Boucher*, 4 C. & F. 562—Patteson.

An indictment on stat. 30 Geo. 2, c. 24, for sending a threatening letter, intending to extort and gain money, could not be supported by showing a letter threatening to accuse the prosecutor of an unnatural crime, if he did not give up a certain bill drawn by the prisoner, of which the prosecutor was the holder. *Rex v. Major*, 2 East, P. C. 1118; 2 Leach, C. C. 772.

Sending a letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him, did not threaten to charge such an infamous crime as to be within stat. 4 Geo. 4, c. 54, s. 3. *Rex v. Hickman*, 1 L. & M. C. C. 34. But what is an infamous crime is now regulated by the stat. 7 & 8 Geo. 4, c. 29, s. 9.

It is no answer to a charge of sending threatening letters, that the contents would lead the party to suspect who wrote the letter, unless it is shown that the prisoner did not mean to conceal himself. *Rex v. Wagstaff*, R. & L. C. C. 398.

A threatening letter referring, in the terms of it, to such circumstances as were plainly intended to denote who the writer was, and making a demand of a sum of money in controversy between him and the prosecutor, which the latter had received, and which the former had before insisted should be accounted for to him, was not a threatening letter within stat. 9 Geo. 1, c. 22, or 27 Geo. 2, c. 15, although the writer did not subscribe his name. *Rex v. Hewing*, 2 East, P. C. 1116; 1 Leach, C. C. 445, n.

Where the wife wrote a threatening letter, and the husband carried it to the party threatened:—Held, that the husband, though privy to the writing, was not within stat. 9 Geo. 1, and 27 Geo. 2; nor could the wife alone be convicted, unless she wrote and sent it without the husband who delivered it being privy to the contents. *Rex v. Hammond*, 2 East, P. C. 1119; 1 Leach, C. C. 444.

To bring the offence of sending a threatening letter within 27 Geo. 2, c. 15, the letter must have been sent to the person threatened, and it must have been so stated in the indictment. *Rex v. Paddle*, R. & R. C. C. 484.

But it seems, that sending the letter to A, in order that he may deliver it to B, is a sending to B, if the letter be delivered by A to B. *Id.*

On an indictment on 27 Geo. 2, c. 15, for sending a threatening letter, it was held, that the dropping a letter in a man's way, in order that he may pick it up, is a sending of it. *Rex v. Wagstaff*, R. & R. C. C. 398.

The sending will be within the statute, although the party saw the prisoner drop the letter, though he did not know the party knew

On writing a letter to a third person, in the name of another, to borrow money, which he obtains by means of that fraud, is only guilty of a misdemeanour. *Rez v. Atkinson*, 2 East, P. C. 673.

An anonymous letter stated, that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent: and that if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt:—Held, that this was not a threatening letter within the stat. 7 & 8 Geo. 4, c. 29, s. 8, although it appeared that the letter was a mere device to defraud the prosecutor of thirty sovereigns. *Rez v. Pickford*, 4 C. & P. 227—Bolland.

To obtain money by a threat to send for a constable, and take the party before a magistrate, and from thence to prison, is not robbery; for the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property. *Rez v. Knewland*, 2 Leach, C. C. 721; 2 East, P. C. 732.

An indictment for sending a threatening letter must set out the letter. *Rez v. Lloyd*, 2 East, P. C. 1122.

Stating that the prisoner sent such a letter, directed to the prosecutor, &c., seems sufficient, without expressly alleging that the prisoner sent it to the prosecutor. *Id.*

The offence of sending a threatening letter may be laid in the county where it is delivered by the post to the prosecutor. *Rez v. Esser*, 2 East, P. C. 1125; *S. P. Rez v. Girdwood*, 2 East, P. C. 1120, 1 Leach, C. C. 142.

An indictment, charging that a prisoner "did feloniously and maliciously, with intent to extort money, charge and accuse A. B. with having committed the horrible and detestable crime, &c., and feloniously, &c., menace and threaten to prosecute the said A. B., &c.," was not good under the stat. 4 Geo. 4, c. 54, s. 5. *Rez v. Abgood*, 2 C. & P. 436—Garrow.

But if the indictment had followed the statute, and the evidence had been of a threat to prosecute, the judge would have left it to the jury to say, whether that was not a threatening to accuse. *Id.*

A conviction on 27 Geo. 2, c. 15, for sending a letter to the prosecutor, threatening "to set fire to his mill, and likewise do all the public injury they were able to him, in all his farms and estates," was held wrong when the prosecutor had not then any mill to which the threat of burning would apply (having parted with it three years before); and the threat as to the farm, &c., not necessarily implying a burning. *Rez v. Jepson*, 2 East, P. C. 1115.

If a party be indicted for sending a threatening letter, the court will, on motion of the prisoner's counsel, as soon as the bill is found, order that he letter be deposited with the officer of the

# XXXVI. SARCILEGE

7 & 8 Geo. 4, c. 29, s. 16.]—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 23 Hen. 8, c. 1, is wholly repealed, and so much of the stat. 1 Edw. 6, c. 12, as relates to this subject.

The provisions of 1 Ed. 6, c. 12, s. 10, were not confined to goods used for divine service; they extended to articles kept in the church to keep it in repair, and therefore a conviction on an indictment on that act, for stealing a snatch-block to raise weights in case the bells wanted repairing, and an iron pot for charcoal, used to air the vaults, was held right. *Rez v. Rourke, R. & R.* C. C. 386; 2 Russ. C. & M. 45.

If a church tower be built higher than the church, and have a separate roof, but have no outer door, and be only accessible from the body of the church, from which it is not separated by any partition; this tower is a part of the church within the stat. 7 & 8 Geo. 4, c. 29, s. 10. *Rez v. Wheeler*, 3 C. & P. 585—Parke.

# XXXVII. BURGLARY.

## 1. Breaking and entering.

7 & 8 Geo. 4, c. 29, s. 11.]—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 12 Anne, s. 1, is wholly repealed, and also so much of the stat. 18 Eliz. c. 7, as relates to this subject.

There must be both a breaking and entering to constitute a burglary, and the breaking must be such as will afford the burglar an opportunity of entering so as to commit the intended felony. *Rez v. Hughes*, 1 Leach; C. C. 406; 2 East, P. C. 491.

If there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. *Rez v. Lewis*, 2 C. & P. 628—Vaughan.

Where a mill, under the same roof and within the same curtilage as a dwelling-house, had a trap-door over a gate-way, which was only fastened by a lid-door kept down by its own weight, without bolts or other interior fastenings:—Held, that an entry into the mill in the night, with intention to steal flour by raising the lid-door amounted to burglary. *Rez v. Brown*, 2 East, P. C. 487—Buller; 2 Leach, C. C. 1016, n.

Though a thief enter a dwelling-house at night through an open door or window, yet if, when within, he break or open an inner door with intent to commit felony, it is burglary. *Rez v. Johnson*, 2 East, P. C. 488.

Introducing the hand between the glass of an outer window and an inner shutter was held to be a sufficient entry to constitute burglary. *Rez v. Bailey, R. & R. C. C.* 341; 2 Russ. C. & M. 12.

And it is a sufficient breaking to constitute such an offence, if the party breaks a pane of glass of a window, and puts his hand in for the purpose of

which was merely kept in its place by its own weight, and which had no fastenings, because, it being a new trap-door, they had not been put on, is not a sufficient breaking to constitute a burglary; but unlocking and opening a hall-door and running away is a sufficient breaking out of the house. *Rex v. Lawrence and Weaver*, 4 C. & P. 231—Bolland.

Lifting the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. *Rex v. Russell*, M. C. C. R. 377.

Throwing up a window, and introducing an instrument between such window and an inside shutter, to force open the shutter, if the hand or some part of it is not within the window, is not a sufficient entry to constitute burglary. *Rex v. Rust*, R. & M. C. C. R. 183.

But where the prisoner raised a window which was not bolted, and thrust a crow-bar under the bottom of the shutter, (which was about half a foot within the window), so as to make an indent on the inside of the shutter, but from the length of the bar his hand was not inside the house:—Held, that it was not a sufficient entry to constitute a burglary. *Rex v. Roberts*, Car. Cr. Law, 293; 2 East, P. C. 487.

Where, in breaking a window in order to steal property in the house, the prisoner's finger went within the house:—Held, that there was a sufficient entry to constitute burglary. *Rex v. Davis*, R. & R. C. C. 499.

Where a window opens upon hinges, and is fastened by a wedge, so that the pushing against it will open it; forcing it open by pushing against it is a sufficient breaking to constitute a burglary. *Rex v. Hall*, R. & R. C. C. 355.

Removing the fastening of a window by the hand introduced through a partially broken pane of the window, and thereby opening the window and entering, is a breaking; not by breaking the residue of the pane, but by unfastening and opening the window. *Rex v. Robinson*, M. C. C. R. 327.

A chimney is part of a dwelling-house, and therefore the getting in at the top is a breaking of the dwelling-house; and where the prisoner, by lowering himself in the chimney, made an entry into the dwelling-house, though he did not enter any of the rooms, it was held sufficient to constitute burglary. *Diss. Holroyd, J.*, and Burrough, J. *Rex v. Brice*, R. & R. C. C. 450.

Pulling down the sash of a window is a breaking sufficient to constitute burglary, although it has no fastening, and is only kept in its place by the pulley-weight, and it is equally a breaking, although there is an outer shutter which is not put to. *Rex v. Haines*, R. & R. C. C. 451.

A window was a little open, and the prisoner pushed it wide open and got in:—Held, no suffi-

closed on the outside next the street; the flap was not bolted, but it had bolts:—six judges were of opinion that there was a sufficient breaking to constitute burglary, but the remaining six were of a contrary opinion. *Rex v. Callen*, R. & R. C. C. 157; 2 Russ. C. & M. 5. And see *Rex v. Brown*, 2 East, P. C. 487.

The prisoner broke the glass of the prosecutor's side door on the Friday night, with intent to enter the house at a future time, and actually entered on the Sunday:—Held, that this was burglary, although a day had intervened, the breaking and entering being both by night, and the breaking being with intent afterwards to enter. *Rex v. Smith*, R. & R. C. C. 417; 2 Russ. C. & M. 32.

When the family within the house were forced by threats and intimidations to let in the offenders by one of them opening the door:—Held, that it was as much a breaking by those who made use of such intimidations without, to prevail upon them so to open it, as if they had actually burst the door open. *Rex v. Shadler*, 1 Russ. C. & M. 8—Thompson.

Quere, whether in an indictment on the 1 Ed. 6, c. 12, s. 10, for breaking and entering a house in the day time, evidence of breaking in the door open and the lock of a cupboard, after having fraudulently obtained admission into the house, was sufficient to support the indictment? *Rex v. Hamilton*, 1 Leach, C. C. 348.

## 2. What is a Dwelling-house.

[See the stat. 7 & 8 Geo. 4, c. 29, s. 13, by which many of the following cases are affected.]

Semble, that it is not burglary to enter an old house occupied with a dwelling-house, and separated therefrom by an open passage eight feet wide, if it is not within the same curtilage. *Rex v. Garland*, 2 East, P. C. 493, 512; 1 Leach C. C. 144.

But if the outhouse be adjoining to the dwelling-house, and occupied as parcel thereof, though there be no common inclosure or curtilage, it may still be considered as part of the mansion. *Rex v. Brown*, 2 East, P. C. 493—Wilson.

A manufactory carried on in the centre halling of a great pile, in the wings of which several persons dwelt, but having no internal communication with the same, though the roofs of all were connected, and the entrances of all were out of the same common inclosure:—Held, not a dwelling-house in which burglary could be committed. *Rex v. Eggrinton*, 2 East, P. C. 494, 666; 1 Leach C. C. 913; 3 B. & P. 508.

An outhouse in the yard of a dwelling-house will be parcel of the dwelling-house if the yard is inclosed, though the occupier has another dwelling-house opening into the yard, and he has another dwelling-house with easements in the yard. *Rex v. Walters*, R. & M. C. C. 13; 2 Russ. C. & M. 5.

the street. *Rez v. Jones*, 1 Leach, C. C. 537. 2 East, P. C. 504.

A burglary committed in a banker's shop, in which no person slept, but to which there was a communication by a trap-door and a ladder from the upper rooms of the house, in which only a weekly workman and his family lived by the permission of the three partners, who were owners of the whole house, may be laid to have been committed in the dwelling-house of these partners, they inhabiting it by means of their servant. *Rez v. Stock*, 2 Leach, C. C. 1015; R. & R. C. C. 185; 2 Taunt. 339.

A summer-house used occasionally for tea and retirement, within the same enclosure as the house, though at the distance of about half a mile, was a building within the 4 Geo. 2, c. 32. *Rez v. Norris*, R. & R. C. C. 69. And see *Rez v. Parker*, 1 Leach, C. C. 320, n.

All buildings appear to be within 4 Geo. 2, c. 32. *Id.*

A building within the same fence as the dwelling-house, and used with it as parcel of the dwelling-house, though it has no internal communication with the house but through an open passage, is parcel of the dwelling-house. *Rez v. Hancock*, R. & R. C. C. 170; 2 Russ. C. & M. 58.

And such a building is equally a part of the dwelling-house, though used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he was a partner. *Id.* But see stat. 7 & 8 Geo. 4, c. 29, s. 13.

J. W. let a part of his house, viz. a shop, passage, cellar, &c., to his son, who did not sleep therein, and there was a distinct entrance into the son's part, but his passage led to his father's cellars, and they were open to his father's part of the house. The shop was broken into, and the prisoner was convicted thereof:—Held, that by reason of the internal communication, the son's part continued part of the father's house, and therefore that it was burglary. *Rez v. Sefton*, R. & R. C. C. 202; 2 Russ. C. & M. 14.

A door which only forms part of the outward fence of the curtilage, and opens into no building but into the yard only, is not such a part of the dwelling-house as that the breaking thereof will constitute burglary. *Rez v. Bennett*, R. & R. C. C. 289; 2 Russ. C. & M. 5, 59.

Prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and a coach-house adjoined; all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c., so as to be altogether an inclosed yard; the workshop had no internal communication with the house, and it had a door opening into the street; its roof was higher than that of the dwelling-house: the street door of the workshop was broken open in the night, and on an indictment for burglary:—Held, the workshop was parcel of the dwelling-house. *Rez v. Chalking*, R. & R. C. C. 334; 2 Russ. C. & M. 56. [The law laid

down in this and the six following cases is altered by the stat. 7 & 8 Geo. 4, c. 29, s. 13.]

A garret made use of as a workshop, and rented with a sleeping-room by the week, is the mansion of the lodger, if the landlord do not sleep under the same roof. *Rez v. Carrell*, 1 Leach, C. C. 287; 2 East, P. C. 506.

Lofts over coach-houses and stables, converted into lodging-rooms, are the dwelling-houses of their inhabitants, if there be an outer door. *Rez v. Turner*, 1 Leach, C. C. 305; 2 East, P. C. 492.

An area gate, opening into the area only, is not part of the dwelling-house, so as to make the breaking thereof burglary, if there is any door or fastening to prevent persons in the area from entering the house, although such door or fastening may not be secured at the time. *Rez v. Davis*, R. & R. C. C. 322; 2 Russ. C. & M. 6, 59.

A building used with and under the same roof with a dwelling-house, but having no internal communication with it, although opening into an inclosed yard belonging to the house, and also into an adjoining street, may be parcel of the dwelling-house, so as to constitute the breaking and entering thereof a burglary. *Rez v. Lithgo*, R. & R. C. C. 357.

The prisoner broke into a goose-house, opening into the prosecutor's yard, into which his house also opened; the yard was surrounded partly by other buildings of the homestead, and partly by a wall; some of the buildings had doors opening backwards, and there was a gate in one part of the wall opening upon a road; this goose-house was held part of the dwelling-house, so as to constitute the breaking thereof burglary. *Rez v. Clayburn*, R. & R. C. C. 360.

Buildings separated from the dwelling-house by a public road, however narrow, will not be a parcel of the dwelling-house, so as to constitute the breaking thereof burglary, if there be no common fence or roof to connect them, although held by the same tenure, and although some of the offices necessary to the dwelling-house adjoin thereto, and although there be an awning extending therefrom to the dwelling-house. *Rez v. Westwood*, R. & R. C. C. 495.

But if such a building be made a sleeping place for any of the servants of the dwelling-house, it may be deemed a distinct dwelling-house. *Id.*

A shop adjoining to a house, if under the same roof, and within the curtilage, is part of the dwelling-house, although there be no internal communication between the shop and the house, and although no person sleep in the shop. *Rez v. Gibson*, 1 Leach, C. C. 357; 2 East, P. C. 508.

A room in a dwelling, occupied therewith and under the same roof, shall be deemed part of the dwelling-house, though it has a separate outer door, and no internal communication with the rest of the house. *Rez v. Burrows*, M. C. C. R. 274.

Where the owner of a house has never by himself, or by any of his family or servants, slept in the house, it is not his dwelling-house, so as to

make the breaking in and stealing goods thereout burglary, though he has used it for his meals, and all the purposes of his business. *Reg. v. Martin*, R. & R. C. C. 108; 2 Russ. C. & M. 18.

Although a man leaves his house, and never means to reside in it again, yet, if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it, for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family is an habitation by him, and the shop will be considered as part of the dwelling-house, so as to constitute the breaking thereof burglary. *Reg. v. Gibbons*, R. & R. C. C. 422; 2 Russ. C. & M. 19.

Where the prosecutor left his house without any intention of living in it again, and intending to use it as a warehouse only; though he had persons (not of his family) to sleep in it, to guard the property:—Held, that it could not be considered as the “dwelling-house” of the prosecutor, so as to support a conviction for stealing therein to more than the amount of 40s. *Reg. v. Flanagan*, R. & R. C. C. 187.

The owner of a house puts a person into it to sleep there at nights till he can get a tenant, in order to protect some furniture there, which he had purchased of the last tenant, which servant had so slept there for three weeks before, but the owner never intended to inhabit it himself:—Held, that a thief could not be capitally convicted of stealing goods in the dwelling-house of such owner to the value of 40s. within the stat. 12 Anne, c. 7. *Reg. v. Davis*, 2 East, P. C. 499; 2 Leach, C. C. 876.

Or if the owner of a house has no intention of residing in it himself, it cannot be considered his dwelling-house, although his servant sleeps in it every night, if his sleeping there be merely to protect the furniture. *Reg. v. Davies*, 2 Leach, C. C. 876; 2 East, P. C. 499.

A house into which the owner has only removed his goods, but has not slept in it, is not his dwelling-house as to the crime of burglary. *Reg. v. Thompson*, 2 Leach, C. C. 771; 2 East, P. C. 498; *Reg. v. Hallard*, 2 East, P. C. 498.

A nocturnal breaking into a house of which the owner has no farther taken possession than by depositing in it sundry articles of merchandise, neither he nor any servant of his having slept in it, is not burglary, for it cannot be considered as the dwelling-house of the owner. *Reg. v. Harris*, 2 Leach, C. C. 701; 2 East, P. C. 498.

A house under repair, but not inhabited, is not the dwelling-house of the owner, though part of his property is deposited therein. *Reg. v. Lyons*, 1 Leach, C. C. 185; 2 East, P. C. 497, differently reported. *S.P. Reg. v. Fuller*, 1 Leach, C. C. 186, n.

A porter lying in a warehouse does not make it a dwelling-house. *Reg. v. Smith*, 2 East, P. C. 497; 2 Leach, C. C. 1018, n. And see *Reg. v. Brown*, 2 East, P. C. 501; 2 Leach, C. C. 1018, n.

A permanent building used and slept in only for a short time, for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it in an indictment for burglary, though unoccupied the rest of the year. *Reg. v. Smith*, M. & R. 256.—Park.

Indictment for a burglary, said in the first count to have been committed in the house of M. R. B., in the second of J. B., and in the third of W. N. It appeared that the place where the robbery was committed was a centre building, having two wings; that in the centre building the business of M. R. B., J. B., W. N., and several other persons, was carried on; that in part of one of the wings was the dwelling of M. R. B., and in the other part that of J. B.; neither having any internal communication with the centre, except by a window in the dwelling of J. B., which looked into a passage that ran the whole length of the centre, and that the other wing was occupied by W. N., from which there was no communication with the centre. Semble, that the robbery did not amount to a burglary. *Reg. v. Egginton*, 2 B. & P. 508.

The servant of three partners in trade had weekly wages, and three rooms assigned to him for lodging, over the bank and brewery office of the partners, with which it communicated by a trap-door and a ladder; a burglary being committed in the banking-room, it was held that it was well laid to be in the dwelling-house of the three partners. *Reg. v. Stock*, 2 Taunt. 338.

### 3. Ownership.

The apartments of lodgers shall be considered as their respective dwelling-houses, if the owner of the premises do not sleep under the same roof. *Reg. v. Rogers*, 1 Leach, C. C. 89; 2 East, P. C. 506.

A house, the whole of which is let out in lodgings, and has only one outer door common to all its inmates, is the mansion-house of its several inhabitants. *Reg. v. Trephern*, 1 Leach, C. C. 427; 2 East, P. C. 506, 780.

Though a servant live rent free for the purpose of his service in a house provided for that purpose; yet, if he has the exclusive possession, and it is not parcel of any premises which his master occupies, it may be described as the house of the servant; especially if the house belongs not to his master, but to some person paramount to his master; as in the case of a toll-collector's house, occupied by the servant of the lessee of the tolls, for the purpose of collecting the tolls. *Reg. v. Camfield*, 1 R. & M. C. C. 42; 2 Russ. C. & M. 25.

If two or more rent of the same owner different parts of the same house, so as to have amongst them the whole house, and the owner does not reserve or occupy any part of it, the separate part of each may be described as the dwelling-house of each. *Reg. v. Bailey*, 1 R. & M. C. C. 23; 2 Russ. C. & M. 30.

A house, the joint property of partners in trade, and in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of them resides in it. *Reg. v. Aithea*, M. C. C. R. 329.

If a married woman take a house, in which a burglary be committed, the house must be held as the house of the husband, although she be living separate from him. *Reg. v. Sneyth*, 5 C. & P. 201.

The house of a husband, in which he allow

his wife to live separate from him, may be described, in an indictment for burglary, as the house of the husband, although the wife lived there in adultery with another man, who paid the housekeeping expenses; and although the husband suspected a criminal intercourse between his wife and the other man when he allowed her to live separate. *Rex v. Wilford*, R. & R. C. C. 517.

Where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use:—Held, that a house which she had hired to live in was, in an indictment for burglary, properly described as her husband's dwelling-house, although she paid the rent out of her separate property, and the husband had never been in it. *Rex v. French*, R. & R. C. C. 491.

If a servant lives in a house of his master's at a yearly rent, the house cannot be described as the master's house, though it is on the premises where the master's business is carried on, and although the servant has it because of his service. *Rex v. Jarvis*, 1 R. & M. C. C. 7; 2 Russ. C. & M. 25.

Where a servant had part of a house for his own occupation, and the rest, in which a burglary is committed, is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house. *Rex v. Wilson*, R. & R. C. C. 115; 2 Russ. C. & M. 26.

And it will be the same if any other person has part of the house, and the rest is reserved. *Id.*

If the owner of a house suffer a person to live in it rent free, it may be stated, in an indictment for breaking into such house in the day-time, to be that person's house; such person being tenant at will. *Rex v. Collett*, R. & R. C. C. 498; 3 Russ. C. & M. 28.

A burglary in the apartments of officers of a public company must be laid to be in the mansion-house of such company. *Rex v. Hawkins*, 2 East, P. C. 501; & *P. Rex v. Pickett*. *Id.*

So, of the apartments of a college not occupied by the students, as the buttery. *Rex v. Maynard*, 2 East, P. C. 501.

Where one, under pretence of being robbed, forced the door of a guest's chamber in an inn, at night, and stole his goods:—Held, that the burglary must be laid to be in the dwelling-house of the innkeeper, and not of the guest. *Rex v. Prosser*, 2 East, P. C. 502.

If a burglary be committed in the house of a trading company, in the house belonging to which an agent of the company resides, with his family, for the purpose of carrying on the business, it may be laid to be the dwelling-house of the agent, although the rent thereof is paid and the lease is held by the company. *Rex v. Margette*, 2 Leach, C. C. 930.

Though a servant live rent-free in a house belonging to an insurance company, and the company pays the taxes, and the company's business is carried on in the house, it is not the dwelling-house of the servant, and if the servant and

house, and the part in which the company's business is carried on be at all times open to those parts in which the servant lives, it may be stated as the servant's house, though the only part entered by the thief was that in which the company's business was carried on; and though the judges would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as the house of the servant. *Rex v. Witt*, R. & M. C. C. R. 248.

If a house is let to A., and a warehouse under the same roof, and with an internal communication to the house, to A. & B.; the warehouse, in an indictment for burglary, cannot be described as the dwelling-house of A. *Rex v. Jenkins*, R. & R. C. C. 244; 2 Russ. C. & M. 31.

If the owner of a cottage lets one of his workmen, with his family, live in the cottage free of rent and taxes, and he lives there principally, if not wholly, for his own benefit, it may be described as the workman's dwelling-house in an indictment for burglary. *Rex v. Jobling*, R. & R. C. C. 525; 2 Russ. C. & M. 28.

#### 4. Intent.

Breaking and entering a house in the night-time to recover tea, which had been seized, is no burglary, being intended for the benefit of the supposed owner. *Rex v. Knight*, 2 East, P. C. 510.

But semble, that it would have been burglary if the indictment had laid the intent to be to rescue the goods seized, which is made felony by statute. *Id.*

If several agree to commit a burglary, but one communicates the intent to an officer, that one may take the other two, and the officer is upon the watch accordingly; the person who has made that communication to the officer will not be particeps criminis in the burglary, although he is present when it is committed, and pretends to assist the other two, but in fact expedites their apprehension. *Rex v. Dannelly*, R. & R. C. C. 310; 2 Marsh. 571.

Nor will it make any difference, although his object in detecting is to obtain for himself (by previous agreement with the officer) part of a reward that will be payable on conviction. *Id.*

#### 5. Indictment.

An indictment for burglary must state at what hour of the night it was committed. *Rex v. Waddington*, 2 East, P. C. 513.

It must be alleged and proved, either that a felony was committed in the dwelling-house, or that the party broke and entered with intent to commit some felony within the same. *Rex v. Dobbe*, 2 East, P. C. 513.

And whatever be the felony really intended, the same must be laid in the indictment, and proved agreeably to the fact. *Rex v. Vandercomb*, 2 East, P. C. 514, 519; 2 Leach, C. C. 708.



tents. *Rez v. Thompson*, 2 East, P. C. 515; 2 Leach, C. C. 1105, n.

An indictment for burglary, charging in one count an intent to steal the goods of the owner, and in another an intent to murder him, is good, for it is the same fact and evidence, only laid in different ways. *Id.*

The name of the owner of the house is essential in an indictment for burglary, and for stealing in the dwelling-house. *Rez v. White*, 1 Leach, C. C. 252; 2 East, 513, 780: *S. P. Rez v. Woodward*, 1 Leach, C. C. 253, n.

A corporation must prosecute in their corporate name; and the addition of such name as a description of the persons of which the corporation is composed is not sufficient in an indictment. *Rez v. Patrick*, 1 Leach, C. C. 253; 2 East, P. C. 1059.

An indictment for burglariously breaking and entering the house of A., with intent to steal the goods of B., is bad, if no person of that name had any property in the house. *Rez v. Jenks*, 2 Leach, C. C. 774; 2 East, P. C. 514.

A house may be described as in the possession of the actual occupier, though his possession be wrongful. *Rez v. Wallis*, M. C. C. R. 344.

#### 6. Evidence and Trial.

The prisoner was indicted for burglary, 18th October, 23 Geo. 3. The indictment was found in August, 23 Geo. 3, and the offence was really committed 18th October, 22 Geo. 3:—Held, that the conviction on the indictment was wrong. *Rez v. Goddard*, 5 R. & R. C. C. 432, n. [*But see* 7 Geo. 4, c. 24, s. 20.]

On an indictment for burglary, the prisoner may be acquitted of the breaking, and found guilty of stealing in the dwelling-house. *Rez v. Withal*, 1 Leach, C. C. 88; 2 East, P. C. 515, 517.

If a prisoner be charged with a burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove that the larceny was committed on a prior day. *Rez v. Vandercumb*, 2 Leach, P. C. 708; 2 East, P. C. 519.

On an indictment for burglary by breaking into a house in the night time, and stealing to the value of 5*l.* or more, the prisoner may be convicted of burglary, or of housebreaking, under the stat. 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of 5*l.* *Rez v. Compton*, 3 C. & P. 418—Gaselee.

On an indictment for burglariously breaking and entering a dwelling-house, (omitting the words "with intent to steal,") and then and there stealing goods therein, the prisoner may be well convicted of the burglary if the larceny be proved: *secus* if not. *Rez v. Furnival*, R. & R. C. C. 445.

Upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only—*Diss. Burrough and Hurlock. Rez v. Butterworth*, R. & R. C. C. 520; 2 Russ. C. & M. 44.

When the felony is laid to constitute the burglary, an acquittal of the burglary is an acquittal of stealing in the dwelling-house. *Rez v. Comer*, 1 Leach, C. C. 36.

Where a party is indicted both for burglary and feloniously stealing in the dwelling-house, and is acquitted of the burglary, but found guilty of the stealing, the verdict should be entered thus, "Jury say not guilty of breaking and entering the dwelling-house in the night, but guilty of stealing the (property) in the dwelling-house." *Rez v. Hungerford*, 2 East, P. C. 518; 1 Leach, C. C. 88.

A. is indicted for a burglary, and B. as accessory both before and after the fact: the facts proved are, that A., at the instigation of B., a police-officer, consents with three others to commit a burglary, and it is agreed that B. should lie in wait to apprehend the three others, and that the reward for their conviction shall be shared between A. & B. The jury find A. guilty of larceny only, and B. as accessory both before and after. *Quære*, 1st, whether as A. was not to participate in the plunder, but only in the reward, he could be convicted of larceny? 2ndly, whether, as A., the principal, had been acquitted of the burglary, B. could be convicted as accessory to the larceny? *Rez v. Dannelly*, and *Rez v. Vaughan*, 2 Marsh. 571.

#### XXXVIII. HOUSEBREAKING.

7 & 8 Geo. 4, c. 29, s. 12; 3 & 4 W. 4, c. 21.—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals the stat. 23 H. 8, c. 1, and so much of the stat. 1 Edw. 6, c. 12, as relates to housebreaking, and wholly repeals the stat. 39 Eliz. c. 15, and 1 W. & M., c. 9, and 10 W. 3, c. 12, *videlicet*, stat. 10 & 11 W. 3, c. 23, and 12 Ann. st. 1, c. 7.

The cases of *Rez v. Mounser*, 2 Leach, C. C. 567; 2 East, P. C. 629; *Rez v. Tandy*, 1 C. & P. 291; and *Rez v. Byford*, R. & R. C. C. 581, relate to housebreaking in the day-time, and to the benefit of clergy, and are inapplicable to the present state of the law. *See* BURGLARY, *ante*, p. 767.

#### XXXIX. LARCENY IN A DWELLING-HOUSE.

7 & 8 Geo. 4, c. 29, s. 12; 2 & 3 W. 4, c. 42.—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals the stat. 12 Ann. st. 1, c. 7.

If a prisoner, who was in the service of the prosecutor, steal a quantity of lace in several pieces, the pieces together being above 5*l.* in value, and bring them all out of his master's house at the same time, this is a capital offence, although it be shown that the prisoner had the opportunity of stealing the lace by a piece at a time, and that no one of the pieces was worth 5*l.* *Rez v. C. M. Jones*, 4 C. & P. 217—Ballard.

Under stat. 12 Anne, st. 1, c. 7, the larceny must have been of things under the protection of the house, and not of any person within it, therefore not of money in the pocket. *Rez v. Oms*, 2 East, P. C. 645; 2 Leach, C. C. 572.

Money feloniously obtained from a person by

the practice of ring-dropping, although it is so obtained in the dwelling-house of another, was not a capital offence within the statute. *Id.*

Stealing a bank-note in a dwelling-house was a felony within the meaning of the words "money, goods, chattels, wares, or merchandises." in stat. 12 Anne, c. 7, *Rex v. Dean*, 2 Leach, C. C. 693; 2 East, P. C. 646, 749.

If one, on going to bed, put his clothes and money by the bed-side, they are under the protection of the dwelling-house, and not of the person, and therefore a party stealing them may be convicted of stealing in a dwelling-house. *Rex v. Thomas*, Car. C. Law, 295.

The penalties of stealing in a dwelling-house did not extend to the case of a prisoner stealing the property of another in his own dwelling-house. *Rex v. Thompson*, 1 Leach, C. C. 338; 2 East, P. C. 644.

Nor to the case of a woman stealing the property of another in the dwelling-house of her husband. *Rex v. Gould*, 1 Leach, C. C. 339, n. 217; 2 East, P. C. 644.

Property left by mistake at a house, and delivered to the occupier, under the supposition that it was for one of the persons in the house, is entitled to the protection of the house, so as to make the stealing of it, if of 40s. value, by a lodger therein, under pretence that it is his, a capital offence. *Rex v. Carroll*, 1 R. & M. C. C. 89.

A bank-note feloniously obtained in the house by a lodger from his landlord, under pretence of going to his banker to get it changed, was not a capital offence within the stat. 12 Anne, c. 7, for where the taking is from the person it is not a stealing in the dwelling-house. *Rex v. Campbell*, 2 Leach, C. C. 564; 2 East, P. C. 644.

The goods of a lodger's guest are under the protection of the dwelling-house; therefore a lodger who invites a man to his room, and then steals his goods to the value of 40s. (now 5l.) when not about his person, is liable to be found guilty of stealing in a dwelling-house. By seven against three judges. *Rex v. Taylor*, R. & R. C. C. 418; 2 Russ. C. & M. 52.

An indictment for stealing in the dwelling-house, persons being therein and put in fear, must state that the persons were put in fear by the prisoners. *Rex v. Etherington*, 2 Leach, C. C. 671; 2 East, P. C. 635.

The cases of *Rex v. Jones*, 2 East, P. C. 641; *Rex v. Matthews*, 2 East, P. C. 642; *Rex v. Godfrey*, 1 Leach, C. C. 287; 2 East, P. C. 642; *Rex v. Stone*, 1 Leach, C. C. 334; 2 East, P. C. 643; *Rex v. Seas*, 1 Leach, C. C. 304; 2 East, P. C. 643; are on the stat. 10 & 11 W. 3, c. 23, which is repealed, and do not apply to the present state of the law.

Where, on an indictment for privately stealing in a shop, &c., it appeared that there were several acting together, some in the shop, and some out, for the purpose of assisting those in the shop, and the property was stolen by the hands of one of those who were in the shop:—Held, that those who were on the outside were equally guilty as

principals, and equally deprived of clergy. *v. Gogerly*, R. & R. C. C. 343; 1 Russ. C. 29.

Transportation for life is the proper sentence of persons convicted before the passing of W. 4, c. 62, of offences punishable with act, and sentenced after. *Rex v. Lewis*, C. R. 372.

## XL. STEALING GOODS IN A COURSE OF FACTURE.

7 & 8 Geo. 4, c. 29, s. 16.]—By the stat. Geo. 4, c. 27, the stat. 22 Car. 2, c. 5, & 53, c. 41, are wholly repealed; and also the of the stat. 4 Geo. 4, c. 53, except so far as relates to the stealing of ammunition, &c.

On an indictment on 18 Geo. 2, c. 27, for using calico placed to be printed, &c., in a business made use of by a calico-printer, for printing, &c.:—Held, that in order to support a capital charge, it was necessary to have proved that the building, from which the calico was made use of either for printing or dyeing calico. *Rex v. Dickson*, R. & R. C. C. 53.

Where, on an indictment on 18 G. 2, c. 27, for stealing yarn out of a bleaching ground, it appeared that the yarn had been spread on the ground, but at the time of the theft was in a cart in order to be carried into the house:—Held, as there was no occasion to leave it in that it was not within the statute, which uses the words, "laid, placed, or exposed, during the stage, process, or progress of manufacture, in building, field, or other place." *Rex v. H* 2 Russ. C. & M. 245.

## XLII. LARCENY ON NAVIGABLE RIVERS, &c.

7 & 8 Geo. 4, c. 29, s. 17.]—By the stat. 7 Geo. 4, c. 27, the stat. 24 Geo. 2, c. 45, is wholly repealed; and also the whole of the stat. 4 Geo. 4, c. 53, except so far as it relates to stealing an indictment, &c.

An indictment for stealing goods on a navigable river is not satisfied by evidence of a theft on one of its creeks. *Rex v. Pike*, 1 Leach, C. C. 317; 2 East, P. C. 647.

## XLIII. STEALING OR DESTROYING RECORDS, WRITINGS OF REAL ESTATE.

7 & 8 Geo. 4, c. 29, ss. 21, 22, 23.]—By stat. 7 & 8 Geo. 4, c. 27, the stat. 8 Hen. 6, c. 10, is repealed so far as relates to this subject.

A commission to settle the boundaries of a manor is an instrument concerning the real estate, and not the subject of larceny at common law. *Rex v. Westbeer*, 1 Leach, C. C. 13.

Before the stat. 7 & 8 Geo. 4, c. 29, when rolls of parchment were a larceny, although such rolls were the records of a court of justice, unless they concerned the real estate. *Rex v. Walker*, R. & M. C. C. R. 1

but it was not so if they concerned the realty.  
*Rex v. Weather, 2 Str. 1133.*

### XLIII. STEALING HORSES, CATTLE OR SHEEP.

#### 1. Horse Stealing.

7 & 8 Geo. 4, c. 29, s. 25; 2 & 3 Will. 4, c. 12.]—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals 2 & 3 Edw. 6, c. 33, and also repeals so much of the stat. 37 Hen. 8, c. 8; 1 Edw. 6, c. 12; and 31 Eliz. c. 12, as relates to the subject.

If a horse be purchased and delivered to the buyer, it is not felony though he immediately ride away with it without paying the purchase money. *Rex v. Harvey, 1 Leach, C. C. 467. 2 East, P. C. 669.*

Obtaining a horse under the pretext of hiring it for a day, and immediately selling it, is felony, if the jury find the hiring was animo furandi. *Rex v. Pear, 1 Leach, C. C. 212. 2 East, P. C. 685, 697. And see Rex v. Turnard, 2 East, P. C. 687. 1 Leach, C. C. 214, n.*

If a thief go to an inn, and, intending to steal a horse, direct the hostler to bring out his horse, pointing to that of the prosecutor, and the hostler, at his desire, lead out the horse for the prisoner to mount: this is a sufficient taking by the prisoner to support an indictment for horse stealing. *Rex v. Pitman, 2 C. & P. 423—Garrow.*

Where the prisoners having entered a stable at night, and taking out horses, rode them thirty-two miles, and then left them at an inn, and were afterwards found pursuing their journey on foot; and the jury found that they took the horses merely with intent to ride and afterwards leave them, and not to return or make any further use of them:—Held, that this was a trespass and not a larceny. *Rex v. Phillips, 2 East, P. C. 662.*

If a person stealing other property take a horse, not with the intent to steal it, but only to get off more conveniently with the other property which he had stolen, such taking of the horse is not a felony. *Rex v. Crump, 1 C. & P. 658—Garrow.*

Foals and fillies were within the stat. 2 & 3 Edw. 6, and are included in the words horse, gelding, or mare:—Held, therefore, that evidence of stealing a mare filly supported an indictment for stealing a mare. *Rex v. Welland, R. & R. C. C. 494.*

An indictment for horse stealing must give the animal one of the descriptions mentioned in the statute. Therefore an indictment for stealing a colt, not saying whether it was a horse or a mare, was not sufficient to take away clergy, but the prisoner might be convicted of simple larceny. *Rex v. Beane, R. & R. C. C. 416.*

A. had agisted his horse with B., and in consequence of hearing of the loss of it, A. went to the field of B., where it was not:—Held to be not sufficient proof of loss to support an indictment for horse stealing. *Rex v. Yend. See the case of Rex v. Lewis, ante, tit. LARCENY, div. (4); 6 C. & P.—Gurney.*

#### 2. Cattle Stealing.

7 & 8 Geo. 4, c. 29, s. 25; 2 & 3 Will. 4, c. 62.]—By the stat. 7 & 8 Geo. 3, c. 37, the stat. 14 Geo. 2, c. 6, and 15 Geo. 2, c. 34, are wholly repealed.

An indictment for stealing a cow cannot be supported by evidence of stealing a heifer. *Rex v. Cook, 1 Leach, C. C. 105; 2 East, P. C. 616.*

The beast, however old, is a heifer until she has had a calf. *Id.*

#### 3. Sheep Stealing.

7 & 8 Geo. 4, c. 29, s. 25; 2 & 3 Will. 4, c. 62.]—By the stat. 7 Geo. 4, c. 27, the stat. 14 Geo. 2, c. 6, and 15 Geo. 2, c. 34, are repealed.

An indictment for stealing a sheep is not supported by proof of stealing a ewe, because the stat. 7 & 8 Geo. 4, c. 29, s. 25, specifies sheep and ewe. *Rex v. Puddifoot, M. C. C. 247.*

An indictment was for stealing sheep; it appeared in evidence that the animals stolen were lambs:—Held, that the prisoner could not be convicted. *Rex v. Loom, R. & M. C. C. R. 169.*

If, on an indictment for stealing "one sheep," it appear that the animal stolen was under a year old, the prisoner must be acquitted, as he ought to have been indicted for stealing "one lamb." *Rex v. Birket, 1 C. & P. 216—Bolland.*

If a ewe is stolen it must be so called in the indictment; and so a lamb must be called a lamb; and the term "sheep" is only proper where the animal stolen is a wether. *Id.*

An indictment for stealing lambs is sustained by proof that the carcasses were found in the owner's ground, and only the skins taken away. *Rex v. Rawlins, 2 East, P. C. 617.*

In the case of *Rex v. Williams, R. & M. C. C. R. 107*, where the prisoner was indicted under the stat. 14 Geo. 2, c. 6, for killing sheep with intent to steal the whole carcass; it was held, that proof of killing with intent to steal part of the carcass is sufficient to support the charge.

Cutting off part of a sheep whilst it is alive with intent to steal such part, will support an indictment for killing with intent to steal part of the carcass, if the cutting off must occasion the sheep's death. *Rex v. Clay, R. & R. C. C. 35.*

An indictment for stealing a sheep, or any other cattle, must mention or ascribe to it some value, for, unless the value exceeds twelve pence, it would not be a capital offence. *Rex v. Paul, R. & R. C. C. 407; 2 Russ. C. & M. 171. But see 2 & 3 Will. 4, c. 62.*

### XLIV. OFFENCES RELATING TO DEER.

7 & 8 Geo. 4, c. 29, s. 26.]—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals the stat. 21 Ed. 1, stat. 2; 16 Geo. 3, c. 30; 43 Geo. 3, c. 107, and 51 Geo. 3, c. 120; and also repeals so much of the Carta de Foresta, and of 3 Ed. 1, c. 20, 1 Ed. 3, stat. 1, as relates to this subject.

to destroy them, and makes the beating or wound-  
ing the keepers, &c., in the due execution of their  
office, felony:—Held, that an assistant-keeper  
has no right to seize the person of one so armed  
in order to get his gun, without having first de-  
manded his gun; and consequently if such per-  
son beat the keeper it was not within the statute,  
the keeper not being in the due execution of his  
office. *Rex v. Aney, R. & R. C. C. 500.*

Upon an indictment for a second offence against  
42 Geo. 3, c. 107, by killing deer, objections  
might have been taken to the conviction for the  
first offence, that it was not in the proper county,  
and that it was not correctly stated in the indict-  
ment for the second offence. *Rex v. Allen, R. &  
R. C. C. 513.*

On an indictment under the stat. 7 & 8 Geo. 4,  
c. 29, s. 26, for killing a deer after a previous  
summary conviction, a conviction by two justices  
of the previous offence was put in:—Held, that  
such a conviction was good. This conviction, in  
stating the offence, did not state the place at  
which it was committed; but the justices, in  
awarding the distribution of the penalty, awarded it  
to the overseers of P., in the said county,  
“where the said offence was committed.”—Held,  
sufficient. *Rex v. Weale, 5 C. & P. 135—Park.*

#### XLV. OFFENCES RELATING TO FISH.

7 & 8 Geo. 4, c. 59, s. 34.]—The stat. 7 & 8  
Geo. 4, c. 27, wholly repeals the stat. 31 Hen. 8,  
c. 2; 5 Eliz. c. 21; 5 Geo. 3, c. 14, and also re-  
peals 4 W. & M. c. 23; 22 & 23 Car. 2, c. 25, so  
far as they relate to this subject.

Semble, an indictment on 5 Geo. 3, c. 14, s. 1,  
for stealing fish out of a river running through  
an inclosed park, need not have stated the ways,  
means, or device by which the fish were taken.  
*Rex v. Carradice, R. & R. C. C. 205.*

Semble, that it is no objection in such an in-  
dictment to allege the fact to have been done fe-  
loniously, although the offence is not a felony,  
nor so declared by the act. *Id.*

On an indictment on 5 Geo. 3, c. 14, s. 1, for  
entering an inclosed park, and taking fish bred,  
kept, and preserved there, in the river Kent, run-  
ning through the park, it appeared that the  
park was walled round, except where the river  
entered and passed out, and that there were fences  
to keep in the deer, that there was nothing to  
keep in the fish, that they were not known to  
breed there, that nothing was done to stock the  
river, but that persons were never suffered to an-  
gle in the park without leave:—Held, that this  
was not a place where fish were to be considered  
as “bred, kept, or preserved” within the meaning  
of the act. By six judges against two. *Rex v.  
Carradice, R. & R. C. C. 205.*

#### 1. Night-poaching.

9 Geo. 4, c. 69.]—By this stat. the stat. 57 Geo.  
3, c. 90, is wholly repealed.

It was no answer to a charge on 57 Geo. 3, c.  
90, for being found armed in the night in a wood,  
with intent to kill game, that the prisoners put  
down their arms and left them before they were  
seen, if it was perceived that some one was there  
armed before they were seen. *Rex v. Nash, R.  
& R. C. C. 386; 1 Russ. C. & M. 418.*

An indictment on 57 Geo. 3, c. 90, charging a  
party with having entered into a forest, chase, &c.;  
with intent to destroy game, and being found  
armed in the night, must, in some way or other,  
have particularized the place. By five against  
three judges. *Rex v. Ridley, R. & R. C. C. 515.*

On an indictment on 57 Geo. 3, c. 90, for  
being out armed, with intent to kill game, it ap-  
peared that several persons were out with such  
intent, but only one of them was armed with a  
gun:—Held, that the rest, who were unarmed,  
were liable to be convicted under that act. *Rex  
v. Smith, R. & R. C. C. 368; 1 Russ. C. & M.  
418.*

For if any one of the party is armed it was  
sufficient to bring the whole party within the sta-  
tute. *Id.*

On an indictment on 57 Geo. 3, c. 90, against  
a person for being found armed in the night, with  
intent to kill game:—Held, that if several went  
into a close in the night to kill game, and one  
has arms without the knowledge of the others,  
the other persons who are unarmed were not li-  
able to be convicted under the above act. *Rex v.  
Southern, R. & R. C. C. 444; 1 Russ. C. & M.  
418.*

A person convicted under 57 Geo. 3, c. 90, of  
being found armed in the night in a forest, chase,  
park, wood, or plantation, might have been sen-  
tenced to hard labour, with imprisonment, by 3  
Geo. 4, c. 114, for all those places are either open  
or inclosed ground. *Rex v. Parkhurst, R. & R.  
C. C. 503.*

On an indictment on the 57 Geo. 3, c. 90, for  
having entered a given close with intent there to  
kill game, and being there found armed, it is ne-  
cessary to prove an entry with that intent into  
the close specified. *Rex v. Barham, R. & M. C.  
C. R. 151.*

On an indictment under 57 Geo. 3, c. 90, a  
man might have been convicted of having entered  
a wood, and of being found armed there, though he  
was not seen in such wood. It was sufficient if  
there were evidence to show that he had been  
there armed. *Rex v. Worker, R. & M. C. C. R.  
165.* In this case the prisoner was not seen in the  
wood, but a gamekeeper saw flashes in the wood  
and heard reports of guns, and saw the prisoner  
afterwards in the close adjoining the wood.

Where an indictment alleged that A. B., &c.,  
on, &c., at, &c., to the number of three and more  
together, did by night unlawfully enter divers

of destroying game:—Held, that it did not contain a sufficient averment that the defendants were by night in the closes for the purpose of destroying game, and the judgment given for the crown was reversed on writ of error. *Davies v. the King* (in error), 10 B. & C. 89; 5 M. & R. 72.

A party out at night, in pursuit of game, carried a thick stick large enough to be called a bludgeon, but which he used at other times as a crutch, he being lame:—Held, that it was a question for the jury whether the prisoner had taken out this stick to use as an offensive weapon, or merely for the purpose to which he usually applied it; and that although it was a weapon within the statute, and might be used offensively, yet, that unless the defendant took it out with an intention of so using it, the indictment could not be sustained. *Rex v. Palmer*, 2 M. & M. 70—Taunton.

An indictment for night-poaching stated the offence to have been committed in a certain wood, called "the Old Walk of, and belonging to, and then in the occupation of James, Earl of W.," and it was proved that the occupation was correctly stated, but that the name of the wood was Long Walk, and that it had never been called Old Walk:—Held, a fatal variance. *Rex v. Owen*, Car. Cr. L. 309; R. & M. C. C. 118.

"A certain cover in the parish of A." is too general a description to sustain an indictment for poaching, under the stat. 9 Geo. 4, c. 69. *Rex v. Crick*, 5 C. & P. 508—Vaughan.

A count in an indictment for night-poaching stated, that the prisoners were in a field called A., for the purpose of then and there taking game:—Held, that the prisoners could not be convicted on that count, unless the jury were satisfied that the prisoners had an intention of taking game in that particular field. *Rex v. Capewell*, 5 C. & P. 549—Parke.

A count for night-poaching may be joined with a count in sect. 2 of the stat. 9 Geo. 4, c. 69, for assaulting a gamekeeper authorized to apprehend, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. *Rex v. Finamore*, 5 C. & P. 551—Parke.

## 2. Offences relating to Rabbits.

7 & 8 Geo. 4, c. 29, s. 30.—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals 3 Jac. 1, c. 13; 7 Jac. 1, c. 13, and 5 Geo. 3, c. 14, and also repeals so much of the stat. 22 & 23 Car. 2, c. 25, as relates to this subject.

Taking a rabbit in a wire was sufficient to constitute an offence within the 5 Geo. 3, c. 14, s. 6, though the rabbit was not killed, and though the party never took it away. *Rex v. Glover*, R. & R. C. C. 269; 2 Russ. C. & M. 189. Diss. Le Blanc.

repealed see Car. C. L. 314, 315.

In the stat. 7 & 8 Geo. 4, c. 29, s. 36, the words "adjoining any dwelling-house" import actual contact, and therefore ground separated from a house by a narrow walk and paling with a gate in it, is not within their meaning. *Rex v. Hedges*, 1 M. & M. 341—Park and Parke.

Whether ground be properly described as a garden within that section, is a question for the jury. *Id.*

The words "plant" and "vegetable production," in sect. 42 of the same statute, do not apply to young fruit trees. *Id.*

On stat. 6 Geo. 3, c. 36, for stealing plants it must have been proved that the offence was committed in the night. *Rex v. Kemp*, 1 Leach, C. C. 222.

## XLVIII. STEALING FIXTURES.

7 & 8 Geo. 4, c. 29, s. 44.—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68, are wholly repealed.

A window casement was not within the statutes 4 Geo. 2, c. 32, or 21 Geo. 3, c. 68. *Rex v. Senior*, 1 Leach, C. C. 496; 2 East, P. C. 561.

A church was within the meaning of the words "or other building," in stat. 4 Geo. 2, c. 32. *Rex v. Parker*, 2 East, P. C. 592; 1 Leach, C. C. 320, n.: S. P. *Rex v. Hickman*, 1 Leach, C. C. 318; 2 East, P. C. 593.

Leadon images, on pedestals, fixed in the ground near a summer-house, the summer-house being in an inclosed field, (but not within the same inclosure as the house), were not within the 4 Geo. 2, c. 32, and consequently an indictment on that statute could not be supported for stealing them. *Rex v. Richards*, R. & R. C. C. 26.

"A church" was "a building" within the meaning of stat. 4 Geo. 2, c. 32, and an indictment for stealing lead affixed thereto need not have stated the person in whom the property or the freehold resided. *Rex v. Hickman*, 1 Leach, C. C. 318; 2 East, P. C. 593; S. P. *Rex v. Parker*, 2 East, P. C. 592; 1 Leach, C. C. 320, n.

Stealing iron rails from a tomb in a churchyard, not connected by any building to the church, was not within the stat. 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68. *Rex v. Davis*, 2 East, P. C. 591; 1 Leach, C. C. 496, n.

Semble, that the stealing of brass fixed to tombstones in a churchyard is a felony, under the stat. 7 & 8 Geo. 4, c. 29, s. 44. *Rex v. Black*, 4 C. & P. 377—Bosanquet.

A person who procured possession of a house, under a written agreement between him and the landlord, for a lease of twenty-one years, with a fraudulent intention to steal the fixtures therein belonging, was, by stealing the lead affixed to the house, guilty of larceny on stat. 4 Geo. 2, c. 32. *Rex v. Munday*, 2 Leach, C. C. 850; 2 East, P. C. 594.

Where the yearly tenant of a house had at his own expense, during his term, hung bells, but quitted the premises without removing them:—Held, that by remaining fixed to the freehold after the expiration of the terms, they became the property of the landlord, and that the tenant could not maintain trover after the landlord had secured them from the freehold. *Lyde v. Russell*, 1 B. & Adol. 394.

#### XLIX. LARCENY BY TENANTS AND LODGERS.

7 & 8 Geo. 4. c. 29, s. 45.]—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 3 Will. & M. c. 9, is wholly repealed.

The cases of *Rez v. Bew*, R. & R. C. C. 480; *Rez v. Goddard*, 2 Leach, C. C. 545; *Rez v. Burnel*, 2 Leach, C. C. 588; 2 East, P. C. 587; *Rez v. Healey*, 1 R. & M. C. C. 1; *Rez v. Pope*, 1 Leach, C. C. 336; 2 East, P. C. 587; and *Rez v. Hurrell*, 1 R. & M. 296, related to the form of the indictment under the stat. 3 & 4 Will. & M. c. 9, s. 5, now repealed. The indictment may now be the same as for Larceny, see 7 & 8 Geo. 4, c. 29, s. 45.

The case of *Rez v. Palmer*, 2 Leach, C. C. 680; 2 East, P. C. 586, decided that a tenant stealing goods from a ready-furnished house was not guilty of felony, but that is now regulated by the stat. 7 & 8 Geo. 4, c. 29, s. 45.

#### L. LARCENY BY CLERKS AND SERVANTS.

7 & 8 Geo. 4, c. 29, s. 46.]—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 33 Hen. 8, c. 1; 21 Hen. 8, c. 7; 5 Eliz. c. 10; and by the stat. 9 Geo. 4, c. 31, the stat. 3 Geo. 4, c. 38, are wholly repealed. See EMBEZZLEMENT.

It was no larceny in a servant, either on stat. 21 Hen. 8, c. 7, or at common law, who embezzled money delivered to him to purchase goods with. *Rez v. Watson*, 2 East, P. C. 562.

But it was afterwards held, that a servant going off with money which his master had given him to carry to another, and applying it to his own use, was guilty of larceny. *Rez v. Lavender*, 2 East, P. C. 566; 2 Russ. C. & M. 201.

A carter going away with his master's cart was holden a felony. *Rez v. Robinson*, 2 East, P. C. 565.

One employed as a clerk in the day time, but not residing in the house, embezzled a bill of exchange which he received from his master in the usual course of business, with directions to transmit it by the post to a correspondent:—Held larceny. *Rez v. Paradise*, 2 East, P. C. 565.

A merchant's or banker's clerk, who purloins money when he is sent to the place of deposit for a special purpose, is as much guilty of felony as if he were not allowed any access whatever to it. *Rez v. Murray*, 2 East, P. C. 683; 1 Leach, C. C. 344.

A servant clandestinely taking his master's corn, though to give to his master's horses, is guilty of larceny. *Rez v. Morfit*, R. & R. C. C. 307; 2 Russ. C. & M. 94.

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It is larceny for a person hired for the purpose of driving sheep to a fair to convey to his own use, he having the intention at the time of receiving them from the *Rez v. Stock*, 1 R. & M. C. C. 87.

An indictment charged that A. B., on, &c. the servant of J. H., on the same day, & gold ring, &c., then and there being in the session of the said J. H., and being his goods, feloniously did steal:—Held, that fair import of the charge was, that A. B. v. servant of J. H. at the time when the theft was committed, and that the indictment therefor granted judgment of transportation for five years. *Rez v. Somerton*, 7 B. & C. 463.

If a servant, being solicited to become a complice in robbing his master's house, in his master thereof, who thereupon tells him to carry on the business, and consents to his opening a door leading to the premises, and with the robbers during the robbery, and marks his property, and lays it in a place where the robbers are expected to come, with a view to apprehend the robbers; this conduct of the servant will not amount to a defence in an indictment against the robbers. *Rez v. Eggrinton*, 2 B. 508; *S. P. Rez v. Dannelly and Vaughn*, Marsh. 571.

#### LI. EMBEZZLEMENT BY CLERKS AND SERVANTS.

##### 1. Of the Offence.

7 & 8 Geo. 4, c. 29, s. 47.]—By person in public service, 2 & 3 Will. 4, c. 4. The stat. 7 Geo. 4, c. 27, wholly repeals the stat. 39 Geo. 3, c. 85.

A. gave his clerk 5*l.*, out of which he was to pay for an advertisement; he paid 1*l.*, but told he had paid 2*l.* 0*s.* 6*d.*, and accounted with accordingly:—Held, no embezzlement; and if in such a case the indictment, besides stating a count for embezzlement, contained a count for a larceny charged to have been committed "in manner and form aforesaid," the prisoner could not be convicted on that count. *v. Murray*, 5 C. & P. 145.

A female was within the 39 Geo. 3, c. 85, against embezzlement. *Rez v. Smith*, R. & C. C. 267; 2 Russ. C. & M. 213.

Seem, that the 39 Geo. 3, c. 85, did not apply to cases which were larceny at common law. *v. Hedge*, 1 R. & R. C. C. 160; 2 Leach, C. 1033.

The stat. 39 Geo. 3, c. 85, extended only to such servants as were employed to receive money and to instances in which they received money by virtue of their employment. *Rez v. Mellis*, R. & R. C. C. 80. Russ. C. & M. 209.

The stat. 39 Geo. 3, c. 85, did not make a crime of embezzlement a new statutory larceny, but only made it a larceny. Therefore, indictment on that statute must have stated what the property embezzled was, as in other cases of larceny; stating that the prisoner took it into possession by virtue of his employment, or

account of his master, was insufficient. *Rex v. McGregor*, R. & R. C. C. 23; 3 B. & P. 106; 2 Leach, C. C. 932; 2 East, P. C. 576.

Seem, that the crime of embezzlement could not be made a capital felony and ousted of clergy, by laying it to have been committed in a dwelling-house, &c., first, because the money or goods embezzled could not be said to be under the protection of the dwelling-house, &c.; and, next, the statute having enabled the court to pass a heavier sentence than in common cases of larceny, it might be considered as having limited all cases within that line of punishment. *Id.*

Previously to the passing of stat. 39 Geo. 3, c. 85, if a banker's clerk or cashier, who was intrusted to receive bank-notes and money at the shop counter, instead of putting them into the cash or bill drawer, secreted them and converted them to his own use, it was a mere breach of trust, and not felony; for the property never was in the banker's possession: but such a taking is now felony. *Rex v. Bazely*, 2 Leach, C. C. 835; 2 East, P. C. 572.

It was not felony by the common law for a cashier of the bank to embezzle an India bond committed to his care, pursuant to the stat. 12 Geo. 1, c. 32. *Rex v. Waite*, 1 Leach, C. C. 28; 2 East, P. C. 570.

Where a person gave his servant a 5*l.* note to get changed, and the servant got it changed, and made off with the change:—Held, not to be a larceny, but an embezzlement. *Rex v. Sullens*, Carr. Supp. 319; R. & M. C. C. 129.

A servant in the employment of two persons, as partners, must be considered as the servant of each; and if he embezzle the private money of one, he was chargeable under the stat. 39 Geo. 3, c. 85, as the servant of that individual partner. *Rex v. Leach*, 3 Stark. 70—Bayley.

So, a person employed as a journeyman miller, and in the habit of receiving money on his master's account. *Rex v. Barker*, 1 D. & R. N. P. C. 19—Richards.

If a person receive money as steward of another, proof of that circumstance is sufficient evidence of his being a steward, to support an indictment for embezzling that money. *Rex v. Beacall*, 1 C. & P. 312. And *Rex v. Wellings*, 454, 457—Park.

Held, by the twelve judges, that if a servant receives money on his employer's account, and embezzles it, he is guilty of a felony, although they had no right to it, and were wrong-doers in receiving it. *Id.*

So, if the party embezzling be employed as the servant of a coporation, although not duly appointed their servant, even under their common seal. *Id.*

If a steward receives money for his employer, which the latter would be guilty of an illegal act in receiving, and such money is kept by the steward, and never reaches the master's hands. Quære, whether this is an embezzling of the money of his master? *Id.*

If a steward, when told by his employer that he has his money in his hands, admits that he

had used the money, but offers to pay it out, and the master will not receive it: Quære, whether an indictment for embezzlement will lie? *Rex v. Beacall*, 1 C. & P. 312. And *Rex v. Wellings*, 454, 457—Park.

Quære, whether a servant of one body, receiving money for another, and appropriating it to his own use, is thereby guilty of embezzlement? *Id.*

Quære also, whether, if an act of parliament vests the property of "goods, chattels, furniture, clothing, and debts," in certain persons, the property of money, and securities for money, be in them? *Id.*

If a clerk receive money for his master (it being no part of his employment to receive money), and appropriate it to his own use: Quære, whether this be an embezzlement in point of law? *Id.*

Where a defendant had established a savings bank, consisting of 130 members, each of whom paid a weekly subscription of 2*s.* 1*d.*, the odd penny being paid to the defendant for the trouble of managing the affairs of the bank, the funds of which were to be disposed of once a week by a lottery, consisting of 129 blanks, and one prize amounting to 13*l.*, which was to go to the holder of the fortunate ticket: and the defendant having absconded, after receiving from one of the subscribers deposits to the amount of 10*l.* 8*s.*, without receiving any benefit therefrom:—Held, that the defendant was not indictable under the 21 Geo. 3, c. 63, for embezzling the money as an "agent," or as a person having the possession of money for "safe custody." *Rex v. Mason*, 1 D. & R. N. P. C. 22—Park.

The stat. 3 Geo. 4, c. 38, s. 2, enacted, "that if any servant shall steal any money from his master, and shall be convicted thereof, and be entitled to the benefit of clergy, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to benefit of clergy, shall be transported for fourteen years:"—Held, that a servant convicted of petit larceny was not within the meaning of this statute, and that he was subject to be transported for seven years only. *Rex v. Ellis*, 5 B. & C. 265.

A clerk who received six bank-notes on his master's account, in payment of a particular debt, made a false entry in his master's book, with a fraudulent intent to conceal the payment of that sum, but afterwards paid to the master the identical notes which he received, applying them to his account, to another debt received by him from his master:—Held, that he was guilty of a felonious embezzlement, in respect of those six notes. *Rex v. Hall*, 3 Stark. 67—Bayley.

Where a servant was entrusted by his master to receive money for him in the county of A which he was to bring to him in the county of B the same day, and after such receipt, instead of proceeding with the money directly, he rode on the road till the day following, and when he got home denied having received the money:—Held, that such denial was evidence to shew that his original receipt in A. was with intent to secrete and embezzle, and so to steal the same within 39 Geo. 3, c. 85, and consequently is

the trial might be had in *A. Rex v. Hobson*, 1 East, P. C. Add. xxiv.; 2 Leach, C. C. 975; R. & R. C. C. 56.

Quere, if a servant receive money from his master to pay J. C., and does not pay it, whether he can be indicted for embezzlement? *Rex v. Smith*, R. R. C. C. 267; 2 Russ. C. M. 213.

Semble, not. *Rex v. Peck*, 2 Russ. C. & M. 213.

Where, on an indictment for embezzlement, it appeared that the servant received the money from her master to pay J. C., but did not pay:—Held, that as the fact of the money not having been paid to J. C. was not evidence of actual embezzlement, it only negatived the application of the money in the manner directed. *Id.*

Where the prosecutor gave the prisoner, his servant, a five-pound note to get changed, which he did, and made off with the change:—Held, that it was an embezzlement and not a larceny. *Rex v. Sullens*, Car. C. L. 319.

If a servant, to whom goods have been delivered by his master to carry to a customer, sell them and convert the money to his own use, he is guilty of felony; for the possession is not out of the master by such delivery. *Rex v. Bass*, 1 Leach, C. C. 251; 2 East, P. C. 566, 698.

Where the owner of a colliery employed the prisoner, as captain of one of his barges, to carry out and sell coal, and paid him for his labour by allowing him two-thirds of the price for which he sold the coals above the price charged at the colliery:—Held, that the prisoner was a servant within the meaning of 39 Geo. 3, c. 85; and having embezzled the price, he was guilty of larceny within the meaning of that act. *Rex v. Hartley*, R. & R. C. C. 139; 2 Russ. C. & M. 209.

By 24 Geo. 3, c. 15, (local act), certain inhabitants, in seven parishes, are incorporated by the name of "The Guardians of the Poor of these Parishes," twelve directors are to be appointed out of the guardians, and the property belonging to the corporation is vested in "the directors for the time being," who are to execute the powers of the act. The prisoner was indicted for embezzling the moneys of "the directors of the poor of the said parishes:—Held, that the moneys should have been laid as "the moneys of the guardians of the poor," by their corporate name, or of the directors for the time being in their individual names. *Rex v. Beacall*, 1 R. & M. C. C. 15; 2 Russ. C. & M. 166.

If a servant secrete moneys which his master has marked and sent by a friend to make a purchase at his shop, with a view to try the honesty of his servant, it is a felonious breach of trust, and an embezzling within the 39 Geo. 3, c. 85, and not a larceny at common law. *Rex v. Headge*, 2 Leach, C. C. 1033; R. & R. C. C. 160.

If a servant embezzled money received from a customer, to whom his master had given it for the purpose of trying the servant's honesty, it was an offence within 39 Geo. 3, c. 85. *Rex v. Whittingham*, 2 Leach, C. C. 912.

A clerk, entrusted to receive money at from out-door collectors, received it abroad out-door customers:—Held, that such a of money might be considered, "by virtue employment," within the 39 Geo. 3, c. 1 though it was beyond the limits to which authorized to receive money for his emp *Rex v. Beechey*, R. & R. C. C. 319; 2 R. & M. 211.

If a banker's clerk be sent to the money for money on a particular occasion, and he that opportunity of secreting money for his use, he is guilty of felony. *Rex v. Mur Leach*, C. C. 344; 2 East, P. C. 683.

It is felony for the confidential clerk of a chant to take a bill of exchange, unpaid from the bill box, and convert it to his own, although he was in the habit of transacting cash concerns of the house from week to week, for, as it had not been delivered to him for purpose by his employer, it is a tortious act from the possession of the master. *Rex v. Chase*, 2 Leach, C. C. 699; 2 East, P. C. 56.

An apprentice could not be convicted of Geo. 3, c. 85, for embezzling money received his master's account, if it did not appear in evidence that the prisoner received the money question, or was employed to receive money his master, by virtue of his employment. *R. Mellish*, R. & R. C. C. 80; 2 Russ. C. & M. 209.

It was the duty of a clerk to receive money daily at N., to enter all such moneys so received in a book, and to remit the amount weekly to His entries were all correct, and admitted receipt of all the moneys; but he did not remit them to L., as was his duty:—Held, no embezzlement. *Rex v. Hodgson*, 3 C. & P. 45 Vaughan.

If a servant received money for his master an article made of his master's material, it was have been within the 39 Geo. 3, c. 85, if he embezzled the money, although he made the article and was to have a given proportion of the price for making it. *Rex v. Hoggins*, R. & R. C. C. 145; 2 Russ. C. & M. 210.

A person employed upon commission to travel for orders and collect debts, was a clerk within the 39 Geo. 3, c. 85, and might have been indicted on that statute for embezzlement, although he was employed by many different houses on each journey, and paid his own expenses out of his commission on each journey, and did not interfere with any of his employers, nor act in any of the counting-houses. *Rex v. Carr*, R. & R. C. C. 198; 2 Russ. C. & M. 209.

A man was sufficiently a servant within the 39 Geo. 3, c. 85, although he is only occasionally employed when he has nothing else to do. *R. v. Spencer*, R. & R. C. C. 299; 2 Russ. C. & M. 210.

And it is sufficient, if he was employed to receive the money he embezzled, although receiving money may not be in his usual employment.



for his master, enters a smaller sum in his master's books, and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry, and it will make no difference though he received other sums for his master on the same day, and in paying those and the smaller sum to his master together he might give his master every piece of money or note he received at the time he made the false entry. *Rex v. Hall*, R. & R. C. C. 463; 2 Stark. 67; 2 Russ. C. & M. 216.

If a bank clerk, employed in taking account of paid notes, embezzle a paid note which he finds on the file not properly cancelled, and utters it for his own use, he might have been indicted on 15 Geo. 2, c. 13, for having embezzled certain effects belonging to the bank. *Rex v. Bakewell*, 2 Leach, C. C. 943; R. & R. C. C. 35.

A banker's clerk taking money from the till, intending to embezzle it, is guilty of felony, although the check of a customer is left in lieu of it, if that customer has really no cash in the banker's hands, though both he and the banker may suppose he has, and if the check is drawn by the customer, not to pledge his own credit with the bank, or draw out money of his own, but to draw out money the prisoner falsely pretends to have in his name. *Rex v. Hammon*, R. & R. C. C. 221; 2 Leach, C. C. 1063; 4 Taunt. 304.

If a servant generally employed by his master to receive sums of one description, and at one place only, is employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum was to be considered as received by him by virtue of his employment, within the meaning of 39 Geo. 3, c. 85. *Rex v. Smith*, R. & R. C. C. 516; 2 Russ. C. & M. 211.

A person received the sum of 7l. 2s. 6d. in his capacity of clerk to overseers, &c., and made an entry in a book of the receipt of that sum accordingly, and placed the money with other sums in his possession; the entry of 7l. 2s. 6d. was afterwards erased, and the sum of 5l. 6s. 10d. substituted for it, and the prisoner only accounted to the parish officers for 5l. 6s. 10d. On an indictment for embezzling 1l. 15s. 7d., and conviction thereon:—Held, that as the prisoner might have paid over the whole of what he received for the 7l. 12s. 6d. and have taken the 1l. 15s. 7d. from other moneys he received, he was improperly convicted. *Rex v. Tyers*, R. & R. C. C. 402; 2 Russ. C. & M. 215.

Where overseers of a township employed a person as their accountant and treasurer, and he receive and pay all the money receivable or payable on their account; and he receives a sum and embezzles it:—Held, that he was a clerk and servant within 39 Geo. 3, c. 85. *Rex v. Squire*, R. & R. C. C. 349; 2 Stark. 348.

A. was employed to lead a stallion, and he was to charge 30s. a mare, and not take less than 20s.

*v. Snowden*, 4 B. & P. 390—Littledale and Parke.

If a clerk receive money from his master to pay away on his master's account, and he state in his accounts that one of the payments was a greater amount than it really was, this is not embezzlement. *Rex v. Murray*, 5 C. & P. 16—Twelve Judges.

Where an indictment for embezzlement could not be supported because the offence is not an embezzlement but a larceny, and the jury count stated the larceny to have been committed "in manner and form aforesaid":—Held, that the prisoner could not be convicted. *Rex v. Murray*, 5 C. & P. 145; M. C. C. 276.

One who was employed at a yearly salary under the appellation of accountant and treasurer to the overseers of a township, whose duty it was to receive all moneys receivable or payable by them, was a clerk and servant within 39 Geo. 3, c. 85. *Rex v. Squire*, 2 Stark. 349—Bayley.

Embezzlement by one who is neither clerk nor servant, nor in any respect under the control of the person by whom he is in a single instance only requested to receive moneys, is not punishable under the stat. 7 & 8 Geo. 4, c. 29, s. 48, as he does not come within the description of clerk or servant, or a person employed for the purpose of, or in the capacity of a clerk or a servant. *Rex v. Nettleton*, R. & M. C. C. R. 259.

Embezzlement of money by a servant not authorized to receive it, is not within 7 & 8 Geo. 4, c. 29, s. 47. *Rex v. Thorley*, M. C. C. R. 30.

A servant may be found guilty of embezzlement, though he is not a general servant, and is employed to receive in a single instance only. *Rex v. Hughes*, M. C. C. R. 370.

A person employed to collect the sacramental money from the communicants is not the servant of the minister, churchwardens, or parson, as to be within the stat. 7 & 8 Geo. 4, c. 29, s. 48, if he embezzle the money. *Rex v. Burton*, R. & M. C. C. R. 237.

The prisoner had worked for the prosecutor, sometimes as a regular labourer and sometimes as a roundsman; but, at the time in question, he not being at all in the prosecutor's service, was sent by the prosecutor to get a check cashed at a banker's, for doing which he was to be paid sixpence. He got the cash, and made off:—Held, no embezzlement, as the prisoner was not a servant of the prosecutor within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 47. *Rex v. Freeman*, 5 C. & P. 538—Parke.

Exchequer bills purchased by the bank for a good consideration, but signed in the name of the auditor of the exchequer by a person not legally authorized, were securities, or at least of facts, within the meaning of the 15 Geo. 2, c. 13, s. 12; and if a servant of the bank embezzled such bills, he might be convicted of felony under that statute. *Rex v. Aslett*, 1 N. R. 1.

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son, R. & R. C. C. 56; 1 East, P. C. Add. xxiv.; 2 Leach, C. C. 975.

Where a servant was indicted on 39 Geo. 3, c. 85, for embezzling his master's money, and the indictment was laid in the county of S., a denial by the servant when in the county of B., of his having received money in the county of S., was held to be evidence to show that the receipt in the county of S. was with intent to embezzle within that statute, and therefore that the trial was properly in the county of S. *Rex v. Hobson*, R. & R. C. C. 56; 1 East, P. C. Add. xxiv.; 2 Leach, C. C. 975.

If a servant receive moneys in one county for the use and on account of his master, who lives in another county, and does not account for it to his master, the offence of embezzling the money may be laid to have been committed in the county in which his master lives. *Rex v. Taylor*, 2 Leach, C. C. 974; 3 B. & P. 596; R. & R. C. C. 63.

Even if there is evidence of the prisoner having spent the money in the county of A., it will not necessarily confine the trial of the offence to the county of A. *Id.*

If a servant receive money for his master in the county of A., and, being called upon to account for it in the county of B., there deny the receipt of it, he may be indicted for the embezzlement in the latter county. *Rex v. Taylor*, 3 B. & P. 596.

### 3. Particular of Charges.

If a prisoner, indicted for embezzlement, does not know the specific acts of embezzlement intended to be charged against him, he should apply to a prosecutor for a particular of the charges; and if it be refused, the judge will, on motion supported by proper affidavits, grant an order for such particular to be given, and postpone the trial, if necessary. Such particular ought at least to state the persons from whom money is alleged to have been received. *Rex v. Hodgson*, 3 C. & P. 422—*Vaughan*. S. P. *Rex v. Bootyman*, 5 C. & P.—*Littledale*.

### LII. EMBEZZLEMENT BY AGENTS.

7 & 8 Geo. 4, c. 29, s. 49.]—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals the stat. 52 Geo. 3, c. 63.

The statute of the 52 Geo. 3, c. 63, for preventing the embezzlement of securities by agents, &c., applied only to persons to whom such securities, &c., were entrusted in the exercise of their function or business. *Rex v. Prince*, 2 C. & P. 517—*Abbott*.

If a stockbroker receive bank-notes for the check of his principal, and be directed to invest their whole amount in exchequer bills, but, instead of so doing, only applies part to that purpose, and runs away fraudulently with the remainder, he cannot be indicted for stealing the check, for that was delivered to and applied by him as the drawer of it intended; nor the bank-notes, for they were never in the possession of

the prosecutor. *Rex v. Welsh*, 2 Leach, C. C. 1054; 4 Taunt. 258; R. & R. C. C. 215.

A. placed valuable securities in the hands of B., with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A." No accident did happen to A., and the proceeds were by B. converted to his own use:—Held, that B. was not indictable under the stat. 52 Geo. 3, c. 63, (now repealed); and it seems that he would not be so under the stat. 7 & 8 Geo. 4, c. 29, s. 49. *Rex v. White*, 4 C. & P. 46—*Tenterden*.

An allegation in an indictment, that A. placed valuable securities in the hands of B., "with an order in writing to invest the proceeds in the government funds," is not supported by proof of an order in writing, directing B. to invest the proceeds in the government funds, in case of any unexpected accident happening to A. *Id.*

### LIII. FALSE PRETENCES AND CHEATS.

#### 1. The Offence.

7 & 8 Geo. 4, c. 29, s. 53.]—The stat. 7 & 8 Geo. 4, wholly repeals the stat. 33 Hen. 8, c. 1, and 52 Geo. 3, c. 64; and also repeals so much of the stat. 30 Geo. 2, c. 24, as relates to this subject; and so much of the hard labour act, 3 Geo. 4, c. 114, as relates to hard labour for this offence; but this last is in effect re-enacted in the 7 & 8 Geo. 4, c. 29.

Where a false pretence was contained in a letter which was lost, the prisoner may be convicted, if parol evidence be given of the contents of the letter. *Rex v. Chadwick*, 6 C. & P.—*Tindal*.

It is an indictable offence if two effect a cheat by means of one pretending to be a merchant, and the other a broker, and as such bartering pretended wines for hats. *Rex v. Macarty*, 1 East, P. C. 823.

Knowingly exposing to sale and selling wrought gold under the sterling alloy, as and for gold of the true standard weight, which is indictable in a goldsmith, is a private imposition only in a common person. *Rex v. Bower*, Cowp. 323.

Delivering less beer in a cask than contracted for as the due quantity is not an indictable offence. *Rex v. Wheatley*, 1 W. Black. 273; 1 Burr. 1129.

Nor is delivering less oats than the quantity contracted for as the due quantity. *Rex v. Denage*, 2 Burr. 1130.

But pretending to have been entrusted by one to take his horses from Ireland to London, and to have been detained by contrary winds till all his money was expended, was held to be within 30 Geo. 2, c. 24. *Rex v. Villeneuve*, 2 East, P. C. 830.

Obtaining the goods of a tradesman under a false pretence of being sent for them to show a customer is fraud, and not felony. *Rex v. Coutwaime*, 1 Leach, C. C. 498.

To have constituted an offence within the 30

Geo. 2, c. 24, money or goods must have been obtained by a false pretence with an intention to defraud; but the pretence might have related to a future transaction, [see *Rez v. Goodhall*, post, p. 774]: and if made by one in the presence of, and in concert with, others, they may be all included jointly in the same indictment. *Rez v. Young*, 1 Leach, C. C. 505; 2 East, P. C. 828, 833; 3 T. R. 98.

Bank-notes were not money, goods, wares, &c., within the meaning of 30 Geo. 2, c. 24. *Rez v. Hill*, R. & R. C. C. 190. But see the 7 & 8 Geo. 4, c. 29, s. 53, which extends 30 Geo. 2, c. 24, to persons obtaining, by false pretences, any valuable security.

To obtain goods by false pretences from the servant of the owner, to whom they were delivered for the purpose of being carried to a customer, who had purchased them, is a taking from the possession of the master; and if so taken, with a preconcerted design to steal them, amounts to felony. *Rez v. Wilkins*, 1 Leach, C. C. 520; 2 East, P. C. 673.

A workman, employed by clothiers, was to keep an account of the number of shearmen employed, and the amount of their earnings and wages, which he was weekly to deliver to a clerk, in writing, who paid him to the amount; he delivered in a false account, charging for more work, and of other men, than was actually done, by which he obtained a larger sum than was actually due:—Held, that it was obtaining money under false pretences, within stat. 30 Geo. 2, c. 24, because without the false pretence he would not have obtained the credit, and is not like a case of money paid generally on account. *Rez v. Wittell*, 2 East, P. C. 830.

It is a false pretence if a carrier obtain the carriage-money by pretending to have delivered the goods and lost the bailee's receipt for them. *Rez v. Airey*, 2 East, P. C. 831; 2 East, 30.

If a prisoner, by false pretences, obtain a check on a banker on unstamped paper, payable to D. F. J., and not payable to bearer, it is not an obtaining a valuable security by false pretences. *Rez v. Yates*, Car. C. L. 333; R. & M. C. C. 170.

There may be a sufficient false pretence within 30 Geo. 2, c. 24, by the acts and conduct of the party, without any verbal representations of a false and fraudulent nature. *Rez v. Freeth*, R. & R. C. C. 127.

The fact of uttering a counterfeit note as a genuine one is tantamount to a representation that it was so; and it is a false pretence, notwithstanding the note upon the face of it would have been good for nothing in point of law, even if true. (Diss. Lawrence, J., who thought that the party taking it was not cheated if he parted with his goods for a piece of paper, which he must be presumed in law to know was worth nothing, if true.) *Rez v. Freeth*, R. & R. C. C. 127.

It was a false pretence within stat. 30 Geo. 2, c. 24, s. 1, where the prisoner obtained money, from the keeper of a post-office, by assuming to be the person mentioned in a money order, which he presented for payment, though he did

not make any false declaration, or assertion, in order to obtain the money. *Rez v. Story*, R. C. C. 81.

Where a man pretending to be the servant person who had bought a chest of tea, deg at the company's warehouse, got a request and permit for the chest, and took it away the assent of a person in the East India company's service, who had the charge of it:—to be felony. *Rez v. Hench*, R. & R. C. C. 2 Russ. C. & M. 120.

If a banker's clerk tell a customer of the that he has paid in money on his account thereby induces the customer to give him a for the amount, which he receives the money and afterwards makes fictitious entries in books, to prevent a discovery of the transaction it is a felonious taking of the money from the banker, without his consent, and not an obtaining of it under false pretence. *Rez v. Hans*, 2 Leach, C. C. 1083; 4 Taunt. 304.

A person who, under mere false pretences purchasing lottery tickets, bargains with holder of them, and obtains the delivery of by giving a draft on a banker, with whom he has no cash, for the amount of them, is not liable for a fraud at common law; for, in order to constitute this offence, the property must be obtained either by conspiracy, or by means of a false token as well as a false pretence, and as in this case, by a mere false assertion, or naked lie. *Rez v. Lara*, 2 Leach, C. C. 65 East, P. C. 819, 827; 6 T. R. 565.

If the owner of goods has been induced to with them by a fraudulent representation, not felony in the person so obtaining them. *v. Adams*, R. & R. C. C. 225; 2 Russ. C. & M. 160.

If there is a plan to cheat a man of his property, under colour of a bet, and he part with possession only to deposit as a stake with one of the confederates; the taking by such confederates is felonious. *Rez v. Robson*, R. & R. C. 413; 2 Russ. C. & M. 123.

To obtain property from another by the practice of ring-dropping is felony, if the jury find that it was obtained under a preconceived design to it. *Rez v. Patch*, 1 Leach, C. C. 238; 2 East, C. 678; *S. P. Rez v. Marsh*, 1 Leach, C. C. 3

A person who induces another to deliver his notes to him, by the practice of ring-dropping, on a condition that if he do not restore them in a time, the entire value of the ring shall be to the person delivering the notes, is guilty of felony; for, although the possession in the notes is parted with, the property still remains in the owner. *Rez v. Watson*, 2 Leach, C. C. 2 East, P. C. 680.

To aid and assist a person to the jurors known, to obtain money by the practice of ring-dropping, is felony, if the jury find that the person was confederating with the person unknown to obtain the money by means of this practice. *Rez v. Moore*, 1 Leach, C. C. 314; 2 East, 1679.

A pretence that a person would do an act

the 30 Geo. 2, c. 24, s. 1. *Rex v. Goodhall, R. & R. C. C. 461*; 2 Russ. C. & M. 300.

A pretence to a parish officer, as an excuse for not working, that the party has not clothes, when he really has, although it induce the officer to give him clothes, was not obtaining goods by false pretences within the meaning of 30 Geo. 2, c. 24. *Rex v. Wakeling, R. & R. C. C. 504.*

The offence of obtaining money under false pretences, created by 30 Geo. 2, c. 24, was complete only where the money is obtained. *Rex v. Buttery, cited in Pearson v. McGowan, 5 D. & R. 616*; 3 B. & C. 700.

Where a misdemeanour consists of different parts, so much of the charge as amounts to a misdemeanour in law must be proved in the venue county. *Id.*

To constitute an offence within stat. 30 Geo. 2, c. 24, money or goods must have been obtained by the defendant by a false pretence with intent to defraud; and it was no objection that the pretence consists in a representation as of some transaction to take place at a future time. *Young v. Rex (in error), 3 T. R. 98. But see Rex v. Goodhall, supra.*

An indictment will lie for fraudulently obtaining goods under pretence of a treaty of marriage. *Anon. Loft, 146.*

But not for a mere case of deceit. *Rex v. Cornbrasse, 1 Wils. 301.*

If one professes to sell an interest in property, and receives the purchase-money, the vendee taking the usual covenant for title, and it turns out that the vendor has in fact previously sold his interest in the property to a third person, this is not sufficient to support an indictment for obtaining money by false pretences. *Rex v. Codrington, 1 C. & P. 661—Littledale.*

Obtaining goods by means of a check which the party knows will not be paid is an indictable offence. *Rex v. Jackson, 3 Camp. 370—Bayley.*

A person is not indictable at common law for obtaining lottery tickets under false pretences where he had drawn a draft on a banker which he knew would not be paid, as this is not a false token. *Rex v. Lava, 6 T. R. 565.*

Selling goods to a customer who did not like them, and then making a conditional sale to another person, and not returning the money, was not an offence within the 30 Geo. 2, c. 24, against obtaining money under false pretences. *Anon. Loft, 271.*

Obtaining credit in account from the party's own banker, by drawing a bill on a person on whom the party has no right to draw, and which has no chance of being paid, is not a false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53, though the banker pays money for him in consequence to an extent that he would not otherwise have done. *Rex v. Wavell, R. & M. C. C. R. 224.*

## 2. Indictment.

An indictment for a fraud at common law,

on a different person, is bad. *Rex v. Law, 1 Leach, C. C. 647*; 2 East, P. C. 819, 884; 4 T. R. 565.

An indictment charging the defendant with obtaining money by false pretences is insufficient, if it do not show what the false pretences were; and if the defendant be convicted, the court will reverse the judgment. *Rex v. Mason, 3 T. R. 581.*

An indictment on 30 Geo. 2, c. 24, for obtaining money by false pretences, must have negatived by special averment the truth of the pretences; it is not enough to charge that the defendant falsely pretended, &c., setting forth the pretences, by means of which said false pretences he obtained the money, &c.; therefore, for want of such averment in the indictment, the court reversed the judgment. *Rex v. Perrott, 3 M. & L. 379.*

An indictment for a fraud in obtaining money under false pretences must state what the false pretences were by which the fraud was effected. *Rex v. Mason, 1 Leach, C. C. 487*; 2 East, P. C. 837; 2 T. R. 581.

On an indictment for delivering in payment for a horse certain promissory notes, as for good and available promissory notes, which the prisoner knew to be not good, nor of any value; the notes purported to be the notes of a country bank which was supposed to have failed:—Held, that at all events it was necessary to prove that the notes were bad, and of no value. *Rex v. Flint, R. & L. C. C. 460.*

Indictment for false pretences, in passing a note of a bank that had stopped payment as a good note. The prisoner knew that the bank had stopped payment; but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not:—Held, that the prisoner must be acquitted. *Rex v. Spencer, 3 C. & P. 490—Gaselee.*

Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. *Rex v. Hill, R. & L. C. C. 190*; 2 Russ. C. & M. 311.

Where an indictment charged the defendant with obtaining, by false pretences, money, the property of A., and it appeared that the money belonged to A.'s servant, who was afterwards reimbursed by his master; the variance was held fatal. *Rex v. Douglas, 1 Camp. 213—Ellis.*

Unless the servant had at that time an equal sum belonging to his master in his hands. *Id.*

If an indictment against a prisoner, for attempting to obtain money under false pretences, charge it to have been attempted by means of a paper writing purporting to be an order for money, and the instrument cannot be considered as stated in the indictment to be such an order, it is bad. *Rex v. Cartwright, R. & R. C. C. 166.*

In an indictment for obtaining goods by false pretences, it is unnecessary to aver that the de-

defendant did knowingly and designedly pretend, &c.; it is sufficient to state that the defendant knowingly and designedly did obtain the goods by means of the false pretences. *Rex v. Howorth*, 3 Stark. 26—Best.

In an indictment on the stat. 30 Geo. 2, c. 24, for obtaining money on false pretences, it was sufficient to allege that the defendant unlawfully, knowingly, and designedly pretended so and so, by means of which said false pretences he obtained the money; afterwards negating such pretences to be true; though it were not in terms alleged that he falsely pretended, &c.; and it seems that it would have been sufficient to have alleged that he obtained the money by such and such pretences, averring such pretences to be false. *Rex v. Airey*, 2 East, 30. And see *Rex v. Fuller*, 1 B. & P. 184.

An indictment on that statute averred, that the defendant pretended that he had paid a certain sum of money into the Bank, and it appeared that he merely said the money had been paid at the Bank:—Held, that the variance was fatal. *Rex v. Pileston*, 1 Camp. 494—Ellenborough.

So, where the indictment charged the defendant with obtaining the money of the prosecutor, and it appeared that the money belonged to his servant, who was afterwards reimbursed by the prosecutor, the variance was held fatal. *Rex v. Douglas*, 1 Camp. 213—Ellenborough.

Where the pretence is conveyed by words spoken by one defendant in the presence of others who are acting in concert together, they may be all indicted jointly. *Young v. Rex* (in error), 3 T. R. 98.

#### LIV. TAKING REWARDS FOR RETURN OF STOLEN GOODS.

##### See PRINCIPAL AND ACCESSORY.

7 & 8 Geo. 4, c. 29, s. 58.—By the stat. 7 & 8 Geo. 4, c. 27, the stat. 21 Hen. 8, c. 11, is wholly repealed.

Quære, whether a person who received money as a reward for helping another to stolen goods could be prosecuted on stat. 4 Geo. 4, c. 1, s. 4, where the principal offender was dead, and therefore had never been convicted? *Rex v. Drinkwater*, 1 Leach, C. C. 15; 2 East, P. C. 770.

It was an offence within 4 Geo. 1, c. 11, s. 4, to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had not power to restore them. *Rex v. Ledbitter*, R. & M. C. C. 76.

#### LV. RESTITUTION OF GOODS.

7 & 8 Geo. 4, c. 29, s. 57.—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals the stat. 4 Geo. 1, c. 11, except as to piracy; and stat. 9 Geo. 4, c. 31, wholly repeals the stat. 1 Geo. 4, c. 115.

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The stat. 21 Hen. 8, c. 11, which restored goods to a prosecutor on conviction of the person who took them away, extended only to a felonious and not to a fraudulent taking. *Rex v. De Veaux*, 2 Leach, C. C. 585; 2 East, P. C. 789; 839. By 7 & 8 Geo. 4, c. 29, a power of restitution was given where goods were obtained by any misdemeanour against that act.

#### LVI. RECEIVERS.

7 & 8 Geo. 4, c. 29, s. 45, 55, 56 & 76.—The stat. 7 & 8 Geo. 4, c. 27, wholly repeals the stats. 3 Will. & M. c. 9; 4 Geo. 2, c. 32; 25 Geo. 2, c. 10; 29 Geo. 2, c. 30; 5 Geo. 3, c. 14; 6 Geo. 3, c. 36; 10 Geo. 3, c. 48; 21 Geo. 3, c. 68; 21 Geo. 3, c. 69; 22 Geo. 3, c. 58; 51 Geo. 3, c. 41, and 3 Geo. 4, c. 24; and also repeals so much of the stats. 31 Eliz. c. 12; 1 Anne, st. 1, c. 9; 6 Anne, 31; vulgo, 5 Anne, c. 31; 4 Geo. 1, c. 11; 3 Geo. 4, c. 114, as relates to this subject.

It was not felony to receive bank-notes knowing them to have been stolen. *Rex v. Sadi*, 1 Leach, C. C. 468; 2 East, P. C. 748. But see 7 & 8 Geo. 4, c. 29, s. 54.

The case of *Rex v. King*, 2 C. & P. 412, was on the 3 Geo. 4, c. 24, and is not applicable to the present state of the law.

A prisoner committed for knowingly receiving part of the cargo of a ship in the Thames was not entitled to be bailed; for the offence is felony, though it was not expressed so to be in the stat. 3 Geo. 3, c. 28. *Rex v. Wyer*, 1 Leach, C. C. 480; 2 East, P. C. 763; 2 T. R. 77.

Persons receiving goods belonging to a vessel in the Thames, knowing them to have been stolen, might be prosecuted for felony under 2 Geo. 3, c. 28. *Id.*

A receiver may be indicted for receiving goods stolen by persons unknown. *Rex v. Thomas*, 2 East, P. C. 781; *S. P. Rex v. Baxter*, 2 East, P. C. 781; 5 T. R. 33; 2 Leach, C. C. 578.

If the prisoner at different times receive property stolen from the prosecutor, although the substantive charge must be confined to some one receiving, yet the other receipts may be given in evidence to show a guilty knowledge that the goods were stolen. *Rex v. Dunn*, Car. C. L. 132; R. & M. C. C. 146.

A receiver, in the case of a sheep feloniously stolen alive, and killed, should be stated to have received mutton. *Rex v. Cowell*, 2 East, P. C. 617.

In an indictment for felony against a receiver of stolen goods, it is sufficient to state that the principal was "tried and duly convicted," without going on to show that judgment was passed upon him, or how he was delivered. *Rex v. Hyman*, 2 Leach, C. C. 925; 2 East, P. C. 782.

And an erroneous attainder against a principal is sufficient as against an accessory, until it is reversed. *Rex v. Baldwin*, 2 Leach, C. C. 928, n.; R. & R. C. C. 241; 3 Camp. 265.

On an indictment against a receiver of stolen

goods after conviction of the principal, it is no objection to the record of conviction of the principal, that it appear therein that the principal was asked if he was (not is) guilty; that it does not state that issue was joined, or how the jurors were returned; and that the only award against the principal is that he be in mercy, &c. *Id.*

An indictment for a misdemeanour on 22 Geo. 3, c. 58, against a receiver of stolen goods, need not have averred that the principal had not been convicted. *Res v. Baxter*, 2 Leach, C. C. 578; 2 East, P. C. 781; 5 T. R. 33.

In an indictment against a receiver of stolen goods for a misdemeanour, it was not necessary to aver that the principal had not been convicted. *Res v. Baxter*, 5 T. R. 83.

An indictment against a receiver of stolen goods must aver the guilty knowledge, which is the gist of the offence, correctly; an indictment which contained a defective statement that the receiver knew the goods to have stolen, omitting the word "been," was thought bad. *Res v. Kernon*, 2 Russ. C. & M. 259.

A receiver of stolen goods may be tried for the misdemeanour, though the prosecutor might have taken the principal, but neglected so to do. *Res v. Wilkes*, 4 Leach, C. C. 103; 2 East, P. C. 746. *But see the stat. 7 & 8 Geo. 4, c. 29, s. 54.*

A. and B. were indicted; A. for stealing six bank-notes of 100*l.* each, and B. for receiving "the said notes," knowing them to have been stolen. A. stole the six 100*l.* notes, and got them changed into 20*l.* notes, some of which B. received:—Held, that B. could not be convicted on this indictment. *Res v. Walkley*, 4 C. & P. 132—Taddy.

If an indictment against a receiver state the principal felony to have been committed by A. B., whatever would have been evidence of the principal felony to convict A. B. is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore, if A. B. confessed the principal felony, that confession is admissible on the trial of the receiver, to prove the commission of the principal felony. *Res v. Blick*, 4 C. & P. 377—Bosanquet.

If two are charged jointly with receiving stolen goods, a joint act of receiving must be proved. Proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. *Res v. Messingham*, R. & M. C. C. R. 257.

[The following points are in the marginal note, but do not appear at all in the case itself:—Successive receivers are all separate receivers, and all punishable. *Quære*, whether, upon a charge of receiving from T. S., the receiving from T. S. must be proved, the statute making it criminal to receive without regard to the person from whom received?]

The case of *Res v. Solomon*, M. C. C. R. 292, was decided on the stat. 3 Geo. 4, c. 24, s. 3, which was repealed by the stat. 7 & 8 Geo. 4, c. 27, and does not apply to the present state of the law.

A count for a substantive felony in receiving

stolen goods, which charged that the goods were stolen by "a certain evil-disposed person," is good. *Res v. Jervis*, 6 C. & P. 156—Tindal.

#### LVII. OFFENCES BY BANKRUPT.

1 Geo. 4, c. 115; 6 Geo. 4, c. 16, ss. 99 & 112.]—By the stat. 6 Geo. 4, c. 16, the stat. 5 Geo. 2, c. 30, and a number of other acts relating to bankrupts, are repealed.

On an indictment against a bankrupt for concealing his effects, if the evidence is, that the bankrupt on his last examination stated that a book given in by him contained an account of all his effects, it is incumbent on the prosecutor to produce the book or account for it, that it may be seen whether that book mentions the property or not. *Res v. Evans*, 1 R. & M. C. C. 70.

If an indictment against a bankrupt for concealing property, in stating the property, does not sufficiently specify particular parts of it, though it may sufficiently specify others, and those specified may be of the necessary value, the indictment will be bad, because the statement as to the part specified tends to embarrass the prisoner. *Res v. Forsyth*, R. & R. C. C. 274.

Seem, that if an indictment against a bankrupt for concealing property has an averment that notice of bankruptcy was put in the Gazette, such averment may be proved by the production of the Gazette, without proof of its being bought of the Gazette printer, or where it came from. *Id.*

An indictment against a bankrupt for secret- ing his effects should show that the commission was duly issued, as well as that it was awarded. *Res v. Frith*, 1 Leach, C. C. 10.

Where a bankrupt surrendered to his commission, and at the time of such surrender refused to answer particular questions concerning his property, but took the oath, and assigned, as his reason for not answering, that he intended to dispute the commission; the refusal to answer such question would not have been a capital offence within the 5 Geo. 2, c. 30, s. 1. *Res v. Page*, R. & R. C. C. 392; 1 R. & B. 308; 3 Moore, 456. *And see* 1 Geo. 4, c. 115, and 6 Geo. 4, c. 16, s. 112.

In an indictment against a bankrupt, he was charged with feloniously making default in not submitting to be examined. *Quære*, whether this was sufficient, without charging him with a refusal to surrender and submit to examination? *Res v. Page*, 3 Moore, 656; 1 R. & B. 308; R. & R. C. C. 392.

An indictment against a bankrupt, under stat. 5 Geo. 2, c. 30, for not making a full disclosure of his estate, should have truly set out the notice requiring him to surrender. Therefore, where the indictment averred that the notice required the bankrupt to surrender, &c., pursuant to stat. 5 Geo. 2, intitled, &c., and on the production of the notice it appeared that the title to the 49 Geo. 3 was substituted for that of the 5 Geo. 2:—Held, that the variance was fatal. *Res v. Barraston*, 1 Gow, 210.

An indictment, after stating that a commission of bankruptcy had issued against A., by virtue of which the commissioners adjudged him to be a bankrupt, charged, that he and other defendants conspired to conceal a part of his personal estate:—Held, that ever since the stat. 6 Geo. 4, c. 16, s. 112, such an indictment is defective, for not showing that the party had actually become bankrupt. *Rex v. Jones*, 4 B. & Adol. 345.

Bankrupt's omission to surrender is not felony, unless it is wilful. *Blake v. Leigh*, Amb. 307.

And where a bankrupt, who was in prison for debt, did not surrender to his commission, nor did he apply to have the time for his surrender enlarged, nor did he apply to be brought up to surrender under sect. 119 of the Bankrupt Act, 6 Geo. 4, c. 16, nor did he give notice to the commissioners that he was in prison:—Held, that under these circumstances he was not indictable under sec. 112 of the stat. 6 Geo. 4, c. 16, for not surrendering to his commission, even though the imprisonment could be shown to have been collusive. *Rex v. Mitchell*, 4 C. & P. 251—Little-dale.

A bankrupt is not indictable on the stat. 6 Geo. 4, c. 16, s. 112, for concealing his books till after he has concluded his last examination. Parol evidence of anything that a bankrupt says at the time of his last examination cannot be received, although it should appear that no part of what he said was taken down in writing. Quære, whether, on such indictment, the petitioning creditor is a competent witness to prove the petitioning creditor's debt? *Rex v. Walters*, 5 C. & P. 138—Park.

#### LVIII. OFFENCES BY INSOLVENTS.

7 Geo. 4, c. 57, ss. 70 & 71.

If an insolvent debtor has sworn that his schedule contains a full, true, and perfect account of all debts owing to him at the time of his petitioning for his discharge; an assignment of perjury on that oath, stating, that "whereas in truth and in fact the said schedule did not contain a full, true, and perfect account;" &c., (in the words of the oath), is too general: it ought to state what debt he is charged with omitting. *Rex v. Hepper*, 1 C. & P. 608—Abbott; 1 R. & M. 210.

An insolvent debtor, omitting to state in his schedule debts due to him, is not indictable for perjury, although he has sworn to the truth of his schedule; but he must be indicted for a misdemeanour, under sect. 70 of the Insolvent Debtors' Act, 7 Geo. 4, c. 57. Perjury under sect. 71 of that act is only committed as to things falsely stated in the schedule. *Rex v. Moody*, 5 C. & P. 23—Tenterden: *S. C. nom. Rex v. Madie*, 2 M. & M. 128.

The form of oath at the end of an insolvent's schedule is an affidavit in writing, and may be so stated in an indictment for perjury. *Id.*

Debts due to the insolvent are "effects or property," within sect. 70 of the Insolvent Debtors' Act. *Id.*

#### LIX. BURNING.

7 & 8 Geo. 4, c. 30, ss. 2 & 17.—The stat. 7 &

8 Geo. 4, c. 27, wholly repeals the stat. 23 Hen. 8, c. 1; 43 Eliz. c. 13; 22 & 23 Car. 2, c. 7; 9 Geo. 1, c. 22, (the Black Act); 9 Geo. 3, c. 29, and 52 Geo. 3, c. 130; and the stat. 9 Geo. 4, c. 31, wholly repeals the stat. 43 Geo. 3, c. 58, (Lord Ellenborough's Act.)

(See L. C. J. Tindal's charge, 5 C. & P. 265, n.)

The feloniously burning of a dwelling-house is arson at common law; but the burning of an out-house is a statutory felony. *Rex v. Nash*, 2 East, P. C. 1021.

If a person set fire to a stack, the fire from which is likely to and which does communicate to a barn, which is thereby burnt, the person is indictable for burning the barn. *Rex v. Cooper*, 5 C. & P. 535.

A building which never had been inhabited, but which was constructed as and intended for a dwelling-house, but which contained straw, boards, and implements of husbandry, was held neither to be a house, out-house, or barn, within the Black Act, 9 Geo. 4, c. 22, s. 7. *Elemore v. Hundred of St. Briavels*, 2 M. & R. 514; 8 B. & C. 461. This statute is repealed, but this case appears equally to apply to the stat. 7 & 8 Geo. 4, c. 30 & 31, in which the same words occur.

A building separated from the house by a passage, used as a school-room, but within the curtilage was an "out-house" within the 9 Geo. 1, c. 22, s. 1, although not of the ordinary description of out-houses. *Rex v. Winter*, R. & R. C. C. 295.

A common jail is a house within the statute of arson. *Rex v. Donovan*, 2 W. Black 682.

The stat. 9 Geo. 1, c. 22, did not vary the nature of the crime of arson. *Rex v. Breeme*, 1 Leach, C. C. 220; 2 East, P. C. 1026. *But see stat. 43 Geo. 3, c. 58.*

A prison or common jail was a house within the meaning of the 9 Geo. 1, c. 22. *Rex v. Donovan*, 1 Leach, C. C. 69; 2 East, P. C. 1020.

A tenant from year to year is not guilty of arson by burning the house of which he is in possession; but if, by firing his own house, he thereby burns the house of another, he is guilty of the crime. *Rex v. Pedley*, 1 Leach, C. C. 249; Cald. 218; 2 East, P. C. 1026.

A tenant in possession of a copyhold messuage is not guilty of arson by burning it, although it has been surrendered to the use of a mortgagee; for it is not the house of another while the tenant continues in possession. *Rex v. Spalding*, 1 Leach, C. C. 218; 2 East, P. C. 1025.

A tenant in possession, under agreement for a lease for three years from a lessee, who held under a building lease, is not guilty of arson by setting the house on fire; and the 9 Geo. 1, c. 22, did not vary the nature of this offence. *Rex v. Breeme*, 1 Leach, C. C. 220; 2 East, P. C. 1026. *But see stat. 43 Geo. 3, c. 58.*

One entitled to dower only out of a house, which was leased to another, may commit arson by burning it. *Rex v. Harris*, 2 East, P. C. 1023.

And so it seems if the legal reversion had been in the prisoner. *Id.*



One put by overseers of the poor into a house to live there is merely a servant, and his possession is theirs, and therefore he may commit arson by burning it. *Rez v. Gowen*, 2 East, P. C. 1027; 1 Leach, C. C. 246.

Burning a man's own house contiguous to others is a misdemeanour at common law. *Rez v. Probert*, 2 East, P. C. 1030; *S. P. Rez v. Isaac*, 2 East, P. C. 1031.

A building had been built for an oven to bake bricks, but afterwards was roofed and a door put to it. In this place the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor, nor the person of whom he rented this building, had any house or farm-yard near it, nor did any wall connect it with any dwelling-house, the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord:—Held, that the building was neither a stable nor an out-house, and that, if a person set it on fire, (the lean-to not being burnt,) he was not indictable for arson. *Rez v. Haughton*, 5 C. & P. 555—Taunton.

An open building in a field at a distance from and out of sight of the owner's house, though boarded round and covered in, is not an out-house within 7 & 8 Geo. 4, c. 30, s. 2. *Rez v. Ellison*, M. C. C. R. 336.

A hovel in the middle of a field, used for the shelter of cattle and occasionally for depositing implements of agriculture, was held not an out-house within the meaning of 9 Geo. 1, c. 22, s. 1, as it was not within the curtilage. *Rez v. Ecclefield*, Deac. C. L. 56. And it seems also not to be within the words of the present statute, unless it could be considered as a stable.

If done with intent to defraud insurers, and other houses are burned in consequence, it is felony. *Id.*

On an indictment for arson on the prosecution of an insurance company, their books are not evidence of the insurance, without notice to produce the policy. *Rez v. Doran*, 1 Esp. 127—Kenyon.

A prisoner tried at the assizes for arson on Wednesday, the 20th of March, was on Monday, the 18th, served at the prison with a notice to produce a policy of insurance. The commission-day was Friday, the 15th, and the prisoner's home was ten miles from the assize town:—Held, that the notice was served too late. *Rez v. Ellicombe*, 5 C. & P. 522; M. & Rob. 260—Littledale.

Held, also, that the intent to defraud an insurance office, being charged in the indictment, was not such notice to the prisoner as would make a notice to produce the policy unnecessary. *Id.*

It must appear upon the face of an indictment for arson that the house was that of another; and it must state whose house, and with that the proof must agree. *Rez v. Rickman*, 2 East, P. C. 1034. And see *Rez v. Glandfield*, 2 East, P. C. 1034.

Setting fire to a parcel of unthreshed wheat was not a felony within 9 Geo. 1, c. 22. *Rez v.*

*Judd*, 2 T. R. 255; 1 Leach, C. C. 484; 3 Esp. P. C. 1018.

Though an indictment for setting fire to a barn stated it to be in the night, yet it was not material to prove that fact under stat. 9 Geo. 1, c. 22; as it was necessary that the indictment should state that there was corn or hay therein. *Rez v. Ma-ton*, 2 East, P. C. 1021.

Although the word "maliciously" be not in the statute, quære, if it must not be laid in the indictment? *Id.*

An indictment for setting fire to an out-house was good, and sufficient to oust the offender of clergy, under stat. 9 Geo. 1, c. 22, though it might have in point of law formed part of the dwelling-house, the burning of which was arson at common law. *Rez v. North*, 2 East, P. C. 1021.

A house in part of which a man lives, and other parts of which he lets to lodgers, may be described in an indictment for setting fire to it as his house, though he has taken the benefit of the Insolvent Debtors' Act, and executed an assignment including the house, if the assignee has not taken possession; at least no objection can be made, if in other counts it is stated as the house of the assignee, and in others of the lodger whose room was set fire to. *Rez v. Ball*, 1 R. & M. C. C. 30; 2 Russ. C. & M. 495.

A cotton-mill was within stat. 9 Geo. 1, c. 22, s. 2, relating to the burning of mills. *Ans.* 2 Russ. C. & M. 493.

Setting fire to paper only in a drying lat belonging to a paper-mill, no part of which was burnt, was not setting fire to an out-house within the meaning of 9 Geo. 1, c. 22. *Rez v. Taylor*, 1 Leach, C. C. 49; 2 East, P. C. 1890.

It was not necessary to aver in an indictment on 9 Geo. 1, c. 22, for setting fire to a hay-stack, that the stack "was thereby burnt." *Rez v. Salmon*, R. & R. C. C. 26; 2 Russ. C. & M. 34.

In an indictment on the 9 Geo. 1, c. 22, for setting fire to a hay-stack, it was no answer to the charge that the prisoner had no malice or spite to the owner of the stack. *Id.*

Or that it stood upon his own ground, if it was not his property. *Id.*

On an indictment for setting fire to a mill, with intent to injure the occupiers thereof:—Held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a man must be supposed to intend the necessary consequence of his own act. *Rez v. Farrington*, R. R. C. C. 26; 2 Russ. & M. 493.

Notwithstanding the stat. 43 Geo. 3, c. 28, a person might still have been indicted within eighteen months limited by the 9 Geo. 1, c. 22, for setting fire to a mill, without alleging it to be to injure or defraud any person. *Id.*

And it was the same as to setting fire to a house, or barn, or rick of another. *Id.*

A stamped policy, on which an unstamped memorandum, importing that the goods mentioned therein were removed to another house, to which removal was thereby allowed, has been

On an indictment on 9 Geo. 1, c. 22, for setting fire to a barn; in support of a challenge to a panel, because the sheriff was an inhabitant of the hundred, it was necessary to prove that the challenge had been given within two days of the indictment, and that the examination had been delivered within the statute required. *Rex v. Savage*, 1 M. & C. C. 51.

An indictment on the stat. 7 & 8 Geo. 4, c. 29, s. 2 & 17, for setting fire to a barn and a stack of straw, charged the offences to have been committed "feloniously, voluntarily, and maliciously," instead of "feloniously, unlawfully, and maliciously."—Held bad. The prisoners had set fire to a stack of stubble, (which, in Cambridgeshire, is called haulm); they were indicted on a first indictment for setting fire to a "stack of straw."—Held, that this was not straw. On their being again indicted for setting fire to a "stack of straw called haulm," the judge directed that to convict upon such a count would not be safe; and the verdict, in consequence, was taken upon other counts, charging the setting to a barn and a wheat-stack. *Rex v. Reade*, 1 C. & P. 245; R. & M. C. C. 239.

On an indictment for setting fire to a stack of beans, a mistake as to the name of the property where the offence was committed, is immaterial, where the charge is transitory, not local. *Rex v. Ward*, 1 M. & C. C. R. 323.

Upon a statute which makes it capital to set fire to a stack of pulse, it is sufficient to state that the prisoner set fire to a stack of beans. The judges will take notice that beans are pulse.

An indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 17, charged a party with setting fire to a "stack of barley, of the value of 100*l.*, of R. P. W.:"—Held good, although the words of the statute creating the offence are, "any stack of corn or grain."—Held also, that the words, "of R. P. W.," sufficiently stated the property:—Held also, that if the indictment state "that the prisoner &c., at &c., feloniously, unlawfully, and maliciously did set fire to a certain stock of barley, of the value of 100*l.*, of R. P. W., then and there being," this is sufficient, without stating that the prisoner, on &c., at &c., feloniously, unlawfully, and maliciously did then and there set fire to the stack. *Rex v. Swatkins*, 4 C. & P. 548—Patteson.

Arson is an injury only to the actual possessor, and must be so laid; and if a man set fire to his own house, if it burn that of his neighbour, it is arson. *Rex v. Pedley*, Cald. 218; *Rex v. Seafeld*, Cald. 397.

An indictment for setting fire to a barge, the property of another, ought to contain an averment that it was done with an intent to injure the owner. *Rex v. Smith*, 4 C. & P. 569—Gibson and Alderson.

A wife is not indictable under the stat. 7 & 8 Geo. 4, c. 30, s. 2, for setting fire to her husband's house with intent to injure him; as in

Where the prisoner was indicted for destroying a threshing machine, and it appeared that it had been previously taken to pieces by the owner, by separating the arms and other parts of it, for the purpose of placing it in safety, but with a view to put it together again, and it was destroyed whilst in this disjointed state; it was decided that the offence was within the statute of the 7 & 8 Geo. 4, c. 30, s. 3. *Rez v. Hutchins*, Dea. C. L. 1517—Park, Bolland, and Patteson.

Where certain side boards were wanting to the machine at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work so effectually as if those boards had been made good; it was held, that it was still a threshing machine within the meaning of the statute. *Rez v. Bartlett and Others*, Dea. C. L. 1517—Vaughan, Parke, and Alderson.

Where the owner removed a wooden stage belonging to the machine on which the man who fed the machine was accustomed to stand, and had also taken away the legs, and it appeared in evidence that though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn, would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one within the act, notwithstanding the stage and legs were wanting. *Rez v. Chubb*, Dea. C. L. 1518—Vaughan and Parke.

But where the prosecutor had not only taken the machine to pieces, but had broken the wheel of it before the mob come to destroy it, for fear of having it set on fire and endangering his premises, and it was proved that without the wheel the engine could not be worked; in this case it was held, that the remaining parts of the machine, which were destroyed by the mob, did not constitute a threshing machine within the meaning of the statute. *Rez v. West*, Dea. C. L. 1518—Alderson.

## LXII. INJURIES TO PROPERTY BY RIOTERS.

7 & 8 Geo. 4, c. 30, s. 8.]—By the stat. 7 & 8 Geo. 4, c. 27, the stats. 9 Geo. 3, c. 29, and 52 Geo. 3, c. 130, and 56 Geo. 3, c. 125, are wholly repealed; and the stat. 1 Geo. 1, st. 2, c. 5, is partially repealed. The stat. 7 & 8 Geo. 4, c. 27, repeals so much of the stats. 22 & 23 Car. 2, c. 11, and 33 Geo. 3, c. 67, as relates to this subject; and the stat. 9 Geo. 4, c. 31, wholly repeals 43 Geo. 3, c. 113. (See *L. C. J. Tindal's charge*, 5 C. & P. 265, n.)

It is not a "beginning to demolish" a house within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 8, unless the jury be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into full effect, they would, in point of fact, have demolished it. *Rez v. Matthew Thomas*, 4 C. & P. 237—Littledale.

committing the outrage had an intention of destroying the house; and, therefore, where considerable damage was done to a house by a mob, who did this with an intention of seizing a person who had taken refuge in the house, this was held to be not within the statute. *Rez v. Pies*, 5 C. & P. 510.

See the case of *Elmore v. St. Brinde*, *ant.* p. 787.

## LXIII. DESTROYING OR DAMAGING SHIPS, &c.

7 & 8 Geo. 4, c. 30, ss. 9 & 10.

If a ship were stranded, and afterwards got off in such a state as to be easily refitted, she could not be said to have been cast away or destroyed under stats. 4 Geo. 1, c. 12, and 11 Geo. 1, c. 28. *Rez v. De Londo*, 2 East, P. C. 1098.

A person who is accessory to a felonious shipwreck was not within 4 Geo. 1, c. 12, unless he belonged to the ship. *Rez v. Pow*, 1 Leach, C. C. 5; 2 East, P. C. 1099. But see stat. 7 Geo. 4, c. 61.

It was an offence within 11 & 12 Will. 3, c. 9, to make a revolt in a ship, or to endeavour to make one, though the object is not to run away with the ship, or to commit any act of piracy, but to force the captain to redress supposed grievances. *Rez v. Hastings*, 1 M. & M. C. C. 82.

The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owner, though he has insured the whole ship, and promised that the other part-owner shall have the benefit thereof. *Rez v. Philp*, M. C. C. L. 264.

If the thing attempted should, if successful, have prejudiced any of the part-owners, it shall be intended that such prejudice was meant. *Id.*

The vendee of a share in a ship shall be deemed complete part-owner, if an entry of the bill of sale to him (as the form 6 Geo. 4, c. 114, s. 2, requires,) is made in the proper book of registry, though it does not express in terms that the bill of sale was produced, because it would be against the duty of the officer to make the entry complete on such production. *Id.*

The giving a date, which has nothing to apply to but the production of the bill of sale, will imply it. *Id.*

Two or more persons may hold shares of a ship jointly. *Id.*

An indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 10, for damaging a vessel, need not state the damage was done "otherwise than by fire." It states how it was done. Whether a small pleasure boat, eighteen feet long, is a vessel within the meaning of that statute—*quære*. Still that it is. *Rez v. Bower and Others*, 4 C. & P. 559—Patteson.

(See *Rez v. Smith*, *ante*, p. 789.)

## LXIV. DESTROYING FIRMS, &c.

7 & 8 Geo. 4, c. 30, s. 15.]—The stat. 7 & 8

4, c. 27, wholly repeals the stat. 5 *Edw.* c. 29, also the 4 *Geo.* 4, c. 54, except as to threatening letters.

The breaking down the head or mound of a fish-pond was not a felony within stat. 9 *Geo.* 1, c. 22, if it appeared to have been the object of the offenders to steal the fish, and not to let them escape through the breach in the mound: and if it were, stat. 5 *Geo.* 3, c. 14, had virtually repealed it as to this offence. *Rex v. Rees*, R. & R. C. C. 10; 2 *East*, P. C. 1067.

Seemle, that the 9 *Geo.* 1, c. 22, applied only to cases of wanton malicious mischief in cutting the mound or head. *Id.*

#### LXV. KILLING OR MAIMING CATTLE.

7 & 8 *Geo.* 4, c. 30, s. 16.]—The stat. 7 *Geo.* 4, c. 27, wholly repeals the stat. 37 *Hen.* 8, c. 6; 22 & 23 *Car.* 2, c. 7; 9 *Geo.* 1, c. 22, (the Black Act); and also 4 *Geo.* 4, c. 54, except as to threatening letters.

The stat. 9 *Geo.* 1, c. 22, was designed to extend and not abridge the offences described in 22 & 23 *Car.* 2, c. 7; and therefore, horses, mares, and colts were included in the word "cattle." *Rex v. Patty*, 2 *East*, P. C. 1074; 1 *Leach*, C. C. 72; 2 *W. Black.* 721; S. P. *Rex v. Magle*, 2 *East* P. C. 1076.

So were geldings. *Rex v. Mott*, 2 *East*, P. C. 1075; 1 *Leach*, C. C. 73, n.

The act of maiming cattle, to make it a capital offence within the meaning of 9 *Geo.* 1, c. 22, must have proceeded from a malicious motive towards the owner. *Rex v. Shepherd*, 1 *Leach*, C. C. 539; 2 *East*, P. C. 1073.

To constitute the offence of maliciously maiming cattle, under the Black Act, it must appear that the maiming was committed from a malicious motive to the owner of the cattle. *Rex v. Pearce*, 1 *Leach*, C. C. 527; 2 *East*, P. C. 1072; S. P. *Rex v. Kean*, 2 *East*, P. C. 1073; 1 *Leach*, C. C. 527, n.

To support an indictment on 9 *Geo.* 1, c. 22, s. 1, for maliciously killing, &c., cattle, there must have been malice proved against the owner of the cattle, and not against a servant or relation of the owner. *Rex v. Austen*, R. & R. C. C. 490. *But see* 4 *Geo.* 4, c. 54, s. 2.

Proof of dislike by a servant to a particular horse, and the fact committed after his master's refusal to let him have another, was not sufficient to bring the case within the statute, though the prisoner had before threatened the injury if his master would not let him have the other horse. *Id.*

But it was not necessary to prove a previous existing malice against the owner. *Rex v. Ranger*, 2 *East*, P. C. 1074.

[Malice against the owner is not material under 7 & 8 *Geo.* 4, c. 30, s. 16.]

A private prosecutor on 9 *Geo.* 1, c. 22, had an option to prefer his indictment in such county as he thought most favourable to the ends of justice. *Rex v. Mortis*, 1 *Leach*, C. C. 73; 2 *W. Black.* 733.

Aiders and abettors of another ousted of clerical as the principal *v. Midwinter*, 2 *66*, n.

Wounding a man by driving a nail within stat. 9 *Geo.* 1, c. 22, is only temporary. 1076; R. & R. C. C. 1076.

On an indictment against sheep, the proper issue is whether the sheep is the agister. *Rex v. ...*

Pigs were caught under the Black Act, 9 *Geo.* 1, c. 22, might have been taken under the 9 *Geo.* 1, c. 22.

Asses were not within the meaning of stat. 9 *Geo.* 1, c. 22, s. 1.

An indictment against a man for maiming a horse or injured, to a certain cattle was not good. *R. & R. C. C. 24*.

If the statement of a man that the animal was maimed, viz. a mare, was not sufficient to sustain the indictment. *Id.*

Pouring acid into the eye of a horse by blinding her, was not maiming. *Rex v. Owens*, R. & R. C. C. 490.

Injuring a sheep by such a maiming was not within the meaning of stat. 4 *Geo.* 4, c. 30, s. 16. & P. 420—Park.

If A. set fire to a cow which is in the possession of B. it is not maiming. *stat. 7 & 8 Geo. 1, c. 22. Rex v. Haughton*.

On an indictment against a man for maiming a horse by pouring acid into the eye of the horse, the prosecutor may prove that at different times the jury are satisfied the poison under the appearance of the horse to quit him. If a man intended for then gives each horse an indictment charging the poison to the horse. *Mogg*, 4 C. & P. 11.

#### LXVI. D

7 & 8 *Geo.* 4, c. 30, s. 16; 7 & 8 *Geo.* 4, c. 27; 23 *Car.* 2, c. 7; 1 & 2 *Geo.* 3, c. 31; 6 and 46 *Geo.* 3, c. 1.

To bring the case within the meaning of stat. 9 *Geo.* 1, c. 22, it must be proved that the malice was against the owner.

In an indictment on stat. 6 Geo. 3, c. 36, for destroying trees, the name of the owner of the trees must have been truly stated, otherwise it was fatal. *Rex v. Patrick*, 2 East, P. C. 1059.

Where shrubs are cut upon an unproved allegation that they were likely to be injurious to an adjoining wall, it is a malicious trespass, though the title to the spot on which the shrubs grew be in dispute between the parties. *Rex v. Whately*, 4 M. & R. 431.

Apple and pear trees grafted in a wild stock, and producing fruit, were trees within 9 Geo. 1, c. 22. *Rex v. Taylor*, R. & R. C. C. 373.

If a person be charged on oath before a magistrate with an offence amounting to felony, and he issues his warrant; on the party being brought before him the charge is substantiated, and the offender is committed to prison; the magistrate committing is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. Where therefore a party was charged under the stat. 7 & 8 Geo. 4, c. 30, s. 19, with having maliciously cut down a tree adjoining a dwelling-house, and was committed to prison as a felon, and the person who laid the information did not prosecute:—Held, that the magistrate was not liable in trespass, although it appeared on the face of the depositions under which the party was committed that he was the occupier of the land the tree grew on. *Mills v. Collet*, 3 M. & P. 242.

## LXVII. FORGERY.

### 1. What is Forgery.

By the stat. 1 Will. 4, c. 66.]—The following statutes as to forgery are either wholly or partially repealed, as under-mentioned; viz:—

*Statutes wholly repealed.*—5 Eliz. c. 14; 21 Jac. 1, c. 26; 7 Geo. 2, c. 22; 13 Geo. 3, c. 79; 18 Geo. 3, c. 18; 33 Geo. 3, c. 30; 37 Geo. 3, c. 122; 41 Geo. 3, (U. K.) c. 39; 41 Geo. 3, c. 57; 45 Geo. 3, c. 89; 52 Geo. 3, c. 138.

*Statutes partially repealed.*—25 Edw. 3, stat. 5, c. 2; (the statute of treason only repealed as to the seals); 1 Mar. stat. 2, c. 6, (this statute is wholly repealed by 2 Will. 4, c. 34); 4 W. & M. c. 4; 8 & 9 W. 3, c. 20; 7 Ann. c. 21; 8 Geo. 1, c. 22; 12 Geo. 1, c. 31; 2 Geo. 2, c. 25; 15 Geo. 2, c. 13; 31 Geo. 2, c. 22; 4 Geo. 3, c. 25; 27 Geo. 3, c. 43; 43 Geo. 3, c. 139; 48 Geo. 3, c. 1; 52 Geo. 3, c. 146; 4 Geo. 4, c. 76.

1 Will. 4, c. 66; 2 & 3 Will. 4, c. 123; 3 & 4 Will. 4, c. 44.]—And see the statutes collected, Collier's Criminal Statutes, tit. FORGERY.

Forgery is the false making of an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons. *Rex v. Jones*, 2 East, P. C. 991—Eyre.

It is felony to forge the name of a person, although such person never existed. *Rex v. Boland*, 1 Leach, C. C. 83; 2 East, P. C. 958.

Discharging a genuine indorsement, and inserting another, is altering the indorsement, and forgery. *Rex v. Birkett*, and *Rex v. Bigg*, Bayl. Bills, 430.

A receipt indorsed on a bill of exchange is a fictitious name is a forgery, although it do not purport to be the name of any particular person. *Rex v. Taylor*, 1 Leach, C. C. 215; 2 East, P. C. 690.

Signing a wrong christian name to the person whose will a false instrument purports to be is a forgery. *Rex v. Fitzgerald*, 1 Leach, C. C. 21; 2 East, P. C. 953.

A person who has for many years been known by a name which was not his own, and afterwards assumes his real name, and in that name draws a bill of exchange, is not guilty of forgery, though the bill was drawn for the purposes of fraud. *Rex v. Aickles*, 1 Leach, C. C. 438; 2 East, P. C. 988.

Signing a money order in an assumed name is forgery, if the name was assumed to defraud the person to whom such order was given, though the prisoner had borne other names unknown to the prosecutor, who knew him only by the assumed name. *Rex v. Francis*, R. & R. C. C. 206.

If, on an indictment for forging a bill of exchange, it is proved that the prisoner assumed a false name for the purpose of pecuniary fraud, connected with the forgery, the drawing, accepting, or indorsing of such bill of exchange, in such false or assumed name, is forgery. *Rex v. Peacock*, R. & R. C. C. 278.

Assuming and using a fictitious name, though for the purposes of concealment and fraud, will not amount to forgery, if it were not for that very fraud, or system of fraud, of which the forgery forms a part. *Box v. Bontien*, R. & R. C. C. 260.

Where a name made use of by a prisoner in a forged instrument is assumed by him with the intention of defrauding the prosecutor, it is forgery, though the prisoner's real name would have carried with it as much credit as the assumed name. *Rex v. Whaley*, R. & R. C. C. 96; 3 East, C. & M. 336.

Indorsing a bill in a fictitious name is a forgery, though the bill would have then been equally negotiable if indorsed by the prisoner in his own name, if the fictitious name was used in order to defraud. *Rex v. Marshall*, R. & R. C. C. 75; S. P. *Rex v. Taft*, 1 Leach, C. C. 12; 2 East, P. C. 959.

It is immaterial whether any additional credit be gained by the forgery, or whether the false name be assumed by the party himself for the occasion. *Id.*

Altering a bill from a lower to a higher sum is forging it; and a person might have been indicted on the 7 Geo. 2 c. 22, for forging such an instrument, although the statute had the word "alter" as well as "forge;" and it was not necessary to state in the indictment that defendant altered the bill. *Rex v. Teague*, R. & R. C. C. 33; 2 East, P. C. 979.

by altering the amount from a lower to a higher sum, it was held no defence thereto, that, before the alteration, it had been paid by the drawer and re-issued, being only stamped with the proper stamp for a re-issuable promissory note, it being the same thing as forging or uttering a forged bill with a wrong stamp. *Id.*

The changing the figure 2 into the figure 5, in a bank-note, (220*l.* to 250*l.*), was held to be forging and counterfeiting a bank-note. *Rez v. Dawson*, 1 Stra. 19; 2 East, P. C. 978.

In forgery, there need not be an exact resemblance; it is sufficient if the instrument is *prima facie* fitted to pass for a true instrument. *Rez v. Elliott*, 1 Leach, C. C. 175, 179; 2 East, P. C. 951. See *Rez v. Collicott*, *ante*, tit. OFFENCES RELATING TO STAMPS.

The case of *Rez v. Mather*, M. C. C. R. 291, was decided on the stat. 7 Geo. 2, c. 22, and 45 Geo. 3, c. 89, both of which are repealed by the stat. 11 Geo. 4 & 1 Will. 4, c. 66, and does not apply to the present state of the law.

Adding a false addition to a fictitious name, to delude a party to present a bill a second time, after a former presentment without success, under pretence that it was for want of that addition that the bill had been before dishonoured, is a forgery. *Rez v. Francis*, Bayl. Bills, 432.

A signature in an assumed name is a forgery, if the name was assumed to defraud in that particular instance, or for a system of fraud within which that signature fell. *Rez v. Marshal*, *Rez v. Whaley*, *Rez v. Dunn*, *Rez v. Toft*, and *Rez v. Peacock*, Bayl. Bills, 434.

And it makes no difference that the bill or note would have been equally taken had the party used his own name. *Rez v. Shepherd*, Bayl. Bills, 436.

If there be two persons of the same name, but of different descriptions or additions, and one signs his name with the description or addition of the other for the purpose of fraud, it is forgery. *Rez v. Webb*, Bayl. Bills, 432.

But, if the signatures to a bill or note are genuine, a false pretence by a person who utters it that he bears a character he does not, will not make him liable to a prosecution for forgery. *Rez v. Hevey*, Bayl. Bills, 433.

Where, upon an indictment for forging and uttering a forged acceptance, the bill was drawn by the prisoner, and addressed to "Mr. T. B., Baize Manufacturer, Romford," and purported to have been accepted by him, payable, when due, at No. 40, Castle-street, Holborn, and it was proved that no such person resided at Romford, and that there was no baize manufactory there, and that he did not live at No. 40, Castle-street, Holborn; and the prisoner produced witnesses to prove that the acceptance was of the handwriting of T. B., but that he had never carried on the business of a baize manufacturer at Romford, nor resided at No. 40, Castle-street, Holborn:—Held, that although this was a case of gross fraud it did not amount to forgery, as the acceptance was written by a person of the name of T. B. *Rez v. Webb*, 6 Bro.

447, n.; 3 B. & B. 228; R. & R. C. C. 405.

get into the hands of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favour it was drawn, indorsed it, he is guilty of a forgery. *Mead v. Young*, 4 T. R. 28.

Quere, whether a false insertion in an indorsement, that the indorser has a procuration, without any other circumstances of falsehood or misrepresentation, will make such an indorsement a forgery within the statute? *Rez v. Maddocks*, 2 Russ. C. & M. 459.

To make a mark in the name of another person, with intent to defraud the person whose name is assumed, is forgery. *Rez v. Dunn*, 1 Leach, C. C. 57; 2 East, P. C. 962.

A prisoner named T. Story went to the post-office at N., and inquired for a letter directed to "T. Story, post-office, Nottingham, to be left till called for;" and a letter directed to T. Storer, post-office, &c., was given him, the postmaster supposing that the prisoner was the person to whom it was directed, not noticing the difference of names; the letter contained a money order, of which the prisoner obtained payment on signing his own name on the back of it:—Held, that this was not forgery. *Rez v. Story*, R. & R. C. C. 81.

If a person authorize another to sign a note in his name, dated at a particular place, and made payable at a banker's; and the person in whose name it is drawn represent it to be the name of another person, with intent to defraud, and no such person as the note and the representation import exists, this is forgery, for it is a false making of an instrument, in the name of a non-existing person. *Rez v. Parkes*, 2 Leach, C. C. 775; 2 East, P. C. 963, 992.

It is a forgery to alter a document, which the prisoner had previously forged himself; and he may be convicted of forging and uttering it in the state to which it was so altered. *Rez v. Kinder*, 2 East, P. C. 856.

If several combine to forge Bank of England notes, and each executes by himself a distinct part of the forgery, but they are not together when the notes are completed, they are nevertheless all guilty as principals. *Rez v. Bingley*, R. & R. C. C. 446.

If several make distinct parts of a forged instrument, each is a principal though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *Rez v. Kirkwood*, M. C. C. R. 304.

The makers of the paper and plate respectively, for the purpose of forging a note afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, and without knowing by whom the other parts are executed. *Rez v. Dade*, M. C. C. R. 307.

A person may be convicted of forging with intent to defraud, although the note was found in his custody when apprehended, and never, in fact, uttered by him. *Rez v. Crocker*, 2 Leach, C. C. 987; 2 N. R. 87; R. & R. C. C. 97.

The case of *Rez v. Crooke*, 2 East, P. C. 921,

Expunging, by a certain liquor, a notification of payment of part of the contents of a bank bill, written on the face of it, would sustain an indictment, on 8 & 9 Will. 3, c. 20, s. 36, for raising out an indorsement on such bill. *Res v. Bigg*, 2 East, P. C. 862.

If the London correspondent of a country banker fail, and the notes of the country bank then in circulation be directed to be paid at another house, the altering of a paid note, (lost on its way to the country bank in order to be re-issued), as to its place of payment, is a forgery, and the drawer of it may prove that it never reached his hands or was re-issued by him. *Res v. Treble*, 2 Leach, C. C. 1040; 2 Taunt. 328; R. & R. C. C. 164.

The paper and stamps of the notes of a country bank, which have been paid by the correspondent banker in London, and which the country banker may legally re-issue, are the valuable property of the country banker while in transitu for the purpose of being re-issued. *Res v. Clarke*, 2 Leach, C. C. 1036.

Forging an order from one to charge certain goods contained in a schedule to his account, and to appropriate part of the proceeds to the defendant's own use, done with intent to defraud the principal, is forgery at common law, though the fraud be not effected. *Res v. Ward*, 2 East, P. C. 861.

One who was committed to jail under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor to the sheriff and jailor, under which he obtained his discharge:—Held, a misdemeanour at common law, although the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for his discharge. *Res v. Fawcett*, 2 East, P. C. 862.

Semble, also, that it was indictable as a forgery. *Id.*

A note, in the name of an overseer of the poor, to a shopkeeper, desiring him to let the prisoner have certain goods, which he would see him paid for, is not a warrant or order for the delivery of goods within the stat. 7 Geo. 2, c. 22. *Res v. Mitchell*, 2 East, P. C. 936.

## 2. The Instrument.

Forging a bill on the commissioners of the navy, though it is not warranted by the 35 Geo. 3, c. 94, if it have the requisites of a bill of exchange, is within the statutes against forgery. *Res v. Chisholme*, Bayl. Bills, 440.

Forging a bill or note for less than 20s. or 5l., which does not comply with the requisites of 17 Geo. 3, c. 30, or any other bill or note the legislature has declared void, is not within the statutes against forgery. *Res v. Moffat*, Bayl. Bills, 439.

Forging or uttering a note without a maker's name is not a capital offence. *Res v. Pateman*, Bayl. Bills, 441.

Forging or uttering a bill or note, purporting

to be a bill of exchange, is no indictable offence, though there be no indorsement upon it in A. B.'s name. *Res v. Bicket*, *Res v. Bugh*, and *Res v. Wicks*, Bayl. Bills, 441, 442.

And forging on unstamped paper a bill or note which requires a stamp, is as much an offence as if it were on stamped paper. *Res v. Bessie-wood*, Bayl. Bills, 63, 442.

A person makes a copy of a receipt, and adds to it other words, as for example, "in full of all demands," which were not in the original; it is a forgery, if the copy is offered in evidence as the supposed loss of the original. *Uppell v. Lid*, 5 Esp. 100—Ellenborough.

The forging and uttering a Prussian treasury note for the payment of one dollar was within the stat. 43 Geo. 3, c. 139, s. 1. *Res v. Goldstein*, 7 Moore, 1; 3 B. & B. 201; 10 Price, 88; Bayl. Bills, 444.

The counterfeit making of any part of a genuine note, which may give it a greater currency, is forgery; therefore, if a note be made payable to a country banker's, or at his banker's in London, who fails, it is forgery to alter the name of the London banker to the name of another London banker, with whom the maker makes his other notes payable after the failure of the first. *Res v. Treble*, 2 Taunt. 328.

The stat. 43 Geo. 3, c. 139, made to prevent forgery in Great Britain of foreign securities, was not to be understood to require that such securities should possess the technical properties required by the law of England, it being sufficient if they imported on the face of the whole instrument an undertaking or order for payment of money. *Res v. Goldstein*, R. & R. C. C. 63—Richardson; 3 B. & B. 201.

And it was sufficient if the instrument were in fact an undertaking or order for payment of money, and operated as such, and purported to be issued by any foreign prince, or his minister. *Id.*

An indictment charged that the prisoner feloniously had falsely made, forged, and counterfeited a certain promissory note for the payment of money, which was as follows: "On demand we promise to pay Messrs S. W. and S. D. stewards for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope Smithfield, or their successors in office, sixty-four pounds, with five per cent. interest for the sum value received this seventh day of February 1815. For F. C. & Co., J. F." This was held a valid promissory note within the stat. 3 Geo. 3, c. 25, and the conviction was affirmed. *Res v. Box*, 6 Taunt. 325.

An order was made under 48 Geo. 3, c. 35, 6, purporting on the face of it to be an order of a magistrate on the treasurer of a county, to allow one J. C. the expenses of burying a dead body cast on shore:—Held, that this was a forgery, although there was no such magistrate in the county of the name of the person who signed the order, and although J. C. was not therein stated to be a parish officer, or that the expenses incurred were necessary. *Res v. Froude*, 3 Mann 645; 7 Price, 609.

A bill upon the commissioners of the navy for pay may be a bill of exchange, although it be not such an instrument as 35 Geo. 3, c. 94, warrants. *Res v. Chisholme*, R. & R. C. C. 297; 2 Russ. C. & M. 458; Bayl. Bills, 440.

If an instrument purporting, as a navy bill, to be an order for payment of money, be directed to the treasurers, instead of the commissioners of the navy, as required by statute, it will not prevent its being considered as an order for payment of money. *Res v. Richards*, R. & R. C. C. 193.

Although a navy pay bill be not numbered as the 35 Geo. 3, c. 94, s. 3, requires, yet the instrument is still a bill of exchange, and an indictment for forging such instrument may lay it to be a bill of exchange. *Res v. Randall*, R. & R. C. C. 195—Bayley.

Forging a magistrate's order to pay money under hand only is not a capital offence; as the 17 Geo. 2, c. 5, under which the magistrate has power to make it, requires it to be under hand and seal. *Res v. Rushworth*, R. & R. C. C. 317; 1 Stark. 396.

And so, if it is addressed to the treasurer of the country, instead of the high constable, the magistrate having no power by the act to make it upon the former. *Id.*

By 48 Geo. 3, c. 75, a justice of the peace may order the treasurer of the county to pay every churchwarden, overseer, headborough, or constable, the expenses he has incurred in burying any dead body that has been cast on shore. A person was convicted of forging a justice's order, stating that a dead body had been cast on shore, in the parish of A.; that J. S. had made an oath before the justice, that he had laid out 3l. 5s. in the burying it, and requiring the treasurer to pay him the sum:—Held, by six against five judges, that this was a warrant or order for payment of money, within stat. 7 Geo. 2, c. 22, although it did not appear on the face of the order that J. S. was a churchwarden, &c., and that the treasurer was bound to conclude that the justice had not made an order, without satisfying himself that J. S. was churchwarden, &c., and therefore that the conviction was right. *Res v. Froud*, R. & R. C. C. 389; 1 B. & B. 300. See *Res v. Harris*, post, p. 797.

A forged bank-note, although the word "pounds" be omitted in the body of it, and there be no water-mark in the paper, is a counterfeit note for the payment of money. *Id.*

The altering a banker's one pound note, by substituting the word "ten" for the word "one," was held to be forgery, although it thereby purported to be a note for ten "pound" and not pounds. *Res v. Poot*, R. & R. C. C. 101.

Forging a deed was within the 2 Geo. 2, c. 25, s. 1, although there may have been subsequent directory provisions by other statutes, that instruments for the same purpose as such forged deed shall be in a particular form, or shall comply with certain requisites, and the forged deed was not in that form, and did not comply with those requisites, for the directory provisions do not make the deed (although out of the form pre-

scribed, and without the requisites) wholly void. Diss. Graham and Bayley. *Res v. Lyon*, R. & C. C. 255; 2 Russ. C. & M. 443.

Forging a power of attorney to receive prize money was a capital offence, under 2 Geo. 2, c. 25, though it was not in the form prescribed by 45 Geo. 3, c. 72, s. 92. *Id.*

A power of attorney to transfer government stock, signed, sealed, and delivered, was a deed within stat. 2 Geo. 2, c. 25, s. 1. *Res v. Fauntleroy*, 1 R. & M. C. C. 52; 2 Bing. 413; 1 C. & P. 421: S. P. *Res v. Pringle*, 1 R. & M. C. C. 68, c.

An order for the payment of prize money, signed in the name of a seaman, was an order for payment of money, or bill of exchange within the stat. 7 Geo. 2, c. 22, the forgery of which was felony, although the requisites of stat. 32 Geo. 3, c. 34, s. 2, had not been complied with. *Res v. McIntosh*, 2 East, P. C. 942, 956; 2 Leach, C. C. 883.

The invalidity of an instrument must appear upon the face of it, in order to found an objection to an indictment for forgery. *Id.*

There can be no forgery of a will of lands, attested only by two witnesses. *Res v. Wall*, 2 East, P. C. 953.

To forge a will is a capital offence, although the supposed testator is living. *Res v. Sterling*, 1 Leach, C. C. 99; 2 East, P. C. 950: S. P. *Res v. Coogan*, 1 Leach, C. C. 449; 2 East, P. C. 1001.

Securities issued by government as exchequer bills are "effects" within the meaning of the 15 Geo. 2, c. 13, s. 12, although, from not having been signed by a person legally authorized, they are not valid and legal exchequer bills. *Res v. Astlett*, R. & R. C. C. 67; 1 N. R. 1; 2 Leach, C. C. 958.

A promissory note for the payment of one guinea in cash, or bank of England note, was not a note for the payment of money within the 2 Geo. 2, c. 25. *Res v. Wilcocks*, 2 Russ. C. & M. 457.

Forging a Scotch bank-note was not within the English statutes against forgery. *Res v. Dick*, 1 Leach, C. C. 68; 2 East, P. C. 925. But see 1 Will. 4, c. 66, s. 30.

Uttering a forged promissory note, purporting to be a note of the Royal Bank of Scotland, was an offence within the meaning of stat. 2 Geo. 2, c. 25. *Res v. McKeay*, Car. C. L. 190; R. & M. C. C. 130. But see *Res v. McKay*, R. & R. C. C. 71.

A bill of exchange for less than 5l., which is void for not being in the form required by stat. 17 Geo. 3, c. 30, cannot be the subject of a capital forgery. *Res v. Maffatt*, 1 Leach, C. C. 431; 2 East, P. C. 954.

The forging or uttering a note which, for want of a signature, is incomplete, is not within the statute which makes forging notes capital. *Res v. Puteman*, R. & R. C. C. 455.

A forgery may be committed of a promissory note on unstamped paper, even since the stat. 31 Geo. 3, c. 25, s. 19, which prohibits the stamp



to utter a forged promissory note, knowing it to be forged, is a capital felony, although the note is not stamped. *Rex v. Reculist*, 2 Leach, C. C. 703; 2 East, P. C. 956.

It was not necessary that a promissory note should be negotiable in order to be a promissory note within 2 Geo. 2, c. 25, so as to be the subject of an indictment for forging or uttering it. *Rex v. Box*, R. & R. C. C. 300; 8 Taunt. 325.

A bill of exchange drawn in fictitious names, where there are no such persons existing as the bill imports, may be a forgery. *Rex v. Wilkes*, 2 East, P. C. 957.

On an indictment for forging a promissory note, it appeared that it was not payable to the bearer on demand, or payable in money; that the maker only promised to take it in payment, and that the requisitions of the stat. 17 Geo. 3, c. 30, were not complied with:—Held, that the forgery of such an instrument was not the subject of an indictment at common law. *Rex v. Burke*, R. & R. C. C. 496.

Where a prisoner was indicted for forging a bill of exchange, and the bill was payable to — or order:—Held, that there must be a payee; forging an instrument payable to — or order is not sufficient. *Rex v. Randall*, R. & R. C. C. 195.

The prisoner drew a bill upon the treasurer of the navy, payable to — or order, and signed it in the name of a navy surgeon:—Held, that to constitute an order for payment of money there must be some payee; a direction to pay — or order is not sufficient. *Rex v. Richards*, R. & R. C. C. 193—*Diss. Mansfield*.

The words "warrant" or "order," in stat. 7 Geo. 2, c. 22, are synonymous. *Rex v. Mitchell*, 2 East, P. C. 936.

A forged order on a tradesman, in the name of a customer, requesting that the goods mentioned in it might be delivered to the bearer, was not within 7 Geo. 2, c. 22, if the customer has no interest in the goods mentioned. *Rex v. Williams*, 1 Leach, C. C. 114; 2 East, P. C. 937. *But see* 1 Will. 4, c. 66, s. 10.

The stat. 7 Geo. 2, c. 22, was not confined to commercial transactions, but would have applied to an order made by a justice to a high constable or treasurer to pay a reward. *Rex v. Graham*, 2 East, P. C. 945.

A bill of exchange or banker's draft might have been charged in an indictment on stat. 7 Geo. 2, c. 22, as an order for payment of money. *Rex v. Willoughby*, 2 East, P. C. 944; *S. P. Rex v. Shepherd*, 2 East, P. C. 944; 1 Leach, 226.

A stamped memorandum, importing that A. B. had paid a sum of money to C. D., but not importing any acknowledgment from C. D. of his having received it, was not such a receipt as the stat. 2 Geo. 2, c. 25, s. 1, made it capital to forge or utter. *Rex v. Harvey*, R. & R. C. C. 227.

Forging a paper writing, purporting to be an office copy of a report of the accountant-general's,

s. 9. *Rex v. Gibson*, 1 Leach, C. C. 61; 2 East, P. C. 899.

An entry of the receipt of money or note made by a cashier of the bank of England in its bank book of a creditor was an accountable receipt for the payment of money within the 7 Geo. 2, c. 22; and altering the principal sum by prefixing a figure to increase its denomination was a capital forgery, but that statute did not extend to cases where the offence was committed with intent to defraud a corporation, until the 18 Geo. 3, c. 18. *Rex v. Harrison*, 1 Leach, C. C. 189; 2 East, P. C. 927, 968.

Forging an order in the name of a silvermith for the re-delivery of plate from Goldsmith's Hall, viz. "Please to deliver my work to the bearer," was within the 7 Geo. 2, c. 22, and 11 Geo. 3, c. 26. *Rex v. Jones*, 1 Leach, C. C. 3; 2 East, P. C. 941.

A note, "Please to send 10*l*. by bearer, as I am so ill I cannot wait on you," was not an order for the payment of money within 7 Geo. 2, c. 22. *Rex v. Ellor*, 1 Leach, C. C. 323; 2 East, P. C. 951.

Forging an indenture of apprenticeship and a receipt for the apprenticeship fee, with intent to defraud the stewards of the Feast of the Sown of the Clergy, is within the statutes which make forgery a capital offence. *Rex v. Jones*, 1 Leach, C. C. 366; 2 East, P. C. 991.

The name of the holder of a navy bill, signed on a proper receipt stamp, and affixed to the navy bill, did not on the face of it purport to be a receipt for money within the stat. 2 Geo. 2, c. 22, and 7 Geo. 2, c. 22: but as the money was paid on such signature, and it always had been considered as a receipt at the Navy Office, it might, by proper averments in the indictment, be brought within the protection of these statutes as a receipt for money. *Rex v. Hunter*, 2 Leach, C. C. 624; 2 East, P. C. 928, 977.

The prisoner drew a bill, "Please to pay to bearer on demand 15*l*., and signed it with his own name, but it was not addressed to any one: there was forged upon this instrument, when altered, the words and signature, "Payable to Messrs. Masterman & Co., White Hart Court, Wm. M'Inerheney." M'Inerheney kept cash at Masterman & Co.'s:—Held, by nine judges that this was not an order for payment of money. *Rex v. Ravenscroft*, R. & R. C. C. 161.

If a person, employed by the execution of a public accountant to settle the account of the testator with government, procure fabricated vouchers, and deliver them to the Navy Board, in order to exonerate the estate of the testator from its extent, it was a forging and uttering within the 2 Geo. 2, c. 25. *Rex v. Thomas*, 3 Leach, C. 877; 2 East, P. C. 934.

Quere, if the altering of one figure to add in a weighing engine ticket comes under the denomination of forgery at common law? *1 v. Wilcox*, R. & R. C. C. 50.

A receipt to a cash memorandum was

within the stat. 2 Geo. 3, c. 25. *Res v. Russell*, 1 Leach, C. C. 9.

A scrip receipt not filled up with the name of the subscriber is not a receipt for money within the statutes against forgery. *Res v. Lyon*, 2 Leach, C. C. 597; 2 East, P. C. 933.

Forging a power of attorney to receive a seaman's wages, in the name of a supposed child as administratrix of such seaman, who, in fact, died childless, is a forgery. *Res v. Lewis*, 2 East, P. C. 957.

A forged draft on a banker was an order for the payment of money within 7 Geo. 2, c. 22, although the person whose name is forged never kept cash with, or was known to the banker. *Res v. Lockett*, 1 Leach, C. C. 94; 2 East, P. C. 940.

A forged order for the delivery of goods was not within the stat. 7 Geo. 2, c. 22, unless it were directed to the person who had the goods; and it must have appeared in an indictment for this offence, that the person whose name was charged to be forged had an authority to make such an order as the forged order purported to be. *Res v. Clinch*, 1 Leach, C. C. 540; 2 East, P. C. 938. But see 1 Will. 4, c. 66, s. 10.

In case of forging an order, the order charged as forged must import that the person making it has a disposing power over the subject of the order, or there ought to be proof that the person in whose name it was made had such power. *Res v. Baker*, R. & M. C. C. R. 231.

A forged paper was in the following form:—"Per bearer, two 11-4 superfine counterpanes. T. Davis, E. Twell." It was not addressed to any person.—Held, by the fifteen judges, that it was neither an order nor a request within the stat. 1 Will. 4, c. 66, s. 10, (the forgery consolidation act). *Res v. Cullen*, 5 C. & P. 116.

A forged request, to be within the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, must import on the face of it to be a request, and if the words have not necessarily that effect, but are so understood in the trade, there must be an innuendo to explain them. *Res v. Cullen*, M. C. C. R. 300.

On an indictment on 11 Geo. 4, & 1 Will. 4, c. 66, s. 10, a request for the delivery of goods need not be addressed to any one. *Res v. Carney*, M. C. C. R. 351.

A person who obtained goods on delivering a forged letter—"Please to let the bearer, W. T., have for J. R. four yards of linen," signed J. R., is not indictable for obtaining goods by false pretence, as this is uttering a forged request for the delivery of goods, which is a felony under sect. 10 of the stat. 1 Will. 4, c. 66. *Res v. Evans*, 5 C. & P. 553—Taunton.

The practice of issuing county court processes in blank, for the attorneys to fill up after they have been issued by the county clerk, is highly irregular. And sensible, that the filling up of a county court summons, or altering a distringas into a summons, after it has been so issued in blank, is a forgery at common law. *Res v. Collier*, 5 C. & P. 160—Patteson.

An indictment had been found against A. for an assault, on which the clerk of the peace had granted a certificate, upon which a magistrate committed A. to the county jail till he should find sureties, or otherwise be discharged by due course of law. A. wrote a forged letter in the name of another magistrate to the governor of the county jail, stating that A. had found sureties, and authorizing the discharge of A.—Held, that the writing and uttering of this forged letter was an indictable offence. *Res v. Harris*, 6 C. & P. 129. See *Res v. Froud*, ante, p. 595.

### 3. Uttering.

Uttering in England a forged note, payable in Ireland only, was within the forgery acts prior to the 11 Geo. 4 & 1 Will. 4, c. 66. *Res v. Kirkwood*, M. C. C. R. 311—Fifteen judges. [This is now regulated by s. 30 of the stat. 11 Geo. 4 & 1 Will. 4, c. 66.]

The uttering a bill with a genuine indorsement, under pretence of being the indorsor, will not subject the party to an indictment as for uttering a forged instrument, as it is only a misdemeanour. *Res v. Hevey*, R. & R. C. C. 407, n.; 2 East, P. C. 556, 856; 1 Leach, C. C. 229.

Forging a bill payable to the prisoner's own order, and uttering it without an indorsement as a security for a debt, is a complete offence, if done with a fraudulent intent, the bill having been issued to obtain credit, though as a pledge only. *Res v. Birkett*, R. & R. C. C. 86.

It is not sufficient to make a person a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn at which they put up a little before he uttered it, and joined him again in the street a short time after the uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended. *Res v. Davis*, R. & R. C. C. 113.

If a wife, by the incitement of her husband, knowingly utters in his absence a forged order and certificate for the reception of prize money, under 43 Geo. 3, c. 123, they may be indicted together, she as a principal on the statute, and he as an accessory before the fact, at common law; and if convicted she might have been punished with death, and he by fine and imprisonment. *Res v. Morris*, 2 Leach, C. C. 1096.

Persons privy to the uttering of a forged note, by previous concert with the utterer, but who were not present at the time of uttering, or so near as to be able to afford any aid or assistance, are not principals, but accessories before the fact. *Res v. Soares*, R. & R. C. C. 25; 2 East, P. C. 974.

If several plan the uttering of a forged order for payment of money, and it is uttered accordingly by one in the absence of the others, the actual utterer is alone the principal. *Res v. Badcock*, R. & R. C. C. 249.

Where a prisoner, charged with uttering a forged note to A. B., knowing it to be forged, gave forged notes to a boy who was ignorant of

brought back the goods and the change to the prisoner:—Held, that it was an uttering by the prisoner to A. B. *Rez v. Giles*, Car. C. L. 191; R. & M. 166.

Persons not present, nor sufficiently near to give assistance at the time of uttering forged notes, are not principals, although they may be accessories before the fact. *Rez v. Stewart*, R. & R. C. C. 363.

Semble, that to have made the uttering of a forged instrument indictable under 13 Geo. 3, c. 79, it must have been parted with or tendered, or offered, or used in some way to get money or credit upon it. *Rez v. Shukard*, R. & R. C. C. 200.

Showing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering or publishing within the statute. *Id.*

Nor will the leaving it afterwards, sealed up, with the person to whom it was shown, under cover, that he may take charge of it, as being too valuable to be carried about, be an uttering or publishing. *Id.*

The offence of disposing and putting away forged bank-notes is complete, although the person to whom they are disposed was an agent for the bank to detect utterers, and applied to the prisoner to purchase forged notes, and had them delivered to him as forged notes, for the purpose of disposing of them. *Rez v. Holden*, R. & R. C. C. 154; 2 Leach, C. C. 1019; 2 Taunt. 334.

A bill was addressed to Messrs. Williams & Co., bankers, Birchin Lane, London, and there might, at that time, have been a 3 on the lower left hand corner of the bill; the prisoner was asked at the time whether the acceptors were Williams, Birch, & Co., and his answers imported that they were. Williams, Birch, & Co. lived at No. 20, Birchin Lane, and it was not their acceptance. There were no known bankers in London using the style of Williams & Co. but them; but at No. 3, Birchin Lane, the name of "Williams & Co." was on the door; and some bills addressed to Messrs. Williams & Co., bankers, Swansea, had been accepted, payable at No. 3, and had been paid there. There was no evidence who lived at No. 3, but another bill of the same tenor as that in question, drawn by the prisoner, had been accepted there:—Held, that, on these facts the prisoner was improperly convicted of uttering a forged acceptance, knowing it to be forged. *Rez v. Watts*, R. & R. C. C. 436; 3 B. & B. 197.

If a person knowingly deliver a forged bank-note to another, who knowingly utters it accordingly, the prisoner, who delivered such note to be put off, might have been convicted of having disposed and put away the same, on the stat. 15 Geo. 2, c. 13, s. 11. *Rez v. Palmer*, R. & R. C. C. 72; 1 N. R. 96; 2 Leach, C. C. 978.

Uttering a forged bill of exchange, purporting

drawer's. *Rez v. Wickes*, R. & R. C. C. 149.—*Dim. Bayley*.

And such an instrument is a bill of exchange, although it is not accepted or indorsed. *Id.*

#### 4. Offences connected with Forgery.

1 Will. 4, c. 66.

*As to personating stockholders, see ante, 71.*

Procuring a person to forge a bill or note is a capital offence. *Rez v. Morris*, Bayl. Bills, 46.

Procuring to utter, a common felony only. *Id.*

Giving a confederate a forged bank-note, that he may utter it, is a disposing and putting away thereof. *Rez v. Palmer*, Bayl. Bills, 439.

Therefore if A. delivered to B. a forged bank-note, to be put off by the latter, this was a "disposing of and putting away" by A. within the 15 Geo. 2, c. 13, s. 11. *Rez v. Palmer*, 1 R. R. & And see *Brooks v. Warwick*, 2 Stark. 360.

The intent to defraud the bank constitutes the offence of feloniously disposing of and putting away counterfeit bank-notes, and it is not done away by the circumstance that the notes were furnished by the prisoner in consequence of an application made by an agent employed thereby by the bank, and that they were delivered to him as forged notes, for the purpose of being disposed of by that agent. *Rez v. Holden*, 2 Taunt. 334.

Semble, that without the actual possession of forged notes, if they had been put in any place under a person's control and by his direction, such person might have been indicted on 45 Geo. 3, c. 89, s. 6, for having them in his custody or possession. *Rez v. Rowley*, R. & R. C. C. 118.

Where, on an indictment on 45 Geo. 3, c. 89, s. 6, for knowingly and wittingly having in his possession forged Bank of England notes, it appeared that the prisoner being suspected of having such in his possession was requested by A. to sell him some, which he said he would do, and A. accordingly paid him for them; the prisoner then went out as he said to fetch the notes, but on his return said, "he had put them in an old shoe in a particular place," which he described. A. then went to look for the notes, and the prisoner followed him, but whilst A. was looking for them, the prisoner threw a stone into the place, and said there they are; A., on looking there, found the notes in an old shoe:—Held, that the prisoner had a sufficient possession within the meaning of the statute. *Id.*

Semble, that every uttering of forged note was the same as having them in actual custody and possession within the statute. *Id.*

Semble, that where a company carry on the business of bankers, although incorporated for a totally different purpose, it was an offence under 41 Geo. 3, c. 87, s. 2, for a person to have a plan for making promissory notes in the name of such corporate company. *Rez v. Gatsopark*, R. & R. C. C. 65.

note, which he pays to A., and A. is understood to have stopped at the bank as a forged note, and is brought by an inspector to A., who immediately pays to B. the amount of the note, and refuses to give it up to the inspector, insisting on his right to retain it, in order to recover the amount from the person from whom he received it. The inspector, in the absence of all circumstances of suspicion, is not justified in charging A. before a magistrate with feloniously having the note in his possession, knowing it to be forged, for the purpose of compelling him to give up the note. By possession under the stat. 45 Geo. 3, c. 89, was meant the original possession of a note acquired in an illegal mode, and not a subsequent possession, like the above, where the original possession was legal. *Brooks v. Warwick*, 2 Stark. 269—Ellenborough.

### 5. Indictment.

It is only necessary to aver a general intent to defraud A. B., without setting out the manner in which that fraud was to be effected. *Rex v. Powell*, 2 W. Black. 787.

"As follows" is a sufficient averment of the tenor of a forged receipt in an indictment. *Id.*

Alleging that the prisoner forged a bill or note "as follows" implies that what follows is in the very words of the bill or note, and makes it necessary to prove the bill or note verbatim. *Rex v. Powell*, Bayl. Bills, 445.

And if the bill or note contain figures, the indictment may follow it in that respect. *Id.*

In an indictment, the words, "in manner and form following, that is to say," do not bind the party to recite the instrument, &c., verbatim, nor render a mere formal omission or mistake fatal. *Rex v. May*, 1 Dougl. 193.

All indictments for forgery must have set out the forged instrument in words and figures. *Rex v. Mason*, 1 East, 180. But see the stat. 2 & 3 Will. 4, c. 123, s. 3.

An indictment for forgery is bad if it describe the bill or note as signed by the person whose name is supposed to have been forged. *Rex v. Carter*, Bayl. Bills, 446.

An indictment for forging a paper writing purporting to be the will of A. B. is good. *Rex v. Birch*, 2 W. Black. 790.

A count charging a prisoner with uttering a forged bill, with intent to defraud A. B., and setting out the bill with the acceptance upon it, is not supported by proving that the prisoner uttered the bill, and that the acceptance on it was a forgery. *Rex v. Horsell*, 6 C. & P. 148.

A count stated that the prisoner had a bill in his possession (which was set out) with a forged acceptance on it, (which was also set out,) and that he, knowing the acceptance to be forged, uttered the bill with intent to defraud A. B. — Held, not good. *Id.*

In an indictment charging that defendant having in his possession a bill of exchange, purport-

ing to be a bill of exchange, forged by the said J. King, &c., is bad, because the word "purport" means what appears on the face of the instrument, and the bill did not purport to be drawn on J. King. *Rex v. Reading*, 1 East, 180, n.: *S. P. Rex v. Gilchrist*, 1 East, 180, n.

So, where an indictment charged that the bill purported to be directed to Richard Down, Henry Thornton, John Freer, and John Cornwall, jun., by the name and description of Messrs. Down, Thornton, & Co. *Rex v. Edsall*, 1 East, 180, n.

Where the forging is by alteration, the indictment may charge that the prisoner forged the altered indorsement, or that he altered by forging, for altering is forging. *Rex v. Teague*, *Rex v. Elsworth*, Bayl. Bills, 443.

An indictment which charges a forged check to be "a warrant and order for the payment of money, which said warrant and order are in the words and figures following," is good. *Rex v. Crowther*, 5 C. & P. 316—Eosanquet.

Where a prisoner was convicted of forging an instrument (purporting to be a Prussian note) in a foreign language, but no count in the indictment contained an English translation of the note; judgment was ordered to be arrested. *Rex v. Goldstein*, 7 Moore, 1; 10 Price, 88; 3 B. & B. 201; Bayl. Bills, 444.

Upon an indictment for publishing a forged receipt for money, with the name Stephen Withers, &c., for the sum of 11. 4s., it was held sufficient to set forth only the receipt itself as follows: "8th March, 1773. Received the contents above by me, Stephen Withers;" without setting forth the account itself to which such receipt referred, and at the foot of which it was subscribed; that account being only evidence to make out the charge. *Rex v. Testick*, 1 East, 181, n.

An indictment charged that a precept had been issued to Christopher Hindle, high constable of B., to collect 21l. 11s. 4d., and that a receipt for 21l. 11s. 4d. had been forged, by falsely cementing to the said precept, at the foot, a receipt in the handwriting of Henry Hargreaves, of the tenor following, "1825, received H. H." which had been before then written by Hargreaves for other money, and that the prisoner uttered it with intent to defraud Hargreaves. This was held bad, because there was nothing to show what the initials H. H. meant, and nothing to show what connection Hargreaves had with Hindle, or with the receipt. *Rex v. Barton*, R. & M. C. C. R. 141.

An indictment for forging the word "settled," at the bottom of a bill of parcels, importing that the bill had been paid, must show by proper averments that it is a receipt, although stat. 35 Geo. 3, c. 55, says that such a memorandum shall be deemed and taken to be a receipt. *Rex v. Thompson*, 2 Leach, C. C. 910.

An indictment for forging a scrip receipt, signed "C. Olier," stating "with the name C. Olier thereunto subscribed, purporting to have been signed by one Christopher Olier, and to be a receipt of the said Christopher Olier," is bad; for "C. Olier" does not upon the face of it purport

to be Christopher Omer; but an indictment stating the tenor only, without any purporting, is good. *Rea v. Reeves*, 2 Leach, C. C. 808.

In an indictment for forging a bill of exchange, all the judges held that it need not be stamped before it could be received in evidence, though the 23 Geo. 3, c. 49, imposing a duty on such instruments, expressly says that no bill of exchange shall be received in evidence unless it is first duly stamped. *Rea v. Hawkenwood*, 2 T. R. 606 n.

In an indictment for uttering a forged bank-note, the words "purporting to be a bank-note" mean that the note upon the face of it appears to be a bank-note, and the want of such appearance cannot be supplied, so as to support the indictment, by any representation of the party when he disposed of it. *Rea v. Jones*, 1 Dougl. 300.

In an indictment for feloniously disposing and putting away counterfeit bank-notes, it is not necessary to aver to whom the note was so disposed of. *Rea v. Holden*, 2 Taunt. 334.

An indictment for forgery or for uttering a forged instrument must set it forth in words and figures. *Rea v. Mason*, 2 East, P. C. 975.

That the court may see whether it be an instrument within the statutes against this offence. *Rea v. Lyon*, 2 Leach, C. C. 597; 2 East, P. C. 933. *But see the stat. 2 & 3 Will. 4, c. 123, s. 3.*

An indictment stating the tenor of a note is sustained by proof that the attestation of the witness, and the words "M. W. her mark," were added after the prisoner's signature, though on the same occasion. *Rea v. Dunn*, 2 East, P. C. 976; S. C. not S. P. 1 Leach, C. C. 57.

An indictment for forging a paper writing purporting to be a will is good. *Rea v. Birch*, 1 Leach, C. C. 79; 2 East, P. C. 980; 2 W. Black. 790.

Where an indictment on 41 Geo. 3, c. 57, s. 2, stated that the prisoner knowingly and without any authority from a certain corporate company called, &c., had in his custody a certain plate on which was engraved part of a promissory note, purporting to be the promissory note of the said company, and it appeared in evidence that this company carried on the business of bankers, although incorporated for a totally different purpose:—Held, that the indictment was bad, having omitted to aver that the company "carried on the business of bankers." *Rea v. Catapodi*, R. & R. C. C. 65.

An indictment for uttering a forged receipt for money, which sets out the receipt in terms, need not set forth the bill of items to which the receipt refers, as that is matter of evidence. *Rea v. Testick*, 2 East, P. C. 925; S. P. *Rea v. Thompson*, 2 Leach, C. C. 632, n.; 1 East, 181, n.

If any part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument. *Rea v. Dawson*, 2 East, P. C. 978; 1 Str. 19.

For every alteration of a true instrument makes it a forgery of the whole. *Id.*

An indictment for forging a bill of exchange, stating it to be signed by H. H. instead of purporting only to be so signed, the signature itself

being a forgery, is good. *Rea v. Carter*, 2 Leach, P. C. 985.

A superfluous description of the instrument forged is not fatal. Therefore an indictment for forging a bond, laying it to be "a bond and writing obligatory," was good upon the stat. 1 Geo. 2, c. 25, though both terms were used in the statute; and a bond is a writing obligatory, though the converse do not hold generally. *Rea v. Dunnett*, 2 East, P. C. 986; 2 Leach, C. C. 581.

An indictment on 2 Geo. 2, c. 25, charging that the prisoner feloniously altered a bill by making, forging, and adding a cipher, &c., was good, though the words of the statute were, "if any person shall falsely make, or forge, counterfeit, &c." *Rea v. Elsworth*, 2 East, P. C. 986.

And it need not be averred that the bill was tendered to the party with intent to defraud when the offence is laid to have been committed, as in what other manner he could be defrauded, though his name did not appear on the bill; so that is matter of evidence. *Id.*

An indictment for presenting a forged order to W. L., treasurer, &c., pretending it was genuine, and obtaining from W. L. under it 4l. 10s. 6d., after charging that the prisoner, with intent to cheat, &c., the treasurer, presented the order, and that he knowingly, &c., pretended it was genuine order, proceeded, "and so the jury, &c., say that the prisoner, on the day and year, &c., did obtain the said sum of 4l. 10s. 6d.; but the intent to cheat and defraud W. L. was not stated in that part of the indictment, nor was the obtaining charged to have been effected knowingly and designly; the indictment held bad. *Rea v. Rushworth*, R. & R. C. C. 317; 1 Stark. 36.

In an indictment for forgery, an avowal of a general intent to defraud is sufficient, without setting out the particular mode by which the fraud was intended to be effected. *Rea v. Pood*, 1 Leach, C. C. 77; 2 East, P. C. 976; 2 W. Black. 787; Bayl. Bills, 445.

An indictment on 45 Geo. 3, c. 69, for uttering forged notes, need not have stated to whom the notes were disposed; it was sufficient to state that the prisoner disposed of the notes with intent to defraud the Bank, he knowing them at the time to be forged. *Rea v. Holden*, R. & R. C. C. 154; 2 Leach, C. C. 1019; 2 Taunt. 334.

Even though the person to whom they were disposed purchased them as and for, and knew them at the time to be, forged notes, and purchased them upon his own solicitation, and as agent for the bank, for the very purpose of bringing the offenders to justice. *Id.*

In an indictment for forgery, a description to a common intent of the person intended to be defrauded is sufficient. *Rea v. Lovell*, 1 Leach C. C. 248; 2 East, P. C. 990.

In an indictment for forging, the words "purporting to be a bank-note," mean that the instrument upon the face of it appears to be a bank-note; and the want of such appearance cannot be supplied by the representation of the party uttering it. *Rea v. Jones*, 1 Leach, C. C. 581; 2 East, P. C. 983; 1 Dougl. 302.

An indictment for forging a bill of exchange, stating that it purported to be directed to John King by the name and description of John Ring, Esq., is bad; for the purport of an instrument is that which appears on the face of it. *Rez v. Reading*, 2 Leach, C. C. 590; East, P. C. 952, 981.

A bank post-bill cannot, in an indictment for forging or uttering, be described as a bill of exchange; but it may be described as a bank bill of exchange. *Rez v. Birkett*, R. & R. C. C. 251.

Discharging one indorsement, and inserting another, or making it thereby a general instead of a special indorsement, may be described as altering an indorsement. *Rez v. Birkett*, R. & R. C. C. 251.

An indictment stating that the prisoner forged a certain paper instrument, partly printed and partly written, in the words and figures following, that is to say, &c., was held to be bad in form, as it did not state what the instrument was in respect of which the forgery was committed, nor how the party signing it had authority to sign it. *Rez v. Wilcox*, R. & R. C. C. 50.

An indictment for forgery stated the offence to have been committed in the county of Nottingham, and it was proved to have been committed in the county of the town:—Held, that although under the 38 Geo. 3, c. 52, it was triable in the county at large, the offence should have been laid in the county of the town. *Rez v. Mellon*, R. & R. C. C. 144. And see *Rez v. Corah*, 2 Russ. C. & M. 374.

An indictment on 43 Geo. 3, c. 139, s. 1, for forging a Prussian treasury note, stated the note, as it was, in a foreign language, but contained no English translation of it: judgment was arrested on the ground that the indictment ought to have contained such translation. *Rez v. Goldstein*, R. & R. C. C. 473; 3 B. & B. 201.

Seem, that the word "purporting," in the 43 Geo. 3, c. 139, s. 1, rather referred to the person by or on whose behalf the instrument was issued than to the form of the instrument. *Id.*

If a statute, as 24 Geo. 3, c. 51, impose a duty on hats, and direct a stamp on paper tickets, denoting such duty, to be affixed to each hat sold; and a subsequent statute, as 36 Geo. 3, c. 125, enact, that so much of the former statute as relates to stamped paper tickets shall cease, and that a stamp denoting the duties imposed by the former act shall be affixed on the lining of each hat, an indictment expressly on the latter statute concluding in the singular number is good. *Rez v. Collins*, 2 Leach, C. C. 827.

An indictment for forging a transfer of stock is good, although the stock had never been accepted by the person in whose name it stood, and although the transfer was not witnessed according to the rules and directions of the bank. *Rez v. Gade*, 2 Leach, C. C. 732; 2 East, P. C. 874.

An indictment for forging a bill of exchange directed to Ransom, Moreland, and Hammersley, stating that it purported to be directed to George Lord Kinnaird, William Moreland, and Thomas Hammersley, by the names and description of Ransom, Moreland, and Hammersley, is bad;

for the purport and tenor are repugnant. *Rez v. Gilchrist*, 2 Leach, C. C. 657; 2 East, P. C. 982; *S. P. Rez v. Edsall*, 2 East, P. C. 984.

If, on an indictment for forgery being presented to the grand jury, it appear that the forged instrument cannot be produced, either from its being in the hands of the prisoner, or from any other sufficient cause, the grand jury may receive secondary evidence of its contents. *Rez v. Hunter*, 3 C. & P. 591.—Park.

An indictment for forgery being presented to the grand jury, a witness declined to produce certain deeds before them:—Held, that if the deeds formed a part of the evidence of the witness's title to his own estate he was not compellable to produce them, but that if they did not the grand jury might compel their production. *Rez v. Hunter*, 3 C. & P. 591—Park and Parke.

On an indictment for uttering a forged deed, it appeared that the deed alleged to have been forged was produced in evidence by the prisoner's attorney on the trial of an ejectment, in which the prisoner was lessor of the plaintiff; and that, after the trial, it was returned to the prisoner's attorney:—Held, that if the prisoner did not produce the deed, he having had notice to produce it, secondary evidence might be given of its contents, without calling his attorney to prove what he had done with the deed. If, as secondary evidence of the contents of the deed, the draft be given in evidence, and in the draft words be abbreviated, which, in the setting out of the deed in the indictment, are put in words at length, it will be for the jury to say whether they think that the words abbreviated in the draft were inserted at length in the deed itself. *Rez v. Hunter*, 4 C. & P. 128—Vaughan.

If a forged deed be in the possession of a prisoner, who is indicted for forging it, the prosecutor is not entitled to give secondary evidence of its contents, unless he has, a reasonable time before the commencement of the assizes, given the prisoner notice to produce it; and a notice given to the prisoner during the assizes is too late; but if the prisoner has said that he has destroyed the deed, no notice to produce it will be necessary. A was charged with forgery, and B was examined on oath before the magistrate as a witness against A; after this, B was himself charged with a different forgery:—Held, that the deposition of B was evidence against him on his trial for the forgery, notwithstanding that it was taken on oath. *Rez v. Haworth*, 4 C. & P. 254—Parke.

## 6. Evidence.

Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. *Rez v. Wylie*, 1 N. R. 92; *S. P. Rez v. Tattersall*, 1 N. R. 93, n.; and *Rez v. Ball*, 1 Camp. 324.

So, proof that a prisoner had in his possession other bills or notes of the same kind is admissible. *Rez v. Hough*, Bayl. Bill, 447.

So, proof that he pointed out where such others were hid. *Res v. Rowley*, Bayl. Bills, 448.

And evidence may be given of the prisoner's general conduct at other utterings of the same sort of bills or notes, and that he passed by different names. *Res v. Millard*, Bayl. Bills, 419.

The finding a forged bill in the custody of a person is no evidence that it was forged in the county where it was found, though under circumstances of great suspicion. *Res v. Crocker*, 2 Leach, C. C. 987; 2 N. R. 87.

Where a prisoner forged a note in the county of S., and some time afterwards removed into the county of W., where he was taken into custody with the note in his possession; and where the indictment was laid. On a question that it ought to have been laid in the county of S.:—Held, that the fact of the note being found in the prisoner's possession in W., where he had resided some months, was evidence to go to the jury of his having fabricated it there. *Id.*

Finding a note forged by A. in the hands of B., who uttered it in the county of M., in which also A. was, though not present at the fact of uttering, is no evidence of the note having been forged by A. in that county, though other notes of the same kind were also there found upon him. *Res v. Parkes*, 2 East, P. C. 992.

A forged bill was found upon A., who then resided in Wiltshire, and had resided there about a year under a false name, but which bill bore date at a time when A. lived in Somersetshire, in the neighbourhood of the person whose signature was forged, and more than two years previous to the period of the bill being found upon him. On an indictment of A. for forgery of the note in Wiltshire, this was held not to be sufficient evidence of the offence having been committed in that county. *Res v. Crocker*, 2 N. R. 87.

Where a prisoner forged the name of his co-trustee, to a power of attorney for selling stock, standing in their joint names, and the forgery being discovered, the stock was not sold:—Held, that such trustee was a competent witness to prove the forgery by the prisoner. *Res v. Wait*, 7 Moore, 473; 1 Bing. 121; 11 Price, 518.

Upon an indictment for forging and uttering a forged acceptance to a bill of exchange in payment for goods, which the prisoner had promised to pay for by an acceptance of a London banker, the bill was addressed to and purported to be accepted by Messrs. Williams & Co., bankers, 3, Birch Lane, London; and it was proved that Messrs. Williams, Burgess, & Co., bankers, of No. 20 in that lane, had not accepted the bill, and that there were no other bankers of that name in London; it being proved that there was a brass plate on the door of No. 3, having the words Williams & Co. thereon; but there was no evidence to show that Messrs. Williams & Co. of 3, Birch Lane, had not done so:—Held, that this did not amount to a proof of forgery as against the prisoner. *Res v. Watts*, 6 Moore, 442; 3 B. & B. 197; 9 Price, 620.

To prove the forging of a bank-note, it is not necessary that the signing clerk at the bank

should be produced, if witnesses acquainted with his hand-writing state that the signature to the note is not in his hand-writing. *Bank Prosecutions*, R. & R. C. C. 378.

On an indictment for forging a bank-note, a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction, at the prisoner's lodgings, after he was apprehended and during his confinement, but never actually in his custody, cannot be read in evidence against him on his trial. *Res v. East*, 2 Leach, C. C. 820.

On an indictment on stat. 2 Geo. 2, c. 23, for uttering forged receipts or acquittances for money, proof that the defendant (who was the representative of one deceased, who had contracted with the Navy Board) produced forged receipts or vouchers as if from the persons employed by C. to supply the articles wanted, with intent to induce the board to pass C.'s accounts, would have made it an offence within the statute, though the persons whose receipts were so forged were only accountable to C., and not to the Navy Board. *Res v. Thomas*, 2 East, P. C. 934.

On a count for uttering several of such forged receipts, the court will not put the prosecutor to his election on which receipt to proceed, if they be all uttered at the same time. *Id.*

Where, on the trial of a prisoner for forging a note, it appeared that he had kept the note in his possession, and never uttered or attempted to make any use of it:—Held, whether the note was made innocently, or with intent to defraud, was for the consideration of the jury, and to be collected from the facts proved. *Res v. Crocker*, R. & R. C. C. 97; 2 N. R. 87; 2 Leach, C. C. 987—Le Blanc.

A jury ought to infer an intent to defraud the person who would have to pay a forged instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was generally to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine did not enter into the prisoner's contemplation. *Res v. Maxagora*, R. & R. C. C. 291.

A forged check on the W. bank was presented for payment at the S. bank, where the supposed drawer never kept cash:—Held, that this was sufficient evidence of an intent to defraud the partners of the S. bank, although there was no probability of their paying the check, even if it had been genuine. *Res v. Croucher*, 5 C. & P. 316—Bosanquet.

Uttering a forged order for the payment of money under a false representation is evidence of knowing it to be forged. *Res v. Sheppard*, 1 Leach, C. C. 226; 2 East, P. C. 967; R. & R. C. C. 169.

Uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, is sufficient evidence of an intent to defraud that person; and

the oath of the person to whom the receipt was attested, that he believed the prisoner had no such intent, will not repel the presumption of an intention to defraud. *Id.*

If, on an indictment for forging a bill of exchange, it appears that the prisoner assumed a false name on such bill, and there is proof of his real name, it is for him to prove that he used the assumed name before the time he had the fraud in view, even in the absence of all proof as to what name he had used for several years before the fraud in question. *Res v. Peacock, R. & R. C. C. 278.*

To support a charge of forgery by subscribing a fictitious name, there must be satisfactory evidence on the part of the prosecutor that it was not the party's real name, and that it was assumed for the purpose of fraud in that instance. *Res v. Bontien, R. & R. C. C. 260—Diss. Heath.*

In an indictment for forging a bill of exchange, the bill may be given in evidence, although it be not stamped. *Res v. Hawkeswood, 1 Leach, C. C. 257; 2 East, P. C. 955; S. P. Res v. Morton, 2 East, P. C. 955; 1 Leach, C. C. 259, n.*

If a bill purporting to be accepted by J. K. be shown to him, and he declares it to be a good bill, that is a sufficient proof that he wrote the acceptance. *Res v. Hevey, 1 Leach, C. C. 232.*

On an indictment for forging a seaman's will, he muster-book of the Navy-Office is good evidence to prove the identity of the supposed testator. *Res v. Rhodes, 1 Leach, C. C. 24; S. P. Res v. Fitzgerald, 1 Leach, C. C. 20; 2 East, P. C. 953.*

On an indictment for forging a scrip receipt, it must appear that the receipt was signed subsequent to the passing of the statute on which the indictment is founded; but though signed before, yet if it was uttered after the passing of the act, the prisoner may be convicted on the count for uttering it, knowing it to be forged. *Res v. Reeves, 2 Leach, C. C. 808, 814.*

On an indictment for forging a will, the pro-  
bate of that will unrepealed is not conclusive evidence of its validity, so as to be a bar to the prosecution. *Res v. Buttery, R. & R. C. C. 342; S. P. Res v. Gibson, R. & R. C. C. 343, n.—Ellenb.*

Where, on an indictment for forging a bill of exchange, it appears that other forged bills upon the same house were found upon the prisoner at the time of his apprehension, they are admissible evidence of guilty knowledge. *Res v. Hough, R. & R. C. C. 120.*

If the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments were forged; proof that the prisoner returned the money on such an instrument, and received the instrument back, is not sufficient without producing the instrument or duly accounting for its non-production. *Res v. Millard, R. & R. C. C. 245.*

To prove the guilty knowledge of an utterer of a forged bank-note, evidence may be given of his having previously uttered other forged notes,

knowing them to be forged. *Res v. Whaley, 2 Leach, C. C. 983; 1 N. R. 92.*

Seemingly, that on an indictment for uttering a bill of exchange with a forged acceptance, knowing the acceptance to be forged, other forged bills of exchange precisely similar, passed to the prosecutor by the prisoner, may be given in evidence to show a guilty knowledge in the prisoner, though they were not passed till about a month after the uttering for which the prisoner is tried. *Res v. Smith, 4 C. & P. 411—Gaselee.*

Proof that a prisoner on uttering a note represented the maker as living at a particular place, and in a particular line of business, the evidence that it is not that person's note is sufficient to prove it a forgery, especially if the prisoner be the payee of the note; and proof that there is another person of the name in a different line of business will not make it necessary for the prosecutor to show that it was not that person's note. *Res v. Hampton, R. & M. C. C. R. 255.*

Where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham," it was held, on an indictment for the forgery of the acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the jury, though neither the best nor the usual evidence given to prove the non-existence of a party whose name is used. *Res v. King, 5 C. & P. 126—Parke and Parke.*

On an indictment for forging a check, purporting to be drawn by G. A. upon Messrs. J. L. & Co., proof that no person named G. A. keeps an account with or has any right to draw on Messrs. J. L. & Co. is prima facie evidence that G. A. is a fictitious person. *Res v. Backler, 5 C. & P. 118—Gaselee and Parke.*

Upon an indictment for uttering a forged note, evidence is admissible of the prisoner's having, at a prior time, uttered another forged note of the same manufacture; and also that other notes of the same fabrication had been found on the files of the bank, with the prisoner's hand-writing on the back of them, in order to show the prisoner's knowledge of the note mentioned in the indictment being a forgery. *Res v. Ball, R. & R. C. C. 122; 1 Camp. 324—Diss. Chambre.*

In order to show a guilty knowledge, on an indictment for uttering forged bank-notes, evidence of another uttering, subsequent to the one charged, is not admissible, unless the latter uttering was in some way connected with the principal case, or it can be shown that the notes were of the same manufacture; for only previous or contemporaneous acts can show quo animo a thing is done. *Res v. Taverner, Car. C. L. 195.*

If a second uttering be made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. *Res v. Smith, 2 C. & P. 633—Vaughan.*

The cases of *Res v. Russell, 1 Leach, C. C. 8; Res v. Crocker, R. & R. C. C. 97; 2 N. R. 87, 2 Leach, C. C. 987; Res v. Smith, 2 East, P. C. 1000, 1 Leach, C. C. 333, n.; Res v. Rhodes, 1 Leach, C. C. 26; Thornton's case, 2 Leach, C. C.*



634; *Rex v. Testick*, 2 East, P. C. 1000; *S. P. of which the apprentice fee, sought to be obtained by the forgery, was to be taken. Rex v. Jones?* *Rex v. Wells*, *Id.*: *Rex v. Dodd*, 1 Leach, C. C. 157; *Rex v. Wait*, R. & R. C. C. 505, 1 Bing. 121, 11 R. & M. 518; *Rex v. Parr*, 1 Leach, C. C. 434, 438; *Rex v. Wait*, 7 Moore, 473, 1 Bing. 121, 11 Price, 518; *Rex v. Pigeon*, 1 C. & P. 98; *Rex v. Mott*, Bayl. Bills, 451; *Rex v. Young*, 1 Phil. Evid. 127; *Rex v. Crocker*, 2 N. R. 87; *Rex v. Treble*, R. & R. C. C. 164; *Rex v. Usher*, 1 Leach, C. C. 48, 2 East, P. C. 999; *S. P. Rex v. Testick*, 2 East, P. C. 925; *Rex v. Akhurst*, 1 Leach, C. C. 150, 2 East, P. C. 1003; *Rex v. Taylor*, 1 Leach, C. C. 214, 2 East, P. C. 690; *Rex v. Sponsbury*, 1 Leach, C. C. 332, 2 East, P. C. 996; *Rex v. Mott*, R. & R. C. C. 435; *Rex v. Young*, R. & R. C. C. 281, n.; *Rex v. Peacock*, R. & R. C. C. 278, are all on the question how far the party whose name was forged was a competent witness; but that is now regulated by 9 Geo. 4, c. 32, s. 2.

On an indictment for forging a bank-note, the cashier who signed "for the governor and company of the Bank of England" is a competent witness to prove the forgery. *Rex v. Newland*, 1 Leach, C. C. 311; 2 East, P. C. 1001; R. & R. C. C. 378.

But he is not an essential witness, as his handwriting may be disproved by other witnesses and evidence. *Rex v. Hughes* and *Rex v. McGuire*, 2 East, P. C. 1002; 1 Leach, C. C. 311, n.

If, on the trial of a prisoner for forging a note, there appears to have been found another note in the same pocket-book as the note for which the prisoner took his trial, payable to the prisoner or order, and purporting to be signed by W. G., W. G. is admissible to prove that the signature was not in his handwriting. *Rex v. Crocker*, R. & R. C. C. 97; 2 N. R. 87; 2 Leach, 987—Le Blanc.

The maker of a note purporting to be payable on demand at his own abode, or at a London banker's, and not paid at either place, is a competent witness to prove whether he has made it payable at the banker's where it purports to be payable. *Rex v. Treble*, 2 Taunt. 328.

The drawer's name appearing to be forged on a bill, as well as the indorser's, it is no objection that the former was not called to prove upon whom the bill was drawn, there being two of the name at the place; and if it be shown by other evidence who the prisoner meant by the person whose name he forged as the payee and indorser. *Rex v. Downes*, 2 East, P. C. 997.

In an indictment for forging a will, a variance between the will recited, by introducing the pronoun "I," and that produced in evidence is fatal. *Rex v. Coogan*, 1 Leach, C. C. 448.

On an indictment for forgery within the stat. 5 Eliz., a variance of Janick Park for Jawick, in the forged deed, is not material. *Rex v. Crooke*, 2 East, P. C. 921.

An indictment for forging an indenture of apprenticeship and a receipt for money, with intent to defraud A., B., C., &c., the stewards of the Feast of the Sons of the Clergy, is sustained by proof that the stewards had the disposition of a charitable fund raised by voluntary contributions, out

Where, on an indictment for forging a note, evidence has been left to the jury of forged bills uttered by the prisoner on other occasions, which were not proved to have been forged, the prisoner should be recommended to mercy. *Rex v. Milard*, R. & R. C. C. 245.

The Bank having preferred several indictments for uttering and having in possession, a respect of the same note, and having elected to proceed on the indictment for having in possession:—Held, that although facts sufficient to support the capital charge were made out as a proof, an acquittal for the minor offence ought not to be directed, because the whole of the minor offence was proved, and it did not merge in the larger. *Bank Prosecutions*, R. & R. C. C. 378.

The Bank may elect to proceed on an indictment or a lesser offence, although an indictment has been found for a capital charge in respect of forging the same note. *Id.*

#### LXVIII. PERJURY AND FALSE OATHS.

##### 1. The Offence.

5 Eliz. c. 9; 2 Geo. 2, c. 25; made perpetual by 9 Geo. 2, c. 8.]—There are a great number of perjury clauses in various acts of parliament, each relating to the oaths respecting the subject-matter of those acts respectively.

To found an indictment for perjury, the requisite circumstances are these: the oath must be taken in a judicial proceeding, before a competent jurisdiction; and it must be material to the question depending, and false. *Rex v. Aylat*, 1 T. R. 63.

With respect to the falsity of an oath, it has been considered to be immaterial whether the fact which is sworn to be in itself true or false. *Rex v. Edwards*, 2 Russ. C. & M. 518.

No perjury can be assigned upon a foreign affidavit. *Musgrave v. Medez*, 19 Ves. jun. 582.

But any person making, or knowingly making a false affidavit made abroad, is guilty of a misdemeanour in attempting to pervert public justice, and is punishable by indictment. *Osney v. Newell*, 8 East, 364.

Falsehood, not strictly amounting to perjury, is an indictable offence as a misdemeanour. *Ex parte Overton*, 2 Rose, Bkt. Cas. 257.

Inciting a witness to give particular evidence when the inciter does not know whether it is true or false, is a high misdemeanour; especially if he, being an attorney on one side, gets himself employed for that purpose on the other side; at least if the evidence is given accordingly. *Id.*

A man may be indicted for perjury, in asserting that he believes a fact to be true which he must know to be false, although he do not swear positively. *Rex v. Pedley*, 1 Leach, C. C. 335.

The taking a false oath before a surrogate, to procure a marriage license, will not support a prosecution for perjury. *Rex v. Foster*, R. & R. C. C. 459; 2 Russ. C. & M. 520. And see *Rex v. Alexander*, 1 Leach, C. C. 63.

If an indictment for taking a false oath before a surrogate, to procure a marriage license, only charges the taking the false oath, without stating it was for the purpose of procuring a license, or that a license was procured thereby, the party cannot be punished thereon as for a misdemeanor. *Id.*

But if the purpose is to obtain a license, and the license is obtained and the marriage had, the party may be indicted as for a misdemeanor. *Id.*

It must either appear upon the face of the indictment, or it must be expressly alleged, that the oath was material. *Rex v. McKeron*, 2 Russ. C. & M. 541: *S. P. Rex v. Bignold*, 2 Russ. C. & M. 541.

A cause was referred, by a judge's order, to C. D.; and by the order it was directed that the witnesses should be sworn before a judge, "or before a commissioner duly authorized." A witness was sworn before a commissioner for taking affidavits, and examined viva voce by the arbitrator:—Held, that a witness so sworn was not indictable for perjury. *Rex v. Hanks*, 3 C. & P. 119—Gaselee.

An indictment for perjury may be supported against a marksman, for swearing falsely in an affidavit, though it would not be receivable in the court it was sworn in, because the jurats did not state that it had been read over to the party swearing it; but the person administering the oath must prove that the party swearing it in fact understood its contents, and the perjury is complete at the time of the swearing of the affidavit; and whether it be receivable in the court or not is immaterial, if the reason why it is not receivable is, that some formal regulation is not complied with. *Rex v. Hailey*, 1 C. & P. 258—Littledale; 1 R. & M. 94.

A person cannot be convicted of perjury on an affidavit, if it refer to a former affidavit, which the prosecutor is not in a condition to prove. *Id.*

But quære whether an indictment for perjury can be sustained upon an affidavit in support of a petition in bankruptcy sworn before the petition was filed? *Rex v. Dudman*, 2 Glyn & J. Bkt. Cas. 389.

A party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion was ever made for the injunction. *Rex v. White*, 1 M. & M. 271—Tenterden.

Perjury may be assigned upon an affidavit of an attorney of the court, made in answer to a charge exhibited against him in a summary way, for having in his possession blank pieces of paper with affidavit stamps, and the signatures of a master extraordinary in Chancery and another person at the bottom of the papers. *Rex v. Crossley*, 7 T. R. 315.

The punishments directed by the stat. 18 Geo.

2, c. 18, to be inflicted upon perjury in falsely taking the freeholder's oath at an election of a knight of the shire, are cumulative under the stat. 5 Eliz. c. 9, s. 6, and 2 Geo. 2, c. 25, s. 2, to which the first mentioned statute refers. *Rex v. Price*, 6 East, 327.

In an answer in Chancery to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the Statute of Frauds, (the agreement not being in writing), and had also denied having entered into any such agreement. Upon this denial in his answer, the defendant was indicted for perjury:—Held, that the denial of an agreement, which, by the Statute of Frauds, was not binding on the parties, was immaterial and irrelevant, and that the defendant was entitled to his acquittal. *Rex v. Dunston*, 1 R. & M. 109—Abbott.

Perjury cannot form the subject of an indictment where the supposed perjury depends upon the construction of a deed. *Rex v. Crespigny*, 1 Esp. 280—Kenyon. And see *Rex v. Pepsy*, Feake, 138.

Quære, whether a person giving his evidence under a commission issuing out of a court of law for the examination of witnesses in Scotland could be convicted of perjury? *Calliand v. Vaughan*, 1 B. & P. 210.

If the record of a cause be erroneous, no perjury can be assigned for false testimony given in the course of the trial. *Rex v. Cohen*, 1 Stark. 511—Ellenborough.

Where perjury was assigned on evidence given before the sheriff's secondary on an inquisition of damages, where the writ of inquiry was directed to be returned into C. P. instead of K. B.:—Held, that an indictment would lie upon the alleged perjury. *Pippett v. Hearn*, 1 D. & R. 266; 5 B. & A. 634.

A prisoner in custody on a charge of perjury is not dischargeable on the indictment being removed into the King's Bench; but if he had been on bail, such removal would have discharged the recognizance. *Rex v. Richardson*, 2 Leach, C. C. 500.

## 2. Indictment and Information.

23 Geo. 2, c. 11.

In an indictment for perjury committed at an Admiralty sessions, where the commission was directed to A., B., and C., and others not named, of whom A., B., and C., were amongst others to be one; the court will take it to mean, that, if either of the persons named of the quorum were present, it would be sufficient. *Rex v. Dowlin*, 5 T. R. 311.

In such case the commission need not be set out in the indictment. *Id.* 317.

For by stat. 23, Geo. 2, c. 11, the prosecutor need only set forth the substance of the offence charged, and by what court, or before whom the oath was taken, (averring such court, &c. to have competent authority to administer the same, &c.),

without setting forth the commission or authority of the court, &c. *Id.* 318.

But where he undertakes to set out more of the proceedings than he need under the statute, he must set them forth correctly. *Id.* 317.

Stating that at such a court, (a Court of Admiralty Session,) J. K. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that at and upon the said trial, it then and there became and was made a material question whether, &c., are sufficient averments that the perjury was committed on the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial. *Id.* 311.

It is not necessary to set forth so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned; it is sufficient to allege generally that the particular question became material. *Id.* 318.

Indictment for perjury stated that it became a material question on the occasion of a certain alleged arrest—L. touched K., &c., and the defendant's evidence as set out was, L. put his arms round him and embraced him; innuendo that L. had, on the occasion to which the said evidence applied, touched the person of K.:—Held, that the materiality of the evidence did not sufficiently appear. *Rex v. Nicholl*, 1 B. & A. 21.

If an indictment for perjury undertake to set out continuously the substance and effect of what the defendant swore when examined as a witness it is necessary to prove that in substance and effect he swore the whole of that which is thus set out, though the indictment contains several distinct assignments of perjury. *Rex v. Leefe*, 2 Camp. 134—Ellenborough.

In an indictment there must be an allegation of time and place, which are sometimes material, and necessary to be laid with precision, and sometimes not. *Rex v. Aylett*, 1 T. R. 63.

A complaint having been made ore tenus by a solicitor before the Chancellor in the court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stating, that, "at and upon the hearing of the said complaint," the defendant deposed, &c., is a sufficient averment that the complaint was heard. *Id.*

The complaint of the defendant being, that he was taken before he got to his own house in the parish of St. Martin in the Fields; innuendo his house in the Haymarket, in St. Martin's, &c.; the innuendo is only a more particular description of the same house, and good. *Id.*

The oath being, that the defendant was arrested upon the steps of his own door; an innuendo that it was the outer door is good. *Id.*

Where time is not material, it need not be positively averred, and, if under a videlicet, may be rejected. *Id.*

Where an indictment averred, that the cause in which the alleged perjury was committed "came on to be tried, and was duly tried by a jury of the county;" and the record of the trial

stated that the jury came of the neighbourhood of Westminster, instead of at Westminster—Held, to be no objection, as the cause was in fact so tried, and no county was mentioned in the record. *Rex v. Israel*, 3 D. & R. 234.

It is sufficiently certain if it is stated that the defendant was in due manner sworn. *Rex v. McCarther*, Peake, 155—Kenyon.

An indictment which stated a bill of Middlesex as "issuing out of the office of the chief clerk, assigned to enrol pleas in the court," &c. was held bad. *Rex v. Schoole*, Peake, 113—Ken.

An indictment for perjury, assigned on an affidavit sworn before the court, need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. *Rex v. Cramby*, 7 T. R. 315.

It is no objection to such an indictment, that it is not stated where the court was holden when the original application was made, or when the rule was made, calling on the defendant to answer the charge; a sufficient venue being laid to the fact of taking the false oath. *Id.*

In an indictment for perjury, the crime was alleged to be committed in the time of the late king, but was charged to be against the person of the now king: this error was fatal, and rendered the indictment totally insufficient. *Leach v. Be* (in error), 4 Bro. P. C. 332. But see the stat. 1 Geo. 4, c. 64, s. 90.

Perjury being committed in the borough, within the limits of the city of Gloucester, which is a county in itself, on the trial of a cause before a jury of the county at large, the indictment may be found and tried by the jury of the county at large. *Rex v. Gough*, 2 Dougl. 791.

A witness committed perjury at the Worcester county quarter sessions, which are held in the Guildhall of Worcester, which is situate in the county of the city of Worcester.—Held, that an indictment for this perjury might be preferred in the county of the city of Worcester. *Rex v. Jones*, 6 C. & P.—Tindal.

An indictment for perjury in an affidavit to this general allegation, "all which said matters and things so as aforesaid deposed and sworn to by the said J. D. were and are material in the matter of the said J. D., a bankrupt." Quæritur whether the perjury was well assigned without going on to aver that the affidavit had been used, or was intended to have been used, in a judicial proceeding? *Rex v. Dudson*, 7 D. & R. 281; 1 B. & C. 850.

The day of filing a bill in Chancery is not material when it is not alleged as part of the cause. *Rex v. Hicks*, 1 Stark. 521—Ellenborough.

Where the indictment alleged "that the defendant, at the time of effecting a policy, purporting to have been underwritten by A. B. & C. and others, on a day specified, well known, &c., and on producing the policy it appeared that A. underwrote the policy on a different day: the defect is fatal, although it appeared that B. & C. did underwrite the policy on that day. *Id.*

An indictment for perjury, charging that the

defendant "falsely and maliciously gave false testimony," without averring that the offence was "wilfully" or that it was "corruptly" committed, is bad in arrest of judgment. *Res v. Richards*, 7 D. & R. 655; S. O. nom. *Res v. Stevens*, 5 B. & C. 346.

Quere, whether an indictment at common law for perjury must not charge the offence to have been "wilfully" as well as corruptly committed? *Id.*

Another count alleged that at the trial of the prosecutor he was found guilty "by means of the false and malicious testimony of defendant in the first count mentioned;" that on a rule nisi for a new trial, the defendant knowingly, falsely, wilfully, and corruptly, made affidavit that the evidence given by him at the trial was true, "whereas it was false in the particulars in the first count assigned and set forth:"—Held, that this count also was bad, for that it should have averred distinctly that defendant was sworn as a witness, and deposed to certain facts at the trial of G. H., instead of leaving it to be taken by indictment. *Id.*

An information for perjury, charging that the defendant, before a committee of the House of Commons, being duly sworn, "knowingly and deliberately, and of his own act and consent, did depose and swear" to certain facts set forth in the information; and that he afterwards, at the bar of the House of Lords, being duly sworn, "knowingly, &c. did swear" to certain facts contradicting what he had previously sworn before the committee of the House of Commons; with a conclusion, "and so the defendant, in manner and form aforesaid, did commit wilful and corrupt perjury;" cannot be sustained, and is bad in arrest of judgment. *Res v. Harris*, 1 D. & R. 578; 5 B. & A. 926.

Where an information for perjury, committed before a select committee of the House of Commons, appointed to try and determine the merits of an election, averred, that the committee was appointed for that purpose; and that they were sworn "to try the matter of the petition," &c.:—Held, that the situation of the committee was well described to support the averment, although ascribed in the statute 10 Geo. 3, c. 16, s. 13, as a select committee "to try and determine the merits of the return or election." *Res v. Dunn*, D. & R. 10.

Where upon an indictment for perjury, on a trial for felony, it neither appeared that the material sworn was material, nor was it alleged to be so, it was held that if the original indictment had been set out, and the materiality could plainly have been collected, it would have been sufficient without any special averment, but that one or the other was absolutely necessary. *Id.*

The word "wilful" is not necessary in an indictment for perjury at common law. *Res v. Ear*, 1 Leach, C. C. 71.

But it is otherwise in an indictment for perjury on stat. 5 Eliz. c. 9. *Id.*

An indictment for perjury committed on a trial for murder need not, in the statement of the in-

dictment for murder, set out the means by which the murder was committed. *Res v. Lincoln*, R. & R. C. C. 421; 2 Russ. C. & M. 538.

If, in an indictment for perjury, the oath is stated to have been at the assizes, before justices assigned to take the said assizes, before A. B., one of the said justices; the said justices then and there having power, &c.; it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and jail delivery. *Id.*

An indictment for perjury, laying the offence to have been committed "at the Guildhall of the city of London" is bad; for the venue must be laid in some parish or ward. *Res v. Harris*, 2 Leach, C. C. 800. But see the stat. 7 Geo. 4, c. 64, s. 20.

It must appear or be alleged, in an indictment for perjury, that the person by whom the oath was administered had competent power to administer it. *Res v. Wood*, 2 Russ. C. & M. 541—Eyre.

Therefore, where perjury was charged in swearing before a justice that S. S. had sworn twelve oaths, and it did not import that the oaths were sworn in the county for which the justice acted, judgment was arrested because it did not appear that the justice had any jurisdiction to administer the oath in question to the defendant. *Id.*

An indictment for perjury at an assize may allege the oath to have been taken before one of the judges in the commission, though the names of both are inserted in the caption. *Res v. Alford*, 1 Leach, C. C. 150.

If an indictment for perjury charge that the defendant falsely swore to certain facts, and the deposition appear to be joint, and that his wife first deposes to the facts, and then the defendant swear that he is sure that A. B. is one of the persons who assaulted, &c., this is no variance, as it is sufficient for the indictment to state the substance of what the defendant swore. *Res v. Grindall*, 2 C. & P. 563—Abbott.

In an indictment for making a false affidavit, it is sufficient to state that the defendant came before A. B. and took his corporal oath, (A. B. having power to administer an oath), without setting out the nature of A. B.'s authority. *Res v. Callanan*, 6 B. & C. 102; 9 D. & R. 97.

Where perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous, although they are in fact separated by the introduction of other matter. *Id.*

The assignment of perjury is not restricted to a mere negative of the very words of what the defendant swore, but may be expressed occasionally with greater amplification. Thus, where a defendant had sworn that he never did, at any time during his transactions with the commissioners of the Victualling Office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor, and the indictment alleged that the defendant did charge more than sixpence per quarter for and in respect of such malt and grain

so purchased; this was held to be a good assignment of perjury, though it was objected that the words, "in respect of," might include collateral and incidental expenses attending the corn and grain jointly with the charge for the corn and grain: and that, bearing that sense, the assignment of perjury was not positive and direct. *Rex v. Atkinson*, Dea. C. L. 1017.

The evidence of one witness is not sufficient to convict of perjury, as in such case there would be only one oath against another. *Rex v. Lee*, 2 Russ. C. & M. 545.

But two witnesses are not essentially necessary to disprove the fact sworn to; for if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. *Id.*

And the rule does not apply where the evidence consists of the contradictory oath of the party accused. *Rex v. Knill*, 5 B. & A. 929, n.: *S. P. Anon.* 2 Russ. C. & M. 545.

### 3. Evidence.

In perjury committed in an answer in Chancery, it is sufficient proof of the fact of swearing and the identity of the defendant, to prove the hand-writing subscribed to the answer, and that the jurat was subscribed by the Master as being sworn before him. *Rex v. Morris*, 1 Leach, C. C. 50.

If the perjury be assigned in an answer in Chancery, evidence of the defendant's signature, and of that of the Master before whom the answer purports to be sworn, is sufficient proof of the defendant's having sworn, without calling the person who wrote the jurat. *Rex v. Benson*, 2 Camp. 508—Ellenborough.

In perjury upon an answer in Chancery, no need to prove the identity of the person, or the actual swearing. *Rex v. Morris*, 2 Burr. 1189.

On an indictment for perjury, in an answer to a bill in Chancery, the proving the hand-writing of the signature of the person who administered the oath is sufficient proof that it was sworn; and if the place at which such answer purported to have been sworn is in the jurat, it is sufficient evidence that the oath was administered at that place. *Rex v. Spencer*, 1 C. & P. 260—Abbott; 1 R. & M. 97.

Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire in the name of J. W.; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election by the name of J. W., who swore to his freehold and place of abode; and that there was no such person, and that the defendant voted on the second day, and was no freeholder, and some time after boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled up for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other

than the name of J. W.—Held, that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment. *Rex v. Price*, 6 East. 323; 2 Smith, 525. And see *Rex v. Left*, 3 Camp. 139, and *Purcell v. M'Namara*, 9 East. 157.

If the perjury be committed at the trial of a cause, the prosecutor must prove the whole of the defendant's testimony. *Rex v. Jones*, Peake, 37—Kenyon.

Unless the point upon which the perjury is assigned arose upon the defendant's cross-examination. *Rex v. Dowling*, Peake, 170—Kenyon: *S. C.* not *S. P.* 5 T. R. 311.

In an indictment for perjury committed on the trial of a cause, it is sufficient for the prosecutor to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. Proof of the evidence set out by a witness who speaks from memory, but will not swear that he has given the whole of the defendant's former testimony, but says that he has stated to the best of his recollection all that was material to the present inquiry, and relating to the transaction in question, and is positive nothing was said qualifying that proved, is sufficient to go to the jury. *Rex v. Rowley*, 1 R. & M. 299—Littledale.

In an indictment for perjury, in a proceeding before a surrogate, it is, *prima facie*, sufficient to prove that he has generally acted in that capacity. *Rex v. Verelst*, 3 Camp. 432—Ellenb.

An affidavit purporting to be sworn before a public commissioner is admissible on the trial of an indictment for perjury without proof of the commission; proof of the commissioner's acts as such is sufficient. *Rex v. Howard*, M. & L. 187—Patterson.

To support an indictment for perjury committed on a trial at the quarter sessions, two witnesses who heard the party examined state that he swore on that trial, and the party was convicted, although neither of the witnesses had down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave. *Rex v. Munton*, 3 C. & P. 498—Tenterden.

To show that perjury was wilful and corrupt, evidence may be given of expressions of malice used by the party towards the person against whom he gave the false evidence. *Id.*

If A. be indicted for perjury, in swearing that he did not enter into a verbal agreement with B. and C. for them to become joint-dealers and co-partners in the trade or business of druggists, and it appear that, in fact, B. was a druggist, keeping a shop with which A. had nothing to do, but that A. and C., being sworn brokers, could not trade, and therefore made speculations in drugs in B.'s name with his consent, he is guilty to divide profits and loss with A. and C.; this will not support the indictment, as this is not the sort of partnership denied by A. upon oath. *Rex v. Tucker*, 2 C. & P. 500—Abbott.

On an indictment for perjury in a cause at Nisi

Prisus, it is no variance that the Nisi Prisus record states the trial to have been on a day different from that stated in the indictment. *Rex v. Copward*, 3 C. & P. 59—Tenterden; 1 M. & M. 118.

If an indictment for perjury in a cause at Nisi Prisus state the trial to have been before one of the judges, (who, in fact, sat for the lord chief justice), and the Nisi Prisus record state the trial to have been before the lord chief justice himself; Semble, that this is no variance. *Id.*

If an indictment for perjury in a cause at Nisi Prisus, in setting out the substance of the oral evidence charged to be false, put "Mr." for "Miser," and "Mrs." for "Mistress," this is no variance, though it should appear that the witness said "Mister" and "Mistress," and not "Mr." and "Mrs." *Id.*

If the indictment incorrectly set out the judgment-roll of the cause, at the trial of which the perjury is alleged to have been committed, the variance is fatal. *Rex v. Eden*, 1 Esp. 97—Ken.

An indictment for perjury alleged to have been committed by a bankrupt set forth a petition to supersede the commission, and stated that at several meetings before the commission the defendant makes certain declarations. At the trial the petition was produced, and the allegation in it was, that, at several meetings before the commissioners, the defendant made those declarations:—Held, no variance. *Rex v. Dubman*, 7 D. & R. 324; 4 B. & C. 850.

In an indictment for perjury it was alleged, that F. C. Aberdeen and others exhibited their ill in the Exchequer, &c., and on the production of the bill it purported to be the bill of A. C. Aberdeen and others:—Held, that there was no variance, if it were proved that it was in fact the ill of F. C. Aberdeen. *Rex v. Roper*, 1 Stark. 118—Ellenborough.

An indictment for perjury stating that A. B. gave certain justices to understand and be informed that C. D., being a brewer of beer and ale for sale, did neglect, &c., is not supported by information containing no allegation that C. D. was a brewer of beer or ale for sale, together with proof aliunde of his being a brewer. *Rex v. Leach*, 2 M. & R. 119.

So, also, that it was no variance, although after the allegation, and after setting out such parts of the bill as were necessary, the words "as appears by the said bill filed of record," were added. *Id.*

Proof that the defendant was "sworn and examined as a witness," supports an averment that he defendant was sworn on the Holy Gospel, but being the ordinary mode of swearing. *Rex v. Rowley*, 1 R. & M. 302—Littledale. But see *Rex v. McCarther*, Peake, 155.

In an indictment for perjury committed on the trial of a former cause, the postea alone is sufficient evidence to prove that there was a trial without showing a copy of the final judgment. *Anon. Bull. N. P.* 243.

An indictment for perjury tried before the Lord Chief Justice at Westminster charged the perjury to have been committed on a trial at Nisi Prisus, although at the King's Bench sittings at Westminster. The prosecutor, to prove

the trial at Nisi Prisus, put in the Nisi Prisus record, with the minute of the verdict indorsed on it by the associate. There was no postea drawn up, and the associate stated that none would be drawn up, as a rule for a new trial was pending:—Held, to be sufficient proof of the trial at Nisi Prisus. *Rex v. Browne*, 5 C. & P. 562—Tenterden; 1 M. & M. 315.

The Nisi Prisus record of a cause, with a minute of the verdict indorsed by the officer of the court, is good evidence that the cause came on for trial, though no regular postea is indorsed. *Rex v. Browne*, 1 M. & M. 315—Tenterden, Bayley, Littledale, and Parke.

In an indictment for perjury, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted and examined as a witness. The indictment did not state his acquittal, nor did the minute of the verdict show it:—Held, that this was immaterial, perol evidence being given that he was in fact examined. *Id.*

Perjury was assigned on an answer in Chancery to a bill before it was amended:—Held, that, to support the allegations respecting the bill, it was sufficient to put in the amended bill, and prove that the amendments were in the handwriting of a clerk in the Six Clerks' Office, whose duty it would be to make them; but that it was not necessary to call the person who wrote the amendments. *Rex v. Laycock*, 4 C. & P. 326—Tenterden.

Semble, that, on an indictment against a bankrupt for perjury before the commissioners, it is necessary to give strict evidence of the trading petitioning creditor's debt, and act of bankruptcy. *Rex v. Punshon*, 1 Rose, Bkt. Cas. 22—Ellenborough; 3 Camp. 96.

But, if the perjury be alleged in an answer to an allegation exhibited before a surrogate, it is prima facie sufficient to prove that the surrogate has generally acted in that capacity. *Rex v. Verelst*, 3 Camp. 432—Ellenborough.

A witness is not incompetent because, in his answer to a cross bill in Chancery, he has sworn to the same fact which he is now called to prove. *Rex v. Peppys*, Peake, 138—Kenyon.

But, on an indictment for perjury committed on a trial, the party who was injured by the verdict, and who had filed a bill for relief, is an incompetent witness. *Rex v. Dalby*, Peake, 12—Kenyon.

But the party who succeeded at the trial is not. *Rex v. De Faria*, Peake, 104—Kenyon.

A defendant who has not paid debt and costs, though his bail are fixed, is not competent to prove perjury committed at the trial of his cause. *Rex v. Eden*, 1 Esp. 97—Kenyon.

A. having brought an action against B., the latter filed a bill in equity against him for a discovery and injunction, and for an account; to which A. having put in his answer, denying the allegations of B., which involved the merits of the suit at law, the injunction was dissolved; on which answer B. indicted A. for perjury; and the indictment and action com-

ing on to be tried at the same assizes, the indictment standing first:—Held, that B. was a competent witness to prove the perjury, as he could not avail himself of the conviction of A. in any civil proceeding between them, either in law or equity. *Rex v. Boston*, 4 East, 572; 1 Smith, 202.

Declarations in actiones mortis are not admissible in evidence on the trial of an indictment for perjury. *Rex v. Mead*, 4 D. & R. 120.

If an indictment for perjury contain several assignments of perjury, on one of which no evidence is given on the part of the prosecution, the defendant cannot go into proof to show that the evidence charge by that assignment of perjury to be false, was in reality true. *Rex v. Hemp*, 5 C. & P. 468—Denman.

On the trial of an indictment for perjury, the witnesses to character were asked, "What is the character of the defendant for veracity and honour?"—and, "Do you consider him a man likely to commit perjury?" *Id.*

## LXIX. CONSPIRACY.

### 1. The Offence.

An indictment for conspiracy at common law, will lie for enticing a young woman under age to leave her father's house, and live in fornication with one of the defendants; and concerting measures, with her own approbation, to carry her off and conceal her for that purpose. *Rex v. Grey* (Lord), 1 East, P. C. 460.

If a man and woman marry in the name of another, for the purpose of raising a specious title to the estate of the person whose name is assumed, it is a conspiracy. *Rex v. Robinson*, 1 Leach, C. C. 37; 2 East, P. C. 1010.

Where it appeared on an indictment for a conspiracy to procure the marriage of paupers, against the parish officers, that a man of one parish had gotten a woman belonging to another with child, and the defendants had agreed with the man to give him two guineas if he would marry the woman, which he did, and received the money, and both swore that they were willing to be married:—Held, that the indictment could not be supported, as there was no violence, threat, contrivance, or sinister means used to procure the marriage without the consent of the parties. *Rex v. Fowler*, 1 East, P. C. 461—Buller.

The indictment need not aver in terms, that the marriage was against the will or consent of the parties, although that must be meant, if it state that it was procured by threats and menaces against the peace, &c. *Rex v. Parkhouse*, 1 East, P. C. 462.

It is not ground of an indictment to procure a marriage between a person not actually chargeable to the parish and a pauper of another parish. *Rex v. Tanner*, 1 Esp. 204—Ashurst.

On motion for a criminal information against two persons for endeavouring to raise the price of oil, it must distinctly appear that they com-

bined together, as it is no offence for an individual separately so to endeavour. *Rex v. Hilder*, 2 Chit. 163.

An indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into a preserve for hares, the property of another, for the purpose of snaring them, though alleged to be done in the night by the defendants, armed with offensive weapons, for the purpose of opposing resistance to any endeavors to apprehend or obstruct them. *Rex v. Turner*, 13 East, 228.

It was held an indictable offence to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day. *Rex v. De Berenger*, 3 M. & S. 68.

Getting money out of a man by conspiring to charge him with a false fact is indictable as a conspiracy, whether the fact charged be criminal or not in itself. *Rex v. Rippeal*, 1 W. Black. 35.

A., having been bail for D., went, accompanied by B. and C., to the lodgings of D., telling her that B. and C. were officers, who would take her to jail if she did not give him security for his debt: B. and C. were not officers, and had no authority to take D. D. gave B. a number of articles, and signed a paper, stating them to be a security, and that A. might sell them if he was not paid in forty-two days:—Sembles, that A., B., and C. might be indicted for a conspiracy. *Blount v. Blake*, 6 C. & P. 75—Lyndhurst.

A conspiracy to extort money is per se an offence at common law, and need not be charged to be attempted by unlawful means. *Rex v. Hingleberry*, 6 D. & R. 345; 4 B. & C. 329.

Information will be granted for a conspiracy by a master, an attorney, and a gentleman, to assign over a female apprentice, by her own consent, for the purpose of prostitution. *Rex v. Delaval*, 3 Burr. 1434; 1 W. Black, 410, 428.

So, for a combination to fix the price of oil. *Rex v. Norris*, 2 Ld. Ken. 300.

An indictment will lie for a conspiracy to obtain money as a reward for an appointment to an office under government. *Rex v. Pollard*, 2 Camp. 229—Ellenborough.

A concerted arrangement to issue a commission of bankruptcy, for the mere purpose of giving a certificate, is a conspiracy liable to indictment or information. *Ex parte Creatchers*, 2 Ves. jun. 260. See tit. OFFENCES BY BANKRUPTS ante, p. 786.

An indictment for conspiring, &c., "to prevent the workmen of J. G. from continuing to work, &c.," is supported by evidence of a conspiracy to prevent any from continuing, &c. *Rex v. Spaldike*, M. & Rob. 179—Paterson.

A combination of workmen, for the purpose of dictating to masters whom they shall employ, is indictable. *Id.*

If brokers agree together, before a sale by au-

tion, that one only of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among them: this is a conspiracy, for which they are indictable. *Levi v. Levi*, 6 C. & P. 239—Gurney.

An indictment for a conspiracy to impoverish a man, by preventing him from working at his trade, need not state the overt acts used to effect the intended mischief. *Rez v. Eccles*, 1 Leach, C. C. 274.

Where two conspire, and one dies, the other may still be indicted for the conspiracy. *Rez v. Nichols*, 13 East, 412, n.

## 2. Indictment.

Semble, that an indictment charging the defendants with conspiring "to cheat and defraud the just and lawful creditors of W. F.," without any further statement of the conspiracy, or of any overt act, is bad, as being too general. *Rez v. Fowle*, 4 C. & P. 592—Tenterden.

Indictment for a conspiracy to indict for a capital offence good, though the word "falsely," is not added to the first charge of this conspiracy, nor the particular crime there specified; and although it is not laid that the said W. G. was acquitted of it. *Rez v. Spragg*, 2 Burr. 993.

Indictment for a conspiracy to extort money, one count averred that defendant, in pursuance of a conspiracy to extort money from the prosecutor, falsely exhibited certain indictments against him; another count averred that defendant, in pursuance of the like conspiracy, offered to suppress an indictment pending against the prosecutor, if he would give them money or so doing. The jury found the defendant guilty, but found, specially, that the indictments preferred by them against the prosecutor were not false:—Held, that the averment in the former count was immaterial, and that the latter count would support the conviction. *Rez v. Hollingberry*, 6 D. & R. 345; 4 B. & C. 29.

Held, that an indictment to conspire to raise the price of funds with intent to injure the persons who should purchase was well enough, without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either British or Irish funds, which, since the union, were each a part of the funds of the United Kingdom. *Rez v. De Beenger*, 3 M. & S. 67.

An indictment charged that defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof:—Held, that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. *Rez v. Gill*, 2 B. & A. 204.

In an indictment for a conspiracy, in producing a false certificate in evidence, it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so. *Rez v. Masbey (Bart.)*, 6 T. R. 619.

## 3. Evidence.

On an information for conspiracy, the fact of conspiring need not be proved, but may be collected from other circumstances. *Rez v. Parsons*, 1 W. Black. 393.

Upon an indictment for a conspiracy, general evidence of the conspiracy charged may be received in the first instance, although it cannot affect the defendant unless afterwards brought home to him, or to an agent employed by him. And the same rule applies where a defendant seeks by such general evidence in the first instance to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence, provided the proposed evidence be previously opened to the court, as in the case of a prosecution to be proved by a conspiracy. *The Queen's case*, 2 B. & B. 302.

On an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and disaffection:—Held, first, that resolutions passed at a former meeting, in another place, and at which one of the defendants presided, the professed object of which meeting was to fix the meeting mentioned in the indictment, were admissible in evidence, to show the intention of such defendant in assembling and attending the meeting in question, at which he also presided: secondly, that a copy of these resolutions, delivered by such defendant, to a witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness had heard read from a written paper, is admissible without producing the original: thirdly, that large bodies of men having come to the latter meeting from a distance, marching in regular order, it was admissible in evidence to show the character and intention of the meeting, that within two days of the same great numbers of men were seen training and drilling before day-break, at a place from which one of these bodies had come to the meeting, and that, on discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again: fourthly, that it was admissible in evidence, for the same purpose, to show that another body of men, in their progress to the meeting, on passing the house of one of the persons who had been so ill-treated, expressed their disapprobation at his conduct by hissing, &c.: fifthly, parol evidence of inscriptions and devices on banners and flags displayed at a meeting is admissible without producing the originals: and lastly, on such an indictment, evidence of the supposed misconduct of the military and others who dispersed the meeting was not admissible.



*Rex v. Hunt*, 3 B. & A. 566; 3 B. & A. 444. And see *Rex v. Bowes*, 4 East, 171, n.

An indictment for a conspiracy contained several counts, alleging several misdemeanours on the same day:—Held, that the prosecutor might give evidence of similar misdemeanours on different days. *Rex v. Levy*, 2 Stark. 458—Abbott.

An indictment for conspiracy to cheat in the sale of a horse is not maintainable without proof of concert between the parties. *Rex v. Pywell*, 1 Stark. 402—Ellenborough.

An indictment against journeymen for a conspiracy against their employers, to prevent them from taking any apprentices, is proved by evidence of their having quitted their employment with an intention to compel such employers to dismiss any person as an apprentice. *Rex v. Ferguson*, 2 Stark. 489—Wood.

On an indictment for a conspiracy, the letters of one of the defendants to the other are, under certain circumstances, admissible in evidence in his favour, to show that he was the dupe of the other, and was not himself a participator in the fraud. *Rex v. Whitehead*, 1 C. & P. 67—Best.

Where two defendants were indicted for a conspiracy to commit a fraud, and one defended himself on the ground that he had himself been deceived by the representations of his co-defendant, and part of a written correspondence between both the defendants having been received in evidence for the crown:—Held, that the whole of the correspondence between the defendants, up to the time of the overt act of the conspiracy, was admissible in evidence for the defence. *Rex v. Whitehead*, 1 D. & R. N. P. C. 61—Abbott.

On an indictment for conspiracy, where there is evidence of several persons having engaged therein, what is said by any of them at another time and place respecting the object of the conspiracy is evidence against the others. *Rex v. Salter*, 5 Esp. 125—Hotham. And see *Rex v. Hammond*, 2 Esp. 719.

So, in an indictment for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, the prosecutor may give various instances of their giving a false representation of their circumstances, as overt acts of the conspiracy. *Rex v. Roberts*, 1 Camp. 399—Ellenborough.

But the wife of one defendant cannot be called on behalf of a co-defendant, though the parties appear and defend separately. *Rex v. Locker*, 5 Esp. 107—Ellenborough.

Nor one defendant who suffers judgment by default. *Rex v. Lafone*, 5 Esp. 155—Ellenb.

### JXX. LIBEL.

#### 1. Liability for.

See title LIBEL, in Civil Cases.

60 Geo. 3, c. 8.

The proprietor of a newspaper is answerable

continually as well as civilly for misconduct in the conducting of the paper, as for the publication of a libel, though he has nothing to do with the publication, and the whole is conducted by his servants. *Rex v. Waller*, 3 Esp. 21—Ken.

The proprietor of a newspaper who is not shown to take, or who shows that he did not take, any part in the publication, is criminally answerable for a libel that appears in it. *Rex v. Alexander*, 1 M. & M. 437—Tenterden.

Generally speaking, the proprietor of a newspaper is criminally answerable for what appears in it; but some possible case might occur in which he would be exempt. *Id.*

A member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contains libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers. *Rex v. Creevey*, 1 M. & S. 273.

An advertisement published in the newspaper concerning any person, though conveying with it an imputation injurious to the character of the party about whom it is published, is not a libel if done bona fide, and with a view of obtaining information on the subject alluded to in the advertisement by a person really interested in the discovery. *Delany v. Jones*, 4 Esp. 191—Ellenborough. And see *Maloney v. Bartley*, 3 Camp. 210—Wood.

Publications tending to degrade and depress persons in considerable stations of power and dignity in foreign countries may be treated as libels, on the ground that they may tend to involve this country in disputes and warfare. *Rex v. Gordon (Lord)*, 1 Russ. C. & M. 233: & P. *Rex v. Vint*, *Id.*

An indictment for publishing libellous matter reflecting on the memory of a dead person, and alleging that it was done with a design to bring contempt on the family of the deceased, to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, cannot be supported. *Rex v. Topham*, 4 T. R. 126.

It is libellous and a misdemeanour to publish in a newspaper the depositions taken before a justice of the peace on a criminal charge before the party is tried; and the printer, on an information against him for a libel, cannot give them in evidence to show that they were truly published. *Rex v. Lee*, 5 Esp. 123—Heath: & P. *Rex v. Fisher*, 2 Camp. 563. And see *Stiles v. Vain*, 7 East, 493; *Carr v. Jones*, 3 Smith, 491.

Expulsion from a Quaker's meeting, and reasons assigned in their books, not a libel. *Rex v. Hart*, 1 W. Black. 386.

It is not libellous fairly and honestly to criticise a painting publicly exhibited, though the terms of censure used may be strong, such as calling the painting a daub. *Thompson v. Shadell*, 1 M. & M. 187—Best.

A written or printed publication, stating the

l. has been guilty of gross misconduct in insulting persons in a barefaced manner, is libellous. *Nement v. Chives*, 4 M. & R. 127; 9 B. & C. 72.

Quere, whether the writing and composing a libel, with an intent to publish, but not followed by publication, be an offence? *Rex v. Burdett*, (Bart.), 4 B. & A. 95.

Quere, also, whether the mere writing a libel, with intent to excite hatred and contempt of the king's government, be an indictable offence. *Rex v. Burdett*, (Bart.), 3 B. & A. 717.

An indictment will not lie for words spoken of justice of the peace in his absence. *Rex v. Vekje*, 2 Camp. 142—Ellenborough.

Where there was a general verdict against the defendant on a count in an information, rule for arresting judgment was discharged, though partly of the matter was perhaps libellous; but might be a cause for lessening the punishment. *Rex v. Binfield*, 2 Burr. 985.

The statute 53 Geo. 3, c. 160, does not alter the common law respecting a blasphemous libel, but only removes the penalties imposed upon persons denying the doctrine of the Trinity by 9 E. 10 W. 3, c. 32, and extends to such persons the benefits conferred upon all other Protestant dissenters by 1 W. & M. sess. 1, c. 18. *Rex v. Waddington*, 1 B. & C. 26.

The stat 9 & 10 W. 3, c. 32, does not take away the common-law proceeding against libellers of the Christian religion. *Rex v. Paine*, 1 East, P. C. 5.

## 2. Information when granted.

It is an invariable rule not to grant an information for a libel, without an exculpatory affidavit, unless where the party libelled is abroad at a great distance, or the subject-matter of the charge is general imputation, or an accusation of criminal language held in parliament. *Rex v. Hassell*, and *Rex v. Bate*, 1 Dougl. 387.

An affidavit to found a motion for a criminal information for a libel must distinctly negative the charge, unless the party libelled be abroad, & the charge be general. *Rex v. Wright*, 2 Chit. 62.

It is a general rule that the court will not grant an information for a private libel, charging particular offence, unless the prosecutor will deny the charge upon oath. *Rex v. Miles*, 1 Dougl. 284.

An information lies for a libel reflecting on the character of a justice of the peace. *Anon.* Lofft, 462.

A criminal information was granted for these words, in a letter to a mayor: "I am sure you will not be persuaded from doing justice by any little acts of your town clerk, whose consummate malice and wickedness against me and my family will make him do anything, be it ever so vile." *Rex v. Waite*, 1 Wils. 22.

So, for sending a letter, charging complainant with an unnatural crime, although in very guarded and general terms, and the complainant did not

positively swear to his innocence. *Rex v. Denison*, Lofft, 148.

So, for printing an account of a ludicrous marriage between an actress and a married man. *Rex v. Kinnersley*, 1 W. Black. 294.

An information held good, though the matter published merely held the prosecutor up to ridicule. *Rex v. Benfield*, 2 Burr. 985.

An information lies for singing songs in the streets, reflecting on the prosecutor's children, with intent to destroy his domestic happiness. *Id.*

A criminal information having been granted against the defendant, he, before the trial at Nisi Prius, distributed hand-bills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's; this matter being disclosed to the judge at Nisi Prius by an affidavit, was held a sufficient ground to put off the trial; and that affidavit being returned to the court of K. B., they granted another information on it against the defendant, considering the affidavit taken at Nisi Prius as taken under the authority of this court. *Rex v. Joliffe*, 4 T. R. 285.

On an information against the defendants for falsely and maliciously publishing a libel concerning the king, by stating in a newspaper that his majesty was afflicted with mental derangement, the jury found them guilty of so doing:—Held, on a motion for a new trial, first, that to assert falsely of his majesty, or of any individual, that he labours under the affliction of mental derangement, is a criminal act, and a malicious intention may be inferred from the mere fact of publication, unless evidence is given by the defendant to rebut such inference: secondly, that such an assertion concerning the king, being in itself mischievous to the public, is an indictable offence, without any allegation or direct proof of a malicious intention: thirdly, that where the jury desired to know "whether in order to convict a defendant for the publication of a libel, a malicious intention must not have existed in his mind," they were correctly answered by the judge presiding at the trial, who informed them, that "a person who publishes that which is calumnious concerning the character of another must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can show the contrary, and that the onus of proving the contrary lies upon him: and, fourthly, that where the publisher of a libel states that the fact which he communicates is "from authority," and it appears that the fact is untrue, he is guilty of a false assertion, in the criminal sense of the word. *Rex v. Harvey*, 3 D. & R. 464; 2 B. & C. 257.

An information lies against a member of parliament for publishing a speech in a newspaper, containing slanderous matter. *Rex v. Abingdon* (Lord), 1 Esp. 226—Kenyon.

It is not a libel barely to reflect on government, if it be done in such a manner as not likely to excite sedition. *Rex v. Woodfall*, Lofft, 776.

The impotence of a libel, either in the writing itself, or the strength or goodness of the characters it attacks, is no excuse for it. *Id.*

If a libellous meaning be clear to the jury, misdating facts, or the omission of letters in words, will not make it less a libel. *Id.*

A libel on King William and Queen Mary, especially as instruments of the revolution, held punishable now. *Id.*

The court refused to grant a criminal information against a bookseller, for printing a report of the House of Commons, though it reflected on the character of an individual. *Rez v. Wright*, 8 T. R. 293.

A publication stating Jesus Christ to be an impostor and a murderer in principle is a libel at common law, for which an information will lie. *Rez v. Waddington*, 1 B. & C. 36.

The court will grant a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication. *Rez v. Fleet*, 1 B. & A. 379.

It is not a libel to express regret that the king has taken an erroneous and incorrect view of policy. *Rez v. Lambert*, 2 Camp. 398—Ellenb.

The court will grant a criminal information against the publisher of a newspaper for a libel reflecting on the clergy of a particular diocese, and generally upon the clergy of the church of England, though no individual prosecutor was named, and though the libellous matter was not negatived on affidavit: it is sufficient to state the publication of the libel by the defendant. *Rez v. Williams*, 1 D. & R. 197; 5 B. & A. 595.

An order made by a corporation and entered in their books, stating that A. B. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in C. P.) was actuated by motives of public justice, &c., in preferring the indictment, is such a libel reflecting on the administration of justice, for which the court will grant an information against the members making that order. *Rez v. Watson*, 2 T. R. 199.

So, an information will lie for publishing a reflection on a judge and jury for acquitting a prisoner. *Rez v. White*, 1 Camp. 359, n.—Grose.

It is an offence at common law to publish a blasphemous libel, as the stat. 9 & 10 W. 3, c. 32, has not altered such law, as to the offence of blasphemy, but only given a cumulative punishment, and a defendant may be convicted on an information for such an offence. *Rez v. Carlile*, 3 B. & A. 161.

A correct account of the proceedings in a court of justice cannot be published, if such an account contain matter of a scandalous, blasphemous, or immoral tendency; and it is a ground for a criminal information. *Id.*

Every copy of a libel sold by a defendant is a separate publication, and subjects him to a dis-

tingent prosecution, and therefore the defendant may be prosecuted by an information filed by the attorney-general, although an indictment has been brought on the prosecution of a different person, for publishing different copies of the same libel. *Rez v. Carlile*, 1 Chit. 451.

Semble, although the truth of a publication is no justification, yet, if the court see that it is true, or probably may be true, it may be good cause why the court should not interfere by granting a criminal information. *Rez v. Draper*, 3 Smith, 391.

Semble, that a defendant, in an information for a libel, may prove the truth of the matter alleged to be false and libellous. *Rez v. Bradley*, 2 M. & R. 152.

No excuse against an information against a printer of a newspaper for a libel that he did not know that it was printed; that he was sorry, and had, immediately on discovery, stopped the sale. *Anon. Loft*, 544, 780.

Although it will go in mitigation. *Rez v. Williams*, Loft, 759.

But being in such close custody as not possibly to know what was doing might be a justification under circumstances. *Id.*

### 3. Indictment and Information, Form of.

In an indictment for a libel, reflecting on the prosecutor in his profession as a solicitor, and which has been addressed and sent to him only, it must be alleged to have been written and sent with intent to provoke the prosecutor to a breach of the peace, and not with an intent to injure him in his profession. *Rez v. Wegener*, 3 Stark 245—Abbott.

An information for a libel need not charge the offence to have been committed *vi et arms*, or allege that the libellous matter is false. *Rez v. Burke*, 7 T. R. 4.

Information held good for publishing a libel against two persons, where the publishing was one single offence. *Rez v. Benfield*, 3 Barr. 363.

And where several persons were charged in the same information, it was held good, the offence arising out of one joint act. *Id.*

Semble, that a count, charging the defendant with having an obscene libel in his possession, with an intent to publish it, is not good. *Rez v. Rosenstein*, 2 C. & P. 414—Park.

Where an information for a libel alleged that the defendant, intending to insinuate and cause it to be believed that divers liege subjects of the king had been inhumanly cut down, maimed, and killed, by certain troops of our lord the king, unlawfully and maliciously published a libel of and concerning the government of the realm, and of and concerning the said troops, and the only innuendo in the libel was applied to the word "dragoons," meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down and killed by

the said troops of our said lord the king:—Held, on arrest of judgment, that this was sufficiently certain, without defining what particular troops were meant. *Rex v. Burdett (Bart.)*, 4 B. & A. 314.

So, where an information alleged that a libel was published of and concerning the government, and the libel did not in express terms charge the acts to have been done by the government or its order, the whole of the libel must be looked at, in order that the court may interpret it in the way in which ordinary persons would understand it, and judge from the whole tenor of it whether it be written of and concerning the government; therefore such an information was held good after verdict, although the record did not contain any averment of extrinsic facts, in order to show that the libel was written of and concerning the government. *Id.*

In an indictment for a libel against W. S., omitting to allege that the defendant published it "of and concerning W. S.:"—Held, that such omission was not supplied by its being alleged, in the introductory part, "that the defendant intended to vilify W. S., he having been mayor of, &c., and to cause it to be believed that as such mayor he had practised corruption, and been guilty of abuse in respect to granting a license to one J. L., to retail beer," &c., and concluding "to the injury and disgrace of W. S.," &c., although the innuendoes pointed the different parts of the libel to W. S. and to J. L., and to the granting the license. *Rex v. Marsden*, 4 M. & S. 164.

Upon an information against the defendant for a libel, for that he, &c., wickedly, maliciously, and seditiously did write and publish, &c., a certain false, scandalous, and seditious libel "of and concerning his majesty's government and the employment of his troops, according to the tenor and effect following," (setting forth the libel verbatim): the words "of and concerning" were a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written "of and concerning the king's government, and the employment of his troops." *Rex v. Home*, Cowp. 672.

How far an innuendo or averment is or is not necessary to support a charge of a libel, consisting in opprobrious words or signs. *Home v. Rex in error*, 4 Bro. P. C. 368.

The charge in an information should be of an intention to excite the prosecutor to break the peace. *Rex v. Wegener*, 1 Stark. 543—Abbott.

#### 4. Evidence.

38 Geo. 3, c. 78.

[And see EVIDENCE, in *Civil Cases of Libel*.]

On the trial of an indictment for a libel, the only questions for the jury are the fact of publishing, and the truth of the innuendoes. *Rex v. St. Asaph (Dean)*, 3 T. R. 428, n.; *S. P. Rex v. Withers*, 3 T. R. 428: But see *stat. 32 Geo. 3, c. 60*, and *Rex v. Holt*, 5 T. R. 443; *Rex v. Woodfall*, Burr. 2667, and 32 Geo. 3, c. 60.

Where a libel imputes to others the commission of an indictable offence, evidence of the truth of it is inadmissible; and where the judge told the jury, in summing up, that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances, and that, if its contents were likely to excite seditious, the defendant must be presumed to intend that which his act was likely to produce, and that, if they found such to be the intent, he was of opinion that it was a libel, and that they were to take the law from him, unless they were satisfied that he was wrong:—Held, that this was a correct mode of leaving the question to the jury, under 32 Geo. 3, c. 60, s. 1. *Rex v. Burdett (Bart.)*, 4 B. & A. 95; 3 B. & A. 717.

The copy of a newspaper delivered at the Stamp-Office under the provisions of the *stat. 38 Geo. 3, c. 78*, is conclusive evidence of publication to sustain an indictment against the proprietor for a libel contained in such copy. *Rex v. Amphlit*, 6 D. & R. 125; 4 B. & C. 35.

An affidavit made and signed by the printer and publisher and proprietor of a newspaper, as required by *stat. 38 Geo. 3, c. 78*, which affidavit contained the names of the parties, the place where the paper was printed, and the title of it: together with the production of a newspaper, tallying in every respect with the description of it in the affidavit, is not only evidence, by that act, of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be; and this upon the trial of an information for a libel contained in such newspaper. *Rex v. Hart*, and *Rex v. White*, 10 East, 95; 3 Camp. 99. And see *Rex v. Hunt*, 2 Camp. 583.

Production of the affidavit filed at the Stamp-Office, and of a newspaper corresponding with that therein mentioned, is sufficient proof of publication in an action or indictment against the proprietor for a libel. *Mayne v. Fletcher*, 4 M. & R. 311; 9 B. & C. 382.

Proof that the defendant gave a bond to the Stamp-Office for the duties on the advertisements in a newspaper, and had occasionally applied at the Stamp-Office respecting the duties, is evidence that he is the publisher. *Rex v. Topham*, 4 T. R. 126.

Quære, whether a libel be triable in any county but that where the publication took place? *Rex v. Burdett (Bart.)*, 3 B. & A. 717; 4 B. & A. 95.

But it is now held, that where a defendant writes and composes a libel in one county, with an intent to publish, and afterwards publishes it in another, he may be indicted in either. *Id.*

A delivery of a sealed letter, enclosing a libel, at a post-office in L., is a publication of the libel there. *Id.*

In an information for publishing a libel contained in a letter in the county of L., from which it was dated, and the defendant was seen there on the day of the date and following day, and the

letter was enclosed in an envelope, and received in the county of M. open, accompanied with written directions for publication, as expressed in the envelope. Quere, whether this was evidence to go to a jury of a publication in L.? *Id.*

But it was afterwards held on such information, for composing and publishing a libel in the county of L., and it was proved that the defendant, on the 22nd of August, wrote the libel there, and that he was seen there on that and the following day; that on the 24th of the same month the libel was delivered in the county of M. by A. to B., enclosed in an envelope, addressed to A., containing written directions to him to forward the libel to B., by whom it was subsequently published in M., and the envelope was open, and it was not proved that there was any trace of a seal or post-mark on it, and A. was not called at the trial as a witness by either party, nor was it proved that he was a resident, or had been about that time in L.: that this was evidence on which the jury might presume that the libel was delivered open to A. in the county of L. *Id.*

The publisher of a public register receives an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the register; after which he receives two letters in the same hand-writing, directed as mentioned, and having the Irish post-mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant; the previous letter having been destroyed: this is a sufficient ground for the court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the register in Middlesex, for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex. *Rex v. Johnson*, 7 East, 65; 3 Smith, 94. *And see Rex v. Watson*, 1 Camp. 215; and *Rex v. Williams*, 2 Camp. 507.

An allegation that a letter was written with intent to injure the prosecutor in his profession cannot be supported if the letter were sent only to the prosecutor. *Rex v. Wegener*, 1 Stark. 543—Abbott.

But delivery to the party libelled is a sufficient publication to support an indictment. *Phillips v. Jansen*, 2 Esp. 624—Kenyon.

It is not competent to a defendant, charged with having published a libel, to prove that a paper similar to that for the publication of which he is prosecuted was published on a former occasion by other persons, who have never been prosecuted for it. *Rex v. Holt*, 5 T. R. 436.

Where the libel is contained in a newspaper, the defendant has a right to have read in evidence extracts from a different part of the same paper connected with the subject of the libellous passage. *Rex v. Lambert*, 2 Camp. 398—Ellenb.

Evidence of buying a libel in the shop of a known bookseller is sufficient *prima facie* evi-

dence to convict him of publication." *Rex v. Mon*, 5 Burr. 2686.

Where a number of placards are printed, and a party adopts and uses some of them, all the rest are duplicate originals, and one of them may be read against such party, without notice to produce. *Rex v. Watson*, 2 Stark. 190.

Other compositions of the defendant on the same subject may be produced in confirmation. *Rex v. Pearce, Peake*, 75—Kenyon.

A defendant may be acquitted of printing, and found guilty of publishing a libel. *Rex v. Williams*, 2 Camp. 546—Lawrence.

If a libel is alleged in an indictment to have been published with intent to defame certain magistrates, and also bring the administration of justice into contempt, it is sufficient to prove a publication with either of those intentions. *Rex v. Evans*, 3 Stark. 35—Bayley.

Where a libel refers to certain other papers, and is not intelligible without those papers being read, the prosecutor on the trial of an information may have those papers read to explain the libel. *Rex v. Slaney*, 5 C. & P. 213—Tindal.

An indictment for a libel on the treasurer of the parish of Greenwich, contained unecessarily an averment that he was duly appointed treasurer:—Held, that an entry in the vestry book, stating that the prosecutor was elected at a vestry duly held in pursuance of notice, was evidence that notice had been given, without which, by particular statute, the election would have been void. *Rex v. Martin*, 2 Camp. 100—Macdonald.

In an information for a libel, imputing improper conduct to A., as town-clerk of H., it was alleged that he was town-clerk, and that it was his duty to issue his precept for summoning the grand jury. The precept was signed both by the mayor and town clerk:—Held, that this satisfied the allegation that he issued his precept, and that the fact that he was an alderman of the borough at the time when he was elected town-clerk made no difference. *Rex v. Hatfield*, 4 C. & P. 36—Vaughan.

Proof of words spoken to a person will support an indictment charging that the defendant spoke them of such a person. *Rex v. Burp*, 4 T. R. 217.

A defendant, brought up for judgment after being convicted of publishing a libel imputing indictable offences to the prosecutor, cannot be allowed in mitigation of punishment to put in affidavits to prove the truth of the libel, but he may put in his own affidavit, stating that at the time of publishing the libel he believed its contents to be true, and setting out reasonable grounds for such belief. *Rex v. Holpin*, 4 N. & R. 8; 9 B. & C. 65.

After judgment on the defendant for a libel the court refused to make an order on the prosecutor to deposit the original libellous papers with the officer of the court. *Rex v. Cater*, 2 East, 361.

**LXXI. SEDITIOUS PRACTICES AND UNLAWFUL OATHS.**

37 Geo. 3, c. 123; 53 Geo. 3, c. 104.

In an indictment on 37 Geo. 3, c. 70, it is sufficient to charge an endeavour, &c., without specifying the means employed. *Rex v. Fuller*, 1 B. & P. 180.

The unlawful administering, by an associated body of men, of an oath to any person, purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, &c. is felony within the statute 37 Geo. 3, c. 123, though the object of such association were a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. *Rex v. Marks*, 3 East, 157.

By s. 4 of 37 Geo. 3, c. 123, it shall not be necessary, in an indictment for any offence under that statute, to set forth the words of the oath, but it shall be sufficient to set forth the purport of it, or some material part thereof:—Held, that an indictment charging that the defendants administered to J. H. an oath, intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace, for any act or expression of his or theirs, &c., is good, without alleging the tenor or purport of the oath to be set forth, and without showing in what manner the public peace was meant to be disturbed by such society. *Rex v. Moore*, 6 East, 419.

Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered the same, said that he held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words; yet held, that parol evidence of what he in fact said, was sufficient without giving him notice to produce such paper. *Id.*

Where the oath on the face of it did not purport to be for a seditious purpose; yet held, that evidence might be given to show that the brotherhood therein referred to was a seditious society. *Id.*

**LXXII. THREATENING TO SUE FOR PENALTIES.**

Threatening by letter, or otherwise, to put in motion a prosecution by a public officer, to recover penalties for selling Fryer's Balsam without stamp, (which by stat. 42 Geo. 3, c. 36, is prohibited to be vended without a stamped label), or the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence at common law, although it be alleged that the money was obtained; no reference being made to any statute which prohibits such attempt. *Rex v. Southerton*, 6 East, 126; 2 Smith, 305.

But it seems that such an offence is indictable upon the stat. 18 Eliz. c. 5, s. 4, for regulating common informers, which prohibits the taking of money, without consent of court, under colour of

process, or without process, from any person, upon pretence of any offence against a penal law. *Id.*

But no indictment for any attempt to commit such a statutable misdemeanour can be sustained as a misdemeanour at common law, without at least bringing the offence intended within, and laying it to be against, the statute. *Id.*

Though if the party so threatened had been alleged to be guilty of the offence imputed within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute, which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for example sake, might also, upon general principles, have been deemed a sufficient ground to sustain the indictment at common law. *Id.*

**LXXIII. COMPOUNDING FELONY.**

If, in an indictment for compounding felony, it be averred that the defendant did desist, and from that time hitherto had desisted, from all further prosecution; and it appear, that, after the alleged compounding, he prosecuted the offender to conviction, the judge will direct an acquittal. *Rex v. Stone and Others*, 4 C. & P. 379—Bolland.

**LXXIV. COMPOUNDING INFORMATIONS.**

The stat. 18 Eliz. c. 5, which prohibits the compounding of any offence upon colour or pretence of process, or without process upon colour of any offence, against any penal law, does not apply to offences cognizable only before magistrates; and an indictment for compounding such an offence was holden bad in arrest of judgment. *Rex v. Crisp*, 1 B. & A. 282.

A popular indictment must not be compounded after conviction. *Bury q. t. v. Levy*, 1 W. Black. 443.

On an indictment on the 51 Eliz. c. 5, s. 4, for compounding an offence against the Highway Act, 13 Geo. 3, c. 84, s. 13, and taking money without process to prevent an action being brought:—Held, that the party so doing was liable to the punishment prescribed by the former act for taking such penalty without leave of a court at Westminster, or without judgment or conviction. *Rex v. Galey*, R. & R. C. C. 81.

**LXXV. OFFENCES BY PUBLIC OFFICERS, AND EXTORTION.**

See *Rex v. Bembridge*, 6 East, 136, n.; and *Rex v. Munton*, 6 East, 590, n.; and the cases of *Rex v. Kennett*, and *Rex v. Pinney*, ante, tit. RIOR, 751.

In an indictment against a public officer for breach of duty, it is sufficient to state generally that he is such officer, without showing his appointment. *Rex v. Holland*, 5 T. R. 607.

Where a duty is thrown on a body consisting of several persons, each is individually liable for

a breach of duty, as well as for acts of commission as of omission. *Id.*

In an indictment against a servant of the East India Company for offences in India, it is sufficient to charge him with a wilful breach of duty, without adding that it was corrupt. *Id.*

In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. *Id.*

Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them. *Id.*

A charge in an indictment against an officer, with a breach of orders in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him. *Id.*

Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale licenses, their jurisdiction attaches so as to exclude the other appointing a subsequent meeting; but they may all meet together on the first day, and if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licenses, their proceedings are illegal and the subject of an indictment. *Res v. Sainsbury*, 4 T. R. 451.

The stat. 42 Geo. 3, c. 85, giving jurisdiction for trying and punishing in this country, persons holding public offices or employments, for offences committed abroad, does not extend to felonies. *Res v. Shaw*, 5 M. & S. 403.

On an indictment on stat. 17 Geo. 3, c. 26, s. 7, for taking more than 10s. in the 100l. for brokerage, &c., it is not necessary to prove that the defendant took the exact sum laid in the indictment, though it be not laid under a videlicet. *Res v. Gillham*, 6 T. R. 265; 1 Esp. 285.

And on the trial of such indictment, it must be left to the jury to consider whether the excess above 10s. in the 100l. were really taken as a fair charge for drawing the writings, &c., or whether it were not so taken as a device to avoid the statute. *Res v. Gillham*, 6 T. R. 265; 1 Esp. 285.

One who was appointed collector of certain duties by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties, by colour and pretence of being collector of such duties, though the money were fraudulently collected and misapplied by him, because he was in fact appointed collector, and in that character received the money. *Res v. Dobson*, 7 East, 218.

A collector of post-horse duty demanded of A. a sum of money, alleging that A. had let out horses for hire without payment of the duty. A. denied that he had done so, and gave the collector a promissory note for 5l., the amount of which,

after it became due, was paid by A. to the collector, who handed it over to his principal, the farmer of the post-horse duties:—Held, that this was extortion in the collector, and that his having paid the money over to his principal made no difference. *Res v. Higgins*, 4 C. & P. 261—Vaughan.

On the trial of an indictment for a fraud against an agent of government, under the control of the Treasury, a letter of instructions addressed to the defendant by the Lords of the Treasury may be read in evidence without proving the commission by which they were appointed. *Res v. Jones*, 2 Camp. 131—Ellenborough.

An indictment does not lie against a trap-pike-keeper to try the question of exemption from toll, unless the ground of exemption was specified at the time the toll was taken. *Res v. Hamlyn*, 4 Camp. 379—Ellenborough.

#### LXXXVI. DISOBEYING ORDERS.

An indictment lies for disobedience to an order of sessions. *Res v. Robinson*, 2 Barr. 79; 1 Ld. Ken. 513.

But an indictment does not lie for disobeying an order to pay money to a surgeon, &c. *Res v. Smith*, 1 Bott's P. L. 403.

A. was indicted for not paying 20s. costs on the discussion of his appeal to the peer's rule; and it was held that an indictment might be brought. *Res v. Byce*, 1 Bott's P. L. 394.

An indictment against certain commissioners for a contempt of an order of sessions, in not paying such costs, stating generally, that the party appealed to the sessions against such notice in writing, under the hands of five commissioners, acting in the execution of the statute, and which notice was made, or purported to be made, under the powers to them given by the act, seems sufficient; for the court will presume, as against the persons issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the act. *Res v. Kingston*, 8 East, 41.

Counts in the indictment stating an appeal against a notice in writing, signed by A. B. C. D., and E., five of the commissioners, and in order by the sessions that the commissioners acting under the statute, and being the respondents in the said appeal, on service of the said order, should pay the appellant 10l. costs of appeal; and alleging service of the order on those five, and others acting as commissioners, &c.; and then charging, that, at a subsequent meeting held by virtue of the act, A., B., (omitting C., D., and E., and also F. and G., commissioners, were present and acting, and formed a majority, a demand of the 10l. costs was made on those six, which they refused to pay; and other like counts, charging service of the order upon part only of those who were indicted for a contempt of it, were on general demurrer holden bad; and the offence being laid jointly against the several sets of defendants in each count, the court could not give

judgment, on such an indictment, even against the four who were parties to the appeal, and on whom service of the order was alleged, there being no one count including those only. *Id.*

In an indictment on 22 Car. 2, c. 12, s. 9, for not sending a cart and men to the six days' highway labour, pursuant to an order from the overseers, the particular remedy given by the act is immaterial, because it was an offence indictable at common law. It is not necessary to allege by whom or when the surveyors were appointed; a statement of "being the surveyors" is a sufficient inducement that they are so. *Rex v. Boyall*, 2 Burr. 832; 2 Ld. Ken. 549.

If on an indictment for disobeying an order of justices, in not abating a nuisance under the Building Act, it appears to have been founded on an order made in a case in which the justices had no jurisdiction, the judge at Nisi Prius will direct an acquittal, although the defect appeared in the record. *Rex v. Holles*, 2 Stark, 536—Abbott.

If there is a positive averment of disobedience to the order of a court of competent jurisdiction, an indictment is good, without a direct allegation of that which is the foundation of such jurisdiction; nor can a defendant otherwise avail himself either at the trial or elsewhere, but by showing a want of jurisdiction in the court. *Rex v. Mytton*, Cald. 536.

Such previous orders as are the foundation of the magistrate's authority must be recited, or at least referred to in an indictment for disobedience of such authority. *Rex v. White*, Cald. 183.

The service upon the party of an order, which is charged to have been disobeyed, must be directly and pointedly alleged, or the indictment cannot be supported. *Rex v. Moorhouse*, Cald. 154.

Where an indictment for a conspiracy to charge a parish under an order to be made by two justices describes the one as an esquire, and in producing the order he is described as clerk, it is a fatal variance. *Rex v. Tanner*, 1 Esp. 104—Ashurst.

An indictment lies against the stewards of a friendly society whose rules have been allowed by the magistrates and registered in London, but who afterwards held their meetings in Middlesex, or disobeying an order of Middlesex justices. *Rex v. Gash*, 1 Stark. 441—Ellenborough.

On an indictment against the stewards, &c., of a benefit society for disobeying an order of two justices, commanding them to re-admit A. B. to be a member of that society, is no defence that A. B. was a person who, by the rules of the society, was ineligible to be a member of it, as that was matter of defence before the justices. *Rex v. Gilkes*, 3 C. & P. 52—Tenterden.

On an indictment against the stewards, &c., of a benefit society for disobeying an order of two justices, commanding them to re-admit A. B. to be a member of that society, if it be proved that the order was served on one of the defendants, and that the others, when A. B. applied to be re-admitted, said, that they would not admit him,

and did not care for the justices' order, that is presumptive evidence of a service of the order upon them. *Id.*

Upon the trial of an indictment for disobeying an order of justices, the recital upon the face of the order of the facts giving the magistrates jurisdiction is not evidence of the existence of such facts; nor is the setting out of the order in *hæc verba* in the indictment a sufficient allegation of the truth of the facts recited therein. *Rex v. Gilkes*, 2 M. & R. 454; 8 B. & C. 439.

Indictment lies against the president and stewards of a friendly society for disobeying an order of justices addressed to them to re-admit a member, though it be sworn that the power of doing so is not in the president and stewards, but in a committee. *Rex v. Wade*, 1 B. & A. 861.

By the Friendly Society Act, 33 Geo. 3, c. 54, s. 2, it was provided that the rules of every such society should be exhibited in writing to the justices at sessions to be by them confirmed, after which they should be signed by the clerk of the peace, and a duplicate should be deposited with and filed by him at such sessions, and that no such society should be deemed to be within the act till good rules for its government should have been so confirmed and filed. By sec. 15 it was enacted, if any member of such society, established by virtue of the act, should think himself aggrieved by any act of the society, two justices of the county, &c., should determine the matter in a summary way, according to the rules of the society, confirmed pursuant to the act, and make such order therein as they should think just. There was no mention of filing in this section. On an indictment for disobeying an order so made to re-admit a member:—Held to be no objection that the clerk of the peace signed the rules exhibited to the justices, but not the duplicates deposited with him:—Held, also, that the indictment which stated by way of introduction, that the society had been established by virtue of the act, and the rules duly confirmed, but omitted to say that they had been filed, was sufficient, as pursuing the 15th section, on which the jurisdiction to make the order was grounded. *Id.*

But *quære*, whether depositing the rules with the clerk of the peace, to be by him filed, would not satisfy the act so as to render the establishment of the society valid, though he omitted to file them? *Id.*

A. was prosecuted by parish officers for disobeying an order of maintenance, and convicted, and sentence deferred by the court with a view to an arrangement; in the meantime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of the maintenance; but part of which was to cover costs. A. paid part, and gave a note for the remainder. He was then brought before the court, and fined 1*l.* and discharged. It did not appear whether the particulars of the arrangement were communicated to the court; but A. made no complaint when brought up. In an action afterwards brought upon the note:—Held,



that no irregularity appeared in the compromise, and that the note was legal. *Kirk v. Stickwood*, 4 B. & Adol. 491.

LXXVII. REFUSING ORDERS.

Indictment that defendant was appointed overseer of the poor of the parish of A., "and that he afterwards refused to take the said office of overseer of the parish to which he was so appointed:" good on demurrer. *Res v. Burder*, 4 T. R. 778; Nolan, 111.

In an indictment against the defendant for refusing to serve the office of overseer of the poor of a parish:—Held, that he was a substantial householder within the statute 43 Eliz. c. 2, and liable to serve such office, although he occupied a house, and paid the rent and taxes in the parish by means of a clerk only, but slept in another parish. *Res v. Poynder*, 2 D. & R. 258; 1 B. & C. 178. *And see Res v. Hall*, 2 D. & R. 241; 1 B. & C. 123.

The voluntary absence of a chief officer of a corporation, upon the charter day of election of his successor, is not indictable upon the stat. 11 Geo. 1, c. 4, s. 6, unless his presence as such chief officer be necessary by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *Res v. Corry*, 5 East, 372; 1 Smith, 538.

LXXVIII. UNLAWFUL TRADING.

It is not an indictable offence to exercise a trade in a borough, contrary to the by-laws of that borough. *Res v. Sharples*, 4 T. R. 777.

The case of *Res v. Pemberton*, 2 Burr. 1035, relates to using a trade without having served an apprenticeship, but the stat. 5 Eliz. c. 4, on which it was founded, is repealed.

LXXIX. ARTIFICERS GOING ABROAD.

5 Geo. 4, c. 97.

The cases of *Res v. Myddleton*, 6 T. R. 739, and *Res v. Hewitt*, R. & R. C. C. 158, are on the stat. 23 Geo. 2, c. 13, which is wholly repealed by 5 Geo. 4, c. 97.

LXXX. PUTTING GUNPOWDER ON BOARD SHIPS.

It would seem that if persons put on board a ship an unknown article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, they are guilty of a misdemeanour. *Williams v. E. I. Company*, 3 East, 192, 201.

LXXXI. ADULTERATING FOOD.

Mixing alum with bread in such manner that crude lumps were found in the bread was holden to be indictable. *Res v. Dixon*, 3 M. & S. 11.

Indictment against the defendant, who was employed to make bread for the Military Asylum, which charged that he delivered to J. H. Swan (ss.) 297 loaves, as and for good household bread, for the use and supply of the said asylum and the children belonging thereto, whereas the said loaves were not good household bread, but contained divers noxious and unwholesome materials not fit for the food of man, was held sufficiently certain, without showing what the noxious materials were, or that the defendant intended to injure the children's health. *Res v. Dixon*, 3 M. & S. 11; 4 Camp. 12—Ellenborough.

Indictment does not lie against a miller for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal different from the produce of the barley, and which is musty and unwholesome. *Res v. Haynes*, 4 M. & S. 214.

Indictment against a miller, charging in the same count that he received two separate parcels of barley, each of four bushels, to be ground at his mill, and that he delivered three bushels of oat-meal and barley-meal mixed, other and different than the produce of the said four bushels, is ill, for the uncertainty to which of the four bushels it relates: the indictment is also ill if it do not show a certain place where the defendant received the barley to grind. *Id. See ante, Obstructing to Give Sufficient Food to Attendants*, &c. 754.

LXXXII. INDECENT EXPOSURE.

Bathing in the sea on the beach near inhabited houses, from which the person may be distinctly seen, is an indictable offence, although the house may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question. *Res v. Croden*, 3 Camp. 89—Macdonald. *See the case of Res v. Nicol*, and *Res v. Rosinski*, *ante*, 753.

LXXXIII. OBSTRUCTING BURIAL.

Indictment charging "that defendant, in a churchyard, interrupted and obstructed W. C. clerk, in reading the order for the burial of the dead, and interring a corpse, and unlawfully, and by threats and menaces, hindered the burial of the corpse:"—Held bad in arrest of judgment: 1st, for not averring that W. C. was a clerk in holy orders, and lawfully acting as such in the burial of the corpse; and 2nd, for not setting out the particular threats and menaces used by the defendant. *Res v. Chere*, 7 D. & R. 461; 4 B. & C. 902.

XXXIV. OFFENCES RELATING TO DEAD BODIES.

2 & 3 Will. 4, c. 75.

Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. *Rex v. Lyan*, 2 T. R. 733; 1 Leach, C. C. 497.

Selling the dead body of a person capitally convicted for dissection, where dissection is no part of the sentence, is a misdemeanour at common law; and in order to support an indictment for such offence, it is not necessary that there should be direct evidence that the defendant had sold the body for lucre and gain, and for the purpose of being dissected. *Rex v. Cundick*, 1 D. & R. N. P. C. 13—Graham.

It is an indictable offence against decency to take a person's dead body with intent to sell or dispose of it for gain and profit. *Rex v. Gilles*, 1 Russ. C. & M. 415; R. & R. C. C. 366, n. (b.)

Quære, if the apprehension of a person in the act of stealing a body from a churchyard is a lawful apprehension, so as to subject such person to an indictment on the 43 Geo. 3, c. 58, for cutting, &c., a sexton, in order to obstruct and resist such apprehension? *Rex v. Duffin*, R. & R. C. C. 365.

Where an indictment averred that one E. L. was publicly executed at, &c.; and that one G. C. of, &c., undertaker, was retained and employed by W. W., the keeper of the jail in and for the county, to bury the body of the said person so executed, for certain reward, to be therefore paid to the said G. C., by and on behalf of the said county; and in pursuance of the said retainer and employment, the body of the said person so executed was then and there delivered to the said G. C. for the purpose of being so by him buried as aforesaid; and it then and there became the duty of the said G. C. to bury the same accordingly, but that the said G. C. being, &c., and having no regard to his said duty, nor to, &c., did not, nor would bury the said body; but on the contrary thereof, unlawfully, &c., and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same for the purpose of being dissected, &c., to the great scandal, &c.:—Held, that the indictment was well framed, though apparently drawn in the language of a declaration in assumpsit. *Rex v. Cundick*, 1 D. & R. N. P. C. 13—Graham.

XXXV. DISTURBING DISSENTING CONGREGATIONS.

A congregation of Lutherans, using the German language in their service, are within the protection of the Toleration Act. *Rex v. Hube*, Peake, 132; 5 T. R. 542.

Methodists and dissenters have a right to the protection of the court, if disturbed in their decent and quiet devotions. *Rex v. Wroughton*, 3 Burr. 1686.

It is no defence to an indictment on that act for disturbing a congregation of Protestant dissenters, that the violence was committed in the defendant's asserting his right to the clerk's reading desk. *Rex v. Hube*, Peake, 132; 5 T. R. 542.

It need not be proved that the minister has taken the toleration oaths. *Id.*

XXXVI. GAMING HOUSES, DISORDERLY HOUSES, AND GAMING.

Keeping and maintaining a common gaming-house for lucre and gain, and causing and procuring idle and evil disposed persons to come there to play together at "Rouge et Noir," and permitting such persons to play at such game for large sums of money, is indictable at common law; and it seems that an indictment for such an offence, merely charging the defendant with keeping a common gaming-house, would be good. *Rex v. Rogier*, 2 D. & R. 431; 1 B. & C. 272.

An indictment lies for keeping a disorderly house. *Rex v. Higginson*, 2 Burr. 1232.

Under an indictment on the stat. 9 Anne, c. 14, s. 5, for gaming, a smaller sum than that named in the indictment under a videlicet may be proved. *Rex v. Hill*, 1 Stark. 359—Ellenborough.

Bills of exchange must be proved precisely as stated. *Id.*

An indictment for a nuisance in keeping a common gaming-house was preferred by a private prosecutor, who, after removing it by certiorari, proceeded no further. Another party then caused a venire to be issued, and other steps taken for bringing the case to trial, though desired by the original prosecutor to forbear. On motion by the latter for a stay of proceedings, (he alleging that the offence had been discontinued), the court refused to interfere, the prosecution being for a public nuisance. *Rex v. Wood*, 3 B. & Adol. 657.

XXXVII. JOINT-STOCK COMPANIES.

A great number of persons at Birmingham (2500), admitting of an extension to 20,000, covenanted by deed of co-partnership to raise a large capital (20,000*l.*) by small subscriptions of 1*l.* for each share, for the purpose of buying corn, grinding it, making bread, and dealing in and distributing flour or bread amongst the partners, under the name and firm of "The Birmingham Flour and Bread Company," and under the management of a committee; and covenanted that no partner should hold more than 20 shares, &c. Upon an indictment against several of the partners, charging them, upon the stat. 6 Geo. 1, c. 18, ss. 18 & 19, as for a public nuisance, with intending to prejudice and aggrieve divers of the king's subjects in their trade and commerce, under false pretences of the public good, by sub-

scribing, collecting, and raising, and also by making subscriptions towards raising a large sum for establishing a new and unlawful undertaking, tending to the common grievance, &c. of great numbers of the king's subjects in their trade and commerce, i. e. making subscriptions towards raising 20,000*l.* in 20,000 shares, for the purpose of buying corn, and grinding and making it into flour and bread, and dealing in and distributing the same; and also with presuming to act as a corporate body, and pretending to raise a transferable and assignable stock for the same purposes. The jury having found specially, that the company was originally (during the high price of provisions) instituted from laudable motives, and for the purpose of more regularly supplying the town of B. and the neighbourhood with flour and bread, and that the same was originally and still is beneficial to the inhabitants at large, but is (i. e. at the time of finding the special verdict, which does not include the time of the offence charged in the indictment) prejudicial to the bakers and millers of the town and neighbourhood in their trades: the court gave judgment for the defendants, considering the case not to be within the stat. 6 Geo. 1, c. 18, ss. 18 & 19, on which the indictment was framed. *Res v. Webb*, 14 East, 406. And see *Res v. Dodd*, 9 East, 516, and *Res v. Hawkins*, 3 M. & S. 488.

The court of C. P. refused to decide the question whether the Golden-Lane brewery were a nuisance within 6 Geo. 1, c. 18, upon a motion to set aside judgment confessed to them. *Brown v. Holt*, 4 Taunt. 587.

#### LXXXVIII. NUISANCE.

The corporation of the city of London, being conservators of the river Thames, and owners of the soil between high and low water mark, cannot authorize a lessee to erect a wharf thereon, which produces inconvenience to the public in the use of the river for the purposes of navigation. *Res v. Grosvenor (Lord)*, 2 Stark. 511—Abbott. And see *Res v. Hollis*, 2 Stark. 536.

When on the trial of an indictment for a nuisance in a river, by erecting staiths for loading ships with coal, the judge left the following points to the jury; whether they were erected in a reasonable part of the river; whether reasonable space was left for navigation; whether loading the vessels by means of them was a public benefit; whether they extended farther than was required, and whether the public benefit produced was greater than the public injury sustained, and he pointed out to the jury, among other benefits, that by means of the staiths the coals were supplied at a cheaper rate, and in better condition, than they otherwise could be:—Held, to be a proper direction—*Diss.* Tenterden, C. J. *Res v. Russell*, 6 B. & C. 566.

It is not conclusive against the defendant that there had not been a writ ad quod damnum and inquiry thereon previous to the defendant making the erection. *Id.*

By an act, reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards. By a subsequent act, the company or persons authorized by them were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient public highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater distance. The locomotive engines frightened the horses of persons using the highway as a carriage road. An indictment against the company for a nuisance:—Held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words authorizing the use of engines were unqualified, and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority. *Res v. Pusey*, 4 B. & Ad. 30.

Defendant, being proprietor of a colliery, made a rail-road from it to a sea-port town. The rail-road was 400 yards long, and was laid upon a turnpike road, which it narrowed so far that in some places there was not a clear space for two carriages to pass. Defendant allowed the public to use his rail-road, paying a toll:—Held, that the facility thereby given to the general traffic with the sea-port, and particularly to the conveyance of coals, &c. thither, was not such a convenience as justified the obstruction of the highway. *Res v. Morris*, 1 B. & Ad. 441.

By an act, 45 Geo. 3, c. 74, authority was given to all persons to lay wagon-ways along or across any of the roads mentioned in the act, (of which the turnpike road in question was one), but the parties so doing were to keep such roads in repair for twenty yards on each side of the wagon-way so laid down:—Held, that the act did not authorize the laying of such wagon-way, where there were not twenty yards of road on each side. *Id.*

The above act was temporary, and was repealed before its expiration. Quære, if the wagon-way, supposing it otherwise legal, would have continued so after the repeal or expiration of the act? *Id.*

By stat. 44 Geo. 3, c. 55, a company was incorporated and empowered to make a railway through certain districts. By sect. 5, they were directed to form new roads in lieu of any existing ones that might be injured by their railway. Sect. 70 empowered proprietors of lands, mines, &c., to make railways through their own lands and those of other persons consenting, and across and along any road or roads, to communicate with the principal railway. And no reference was made to any former limitation of powers:—Held, nevertheless, that the power in this clause was

not absolutely given, but must be subject to the provision of sect. 5, or to the condition of leaving space enough, independent of the railway, for the public to pass. *Id.*

On indictment for nuisance to a public canal navigation established by act of parliament, it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct and embankment, in which were several arches and culverts: that a brook fell into the river above its point of intersection with the canal; and that in times of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the above-mentioned arches, and through them to the river, doing however much mischief to the lands over which it passed: that, except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times, but those of high flood, notwithstanding the improved drainage of the country which had increased the body of water: that the defendants, occupiers of lands adjoining the river and brook, and for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, erected or heightened certain artificial banks called fenders on their respective properties, so as to prevent the flood-water from escaping as above-mentioned; and that the water had consequently in time of flood come down in so large a body against the aqueduct and canal banks as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced many hundred acres of land would again be exposed to inundation:—Held, that the defendants were not justified under these circumstances in altering, for their own benefit, the course in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and in ordinary stream; that an action on the case would have lain at the suit of an individual for such diversion, and consequently that an indictment will lay where the act affected the public. The jury found that the acts creating the nuisance were done by the defendants severally:—Held, nevertheless, that, as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated he acts to have been several. *Rex v. Trafford, B. & Adol. 874.*

An indictment does not lie against the owner of a vessel, sunk by accident or misfortune in a navigable river, for not removing it. *Rex v. Watts, 2 Esp. 675—Kenyon.*

Nor for obstructing a highway by the holding of a fair or market, if there have been an uninterrupted custom for twenty years. *Rex v. Smith, 1 Esp. 109—Ellenborough. And see Rex v. Canfield, 6 Esp. 136.*

But it does for setting a person in the footway of the public streets, in London, to deliver out printed bills of defendant's occupation, whereby the footway was greatly obstructed. *Rex v. Kermor, 1 Burr. 516.*

An indictment lies for keeping stage-coaches

in the street beyond a reasonable time necessary for loading and unloading. *Rex v. Cross, 3 Camp. 224—Ellenborough.*

A wagoner, occupying one side of a public street in a city, before his warehouses, in loading and unloading his wagons, for several hours at a time, both day and night, and having one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot-passengers were incommoded by cumbersome goods lying on the ground, on the same side, ready for loading, is indictable for a public nuisance; though there were room for two carriages to pass on the opposite side of the street. *Rex v. Russell, 6 East, 427; 2 Smith, 424.*

An indictment lies for sawing timber in the public street, though it was solely done for the purpose of enabling the defendant to get it into his yard. *Rex v. Jones, 3 Camp. 230—Ellenbo.*

So, for a nuisance in erecting buildings near the highway and dwelling-houses, and there making acid spirit of sulphur, whereby the air was impregnated with noisome and offensive stinks, to the common nuisance of all inhabiting and passing. *Rex v. White, 1 Burr. 333.*

But the merely carrying on of an offensive trade is not an indictable offence, unless it be destructive to the health of the neighbourhood, or render the houses uncomfortable or untenable. *Rex v. Davey, 5 Esp. 217—Heath.*

And if it only affect the inhabitants of three houses, it is not sufficient. *Rex v. Lloyd, 4 Esp. 200—Ellenborough.*

If, by a private act of parliament, all houses for the slaughtering of horses within 1000 yards of a certain workhouse are to be deemed public nuisances and removed; but, if they existed before the act, the owners are to receive a compensation:—Held, that if an indictment be found at common law with counts on that act, the defendant may be convicted if he so carried on the trade as to make it a public nuisance, and that he is not then entitled to any compensation. *Rex v. Watts, 2 C. & P. 486—Abbott.*

If a party set up a noxious trade remote from habitations and public roads, and after that new houses are built, and new roads constructed near it, the party may continue his trade although it be a nuisance to persons inhabiting such houses or passing along such roads. *Rex v. Cross, 2 C. & P. 483—Abbott.*

To support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to the health, it is sufficient if they be offensive to the senses. *Rex v. Neil, 2 C. & P. 485—Abbott.*

An acquiescence for fifty years by the neighbourhood will prevent an indictment for continuing a noxious trade. *Rex v. Neville, Peake, 93—Kenyon.*

So, for setting up a noxious manufactory in a neighbourhood in which other offensive trades have long been borne with; unless the inconve-

nience to the public be greatly increased. *Res v. Neville, Peake*, 91—Kenyon.

Indictment charged the defendant with keeping certain inclosed lands, near the king's highway, for the purpose of persons frequenting the same to practise rifle shooting, and to shoot at pigeons with fire-arms, and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons armed with fire-arms to meet in the highways, &c., near the said inclosed grounds, discharging fire-arms, making a great noise, &c., by which the king's subjects were disturbed and put in peril. At the trial it was proved that the defendant had converted his premises, which were situate at Bayswater, in the county of Middlesex, near a public highway there, into a shooting ground, where persons came to shoot with rifles at a target, and also at pigeons, and that as the pigeons which were fired at frequently escaped, persons collected outside of the ground and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot.—Held, that the evidence supported the allegation, that the defendant caused such persons to assemble, discharging fire-arms, inasmuch as their doing so was a probable consequence of his keeping ground for shooting pigeons in such a place. *Res v. Moore*, 3 B. & Adol. 184.

A man carrying on a noxious business in a place where it has been long established is indictable for a nuisance, if the mischief is increased by the manner or extent of carrying it on; but if the business is increased, but with no additional mischief by reason of a better mode of carrying on the business, it is otherwise. *Res v. Watts*, 1 M. & M. 283—Tenterden.

#### LXXXIX. HIGHWAYS AND BRIDGES.

An indictment for not repairing a common highway, leading from the parish of A. to the parish of B., is exclusive of B., although it afterwards allege that the part of the said road, which was out of repair, is in the parish of B. *Res v. Gamlingay*, 1 Leach, C. C. 528; 3 T. R. 513.

An indictment charged that the defendants removed a culvert in the parish of S., opposite to a mill there, in a highway there, leading from S. to H.—Held, on motion, in arrest of judgment, that it sufficiently appeared that the culvert removed was in the parish of S. *Res v. Knight*, 7 B. & C. 413; 1 M. & R. 217.

A road had been repaired by a parish, and persons on horseback had used it; but there was no evidence that any carriage had ever gone along the whole length of it.—Held, that the parish could not be convicted of non-repair of it on an indictment stating it to be a way for carriages; and that there should have been a count in the indictment charging it to be a way for horses. *Res v. St. Leonard*, 5 C. & P. 579—Parke.

The intention of stat. 13 Geo. 3, c. 78, s. 24, is, that the surveyor, giving the information to

the presenting magistrate, must be the surveyor of the district where the road presented is situated. *Res v. Fylingdales*, 7 B. & C. 428; 1 M. & R. 176.

The presentation must state that the information was upon oath given to the presenting magistrate. *Id.*

Where a magistrate presented a road in the township of F., "upon the information of A. J. surveyor of the highways for the township of C, which is 35 miles distant from the township of F."—Held, in arrest of judgment, that this presentation was bad, for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under 13 Geo. 3, c. 78, s. 24, to give information as to the road in F. *Id.*

A high constable cannot present for a nuisance to a highway like a magistrate, but must p before a grand jury and give his evidence upon oath. *Res v. Bridgewater and Tarrant Coal Company*, 7 B. & C. 514.

The description of a road, in a presentation of a justice, must allege that it lies in the parish, or they are not bound to repair. *Res v. Barford*, Cowp. 111.

But an indictment stating a road to lead from the hamlet of H. was held good. *Res v. Harrow*, 4 Burr. 2090.

In an indictment for the non-repair of a highway, it must be affirmatively stated that the road is within the district which is bound to repair. *Res v. Upton*, 6 C. & P. 133—Tindal.

Stating a road to be out of repair, "from and through" a place, excludes the terminus. *Id.*

An indictment against a parish for not repairing one side of a road should state a liability to repair it to the middle. *Res v. St. Peter, Peake*, 219—Kenyon. And see *Res v. Borkland*, 2 Camp. 494.

If a parish be situate, part in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against its inhabitants of that part only is bad; the indictment must be against the whole parish. *Res v. Clifton*, 5 T. R. 498.

If a parish lie in two distinct counties, an indictment for not repairing the highway may be brought against that part of the parish in which the ruinous road lies. *Res v. Weston*, 4 Bz. 2507. And see 5 Burr. 2700.

An objection, that the description of a road in an indictment is too general, can only be taken by a plea in abatement. *Res v. Hunsborough*, 1 Stark. 357—Ellenborough.

An indictment against the parish of B. for not repairing a road leading from A. to B., is exclusive of B., and therefore bad; and it is not aided by a subsequent allegation that a certain part of the same highway situate in B. is in decay. *Res v. Gamlingay*, 3 T. R. 513.

If the commissioners, under an inclosure act, set out a private road for the use of the inclosed

ants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing, it not concerning the public. *Res v. Richards*, 8 T. R. 634.

Indictment for non-repair of a highway within certain limits, charging the corporation of Liverpool with a prescriptive liability to repair all common highways, &c., within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of showing that the highway in question was not within any of the exceptions. *Res v. Liverpool (Mayor)*, 3 East, 86.

A count, stating the defendant's liability to arise by virtue of an agreement with the owners of houses alongside of it, is also bad; for the parish, who are *prima facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any agreement with others. *Id.*

In an indictment for obstructing a common highway, the highway may be laid as a common highway for carts, carriages, &c., although it has always been arched over, provided that it is capable of being used by all ordinary carriages, and notwithstanding the archway be not sufficiently high to permit road waggons and other carriages of unusual dimensions to pass under it. *Res v. Lynn*, 1 C. & P. 527—*Littledale*; 1 R. & M. 150.

The inhabitants of a parish are not bound to repair a way used by the public, and repaired by the parish for more than 20 years, if there be no owner who could dedicate the way to the public, and the repairs by the parish be shown to have been begun and continued under a mistaken notion of the liability of the inhabitants to repair. *Res v. Edmonton*, 2 M. & M. 24.

The inhabitants are bound by such repairs, if made with a full knowledge of the facts, and with the intention of taking upon themselves the public duty. *Id.*

Seemingly, that roads set out under an inclosure act do not by a presumption of law belong to the owners of the adjoining land. *Id.*

To an indictment against a parish for non-repair of a highway lying within it, a plea that the inhabitants of another parish have repaired, and been used and accustomed to repair, and of right ought to have repaired:—Held ill, as it did not show any consideration. *Res v. St. Giles, Cambridge*, 5 M. & S. 260.

But in a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge, situate within the township, it is not necessary to state any consideration for such prescription. *Res v. W. R. Yorkshire*, 4 B. & A. 623.

Indictment against the inhabitants of a parish for not repairing a road: plea, that the inhabitants of a particular district within the parish have immemorially repaired all the roads within that district, of which the road indicted was one:—Held, that this was a good plea, although it

did not state any consideration for the liability of the inhabitants of the district. *Res v. Becclesfield*, 1 B. & A. 348; 1 Stark. 393.

To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea, stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted was within the township of G. B., &c., and that the residue, &c., was within the township of L. B., &c.; and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c., is bad; without specifying what part of the highway lay within one township, and what part within the other. *Res v. Bridekirk*, 11 East, 304. And see *Res v. Taunton*, 3 M. & S. 465.

Where a local turnpike act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the act:—Held, that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road:—Held, also, that such inhabitants may, after conviction, apply by motion for relief against the trustees under 13 Geo. 3, c. 84, s. 33:—Held, also, that 13 Geo. 3, c. 84, s. 63, only refers to diversions under writs of *ad quod damnum*, and under 13 Geo. 3, c. 78, s. 19. *Res v. Netherthong*, 2 B. & A. 179.

In order to be discharged from an indictment for not repairing a highway, the parties must produce an affidavit that the road is now actually repaired since the conviction, and is likely to continue so. *Res v. Loughton*, 3 Smith, 575.

An indictment against a parish for not repairing a highway cannot be quashed on an affidavit that the way was then in repair; but the defendant must plead guilty, and pay a nominal fine. *Res v. Lincombe*, 2 Chit. 214.

The court will not entertain an application for setting aside an award founded on an indictment at the assizes for not repairing a road, though the question in dispute be of a civil nature. *Res v. Cotesbatch*, 2 D. & R. 265.

Where one inhabitant of a parish has removed an indictment against it for the non-repair of a road into K. B., and has entered into the usual recognizance for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment. *Res v. Laxborough*, 1 Dowl. Pr. R. 527.

A bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. *Res v. W. R. Yorkshire*, 2 East, 342. And see *Res v. Glamorgan*, 2 East, 356, n.

An indictment, charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought it will be reversed. It seems that a count charging him by reason of being owner of a navigation under a private act of parliament must set forth the act. *Rez v. Kerrison*, 1 M. & S. 435.

The inhabitants of a county are bound to repair every public bridge within it, unless, when indicted for the non-repair of it, they can show by their plea, that some other person, or body politic or corporate, is liable; and every bridge in a highway is by the statute of Bridges, 22 Hen. 8, c. 5, taken to be a public bridge for this purpose; therefore where Queen Anne, in 1708, for her greater convenience in passing to and from Windsor Castle, built a bridge on the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry which belonged to the crown, and she and her successors maintained and repaired the bridge till 1796, when being in part broken down, the whole was removed, and the materials converted to the use of the King, by whom the ferry was re-established as before; the court held that the inhabitants of the county of Bucks, who, in answer to an indictment for the non-repair of that part of the bridge lying in the county of Bucks, pleaded these matters, and showed that the bridge was a common public bridge, were nevertheless bound to rebuild and repair it. *Rez v. Buckinghamshire*, 12 East, 192.

By the stat. 43 Geo. 3, c. 59, s. 5, no bridge thereafter to be erected or built is to be repairable at the expense of the county, unless erected under the directions of the county surveyor, &c. This applies only to bridges newly built, not to a bridge merely widened or repaired since the passing of the act. *Rez v. Lancashire (Justices)*, 2 B. & Adol. 813.

Trustees under a turnpike act having built a bridge across a stream where a culvert would have been sufficient, but a bridge is better for the public, the county cannot refuse to repair such bridge, on the ground that it was not absolutely necessary. *Id.*

By the stat. 43 Geo. 3, c. 59, s. 5, no bridge thereafter to be built in any county by or at the expense of any individual or private person, body politic or corporate, shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, &c. *Rez v. Derby*, 2 B. & Adol. 147.

Trustees appointed by a local turnpike act are individuals or private persons within the meaning of this statute; and therefore a bridge erected by such trustees after the passing of the statute, but not under the direction or to the satisfaction of the county surveyor, &c., is not a bridge which the inhabitants of the county are liable to repair. *Id.*

To an indictment against the inhabitants of a

county for the non-repair of a foot bridge, they pleaded that it was parcel of a carriage bridge, which A. B. was bound to repair *ratione tenuræ*. Replication admitted the liability of A. B. to repair the carriage way, but denied that the foot bridge was parcel of the same; whereupon issue was joined. The evidence was, that the carriage bridge mentioned in the pleadings had been built before 1113, and that certain abbey lands had been ordained for the repairs of the same, and the proprietors of those lands (of which those mentioned to be held by A. B. were part) had always repaired the bridge so built. In 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot bridge along the outside of the parapet of the carriage bridge, partly connected with it by brickwork and iron pins, and partly resting on the stone-work of the bridge:—Held, that this (being the part of the bridge mentioned in the indictment) was not parcel of the carriage bridge, which A. B. was bound by tenure to repair, and consequently that the county was liable to repair the foot bridge. *Rez v. Middlesex*, 3 B. & Adol. 201.

Though a charter of Edw. 6, granted upon the recited prayer of the inhabitants of the borough of Stratford-upon-Avon, that the king would esteem them, the inhabitants, worthy to be made, reduced, and erected into a body "corporate and politic," and thereupon proceeding to "grant (without any word of confirmation) unto the inhabitants of the borough, that the same borough should be a free borough for ever thereafter," and then proceeding to incorporate them by the name of the bailiffs and burgesses, &c., would, without more, imply a new incorporation; yet, where the same charter recited that it was an ancient borough, in which a guild was theretofore founded and endowed with lands, out of the rents, revenues, and profits of which a school and an almshouse were maintained, and a bridge was from time to time kept up and repaired; which guild was then dissolved, and its lands lately come into the king's hands; and further reciting, that the inhabitants of the borough, from time immemorial, had enjoyed franchises, liberties, free customs, jurisdictions, privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild and otherwise, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the borough and its government would fall into a worse state without speedy remedy: and thereupon the inhabitants of the borough had prayed the king's favour for bettering the borough and government thereof, and for supporting the great charges which from time to time they were bound to sustain, to be deemed worthy to be made, &c., a body corporate, &c.; and thereupon the king, after granting to the inhabitants of the borough to be a corporation, (as before stated), granted them the same lands and limits as the borough and the jurisdiction thereof from time immemorial had extended to: and then the king, "willing that the almshouse and school should be kept up and maintained"

therefore, (without naming the bridge,) and that the great charges to the borough and its inhabitants from time to time incident might be thereafter the better sustained and supported, granted to the corporation the lands of the late guild: and it further appearing by parol testimony, as far back as living memory went, that the corporation had always repaired the bridge:—Held, that taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, 1st, that this was a corporation by prescription, though words of creation only were used in the incorporating part of the charter of Edw. 6; 2dly, that the burthen of repairing the bridge was upon such prescriptive corporation during the existence of the guild before that charter; though the guild, out of their revenues, had in fact repaired the bridge; which was only in case of the corporation, and not *ratione tenuræ*, and that the corporation were still bound by prescription, and not merely by tenure; and therefore that a verdict against them upon an indictment for the non-repair of the bridge, charging them as immemorably bound to the repair of it, was sustainable. *Rex v. Stratford-upon-Avon (Mayor, &c.)*, 14 East, 348.

Where, by an act of parliament, trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public, and therefore where trustees empowered by act of parliament to make a road from A. to B. (being in length twelve miles), and completed eleven miles and a half of such road, to a point where it intersected a public highway, it was held that the district in which the part so completed lay was not bound to repair it. *Rex v. Cumberworth*, 3 B. & Adol. 108.

On an indictment for encroaching on a public highway, it appeared that in 1771 commissioners under an inclosure act had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as private and eight yards wide; and in setting it out they left a space of sixty feet between the fences; and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, and the township repaired it. The space said to be encroached upon was at the side of this road, and here was a diversity of evidence as to the use made of this space by the public and its condition since the time of the award:—Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of this evidence it was a proper question for the jury whether or not the road in question, though originally intended to be private, had been dedicated to and adopted by the public. *Semble*, per Lord Kenten, C. J., that when a road runs through a space of fifty or sixty feet between inclosures set out by act of parliament, it is *prima facie* to be

presumed that the whole of that space is public, though it may not all be used or kept in repair as a road. *Rex v. Wright*, 3 B. & Adol. 681.

The inhabitants of a county are bound by common law to repair bridges erected over such water only as answers the description of *flumen vel cursus aque*, that is, water flowing in a channel between banks more or less defined, although such channel may be occasionally dry. And therefore where the road by which a bridge was approached passed between meadows which were occasionally flooded by a river, and for convenient access to the bridge a raised causeway had been made, having arches or culverts at intervals for the passage of the flood-water, which were equally necessary to the safety of the main bridge and the causeway:—It was held, that the inhabitants of the county were not bound to repair such arches, being at the distance of more than 300 feet from the end of the main bridge. *Rex v. Oxfordshire*, 1 B. & Adol. 289.

An indictment for not repairing an ancient bridge, described it as being situate within the parish of P. and M., and averred that the inhabitants of P., and those of the township of M. aforesaid, were liable to repair such bridges, without proceeding to state what part of it was situate in the township of M., and that the inhabitants thereof were liable to repair it:—Held, bad upon error, as no special or sufficient consideration was shown to render the inhabitants of the township liable to repair, as they could not hold land, and consequently could not be liable *ratione tenuræ*. *Rex v. Penegoes and Mac-hynlleth (in error)*, 3 D. & R. 388; 2 B. & C. 166.

Indictment against a county for not repairing a bridge: plea, that J. S. is liable *ratione tenuræ*. The plea not sustained by evidence that the estate of J. S. was part of a larger estate, which part J. S. purchased of the former owner, who retained the rest in his own hands, and as well before the purchase as since has repaired the bridge; but where in such case the county was found guilty, the court gave leave to stay the judgment upon payment of costs until another indictment was preferred, in order to try the liability. *Rex v. Oxfordshire*, 16 East, 223.

An indictment for non-repair of a road or bridge on a liability *ratione tenuræ* cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory. *Rex v. Hayman*, 1 M. & M. 401—Tindal.

On such an indictment rated inhabitants are admissible as witnesses for the prosecution. *Id.*

An indictment had been preferred against a county for not repairing a bridge at the instance of the inhabitants of a parish, and the question intended to be tried was, whether the inhabitants of the parish or of the county were liable to repair it. The court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the bridge. *Rex v. Buckingham (Justices)*, 8 B. & C. 375; 2 M. & R. 412.



Upon not guilty to an indictment against the inhabitants of a county for not repairing a public bridge, it is competent to the defendants to give evidence of the bridge having been repaired by private individuals. *Rex v. Northampton*, 2 M. & S. 262.

The court is reluctant to stay judgment on an indictment for not repairing a bridge, and will not stay it generally, but only till further order; and, if the trial of another indictment is not proceeded in with all despatch, judgment will be given. *Rex v. Southampton*, 2 Chit. 215.

The court of quarter sessions cannot impose more than one fine for the non-repair of a bridge. *Rex v. Machynlleth*, 4 B. & A. 469.

A presentment under 13 Geo. 3, c. 78, s. 4, against a smaller district than a parish, must state expressly how they are liable to the repair of roads. *Rex v. Penderryn*, 2 T. R. 513.

A presentment by a magistrate under the stat. 13 Geo. 3, c. 78, s. 24, of a nuisance in a highway, must allege the offence to be done against the form of the statute. *Rex v. Winter*, 13 East, 258.

The fact of non-repair is triable, when a justice presents a highway upon his own view. *Rex v. Wiltshire (Justices)*, 1 W. Black. 467; 3 Burr. 1530.

Pending an information at the instance of a parish against a county for not repairing a bridge, the object being to try whether the parish or the county were liable to repair the bridge, the court refused to grant the defendants an inspection of the parish books relating to former repairs of the bridge. *Rex v. Bucks*, 2 M. & R. 412.

#### XC. RETURNING FROM TRANSPORTATION.

5 Geo. 4, c. 84.

An indictment, for being at large after an order of transportation, stated that the prisoner was capitally convicted at the assizes of 1818; and that mercy was extended to him on condition of his being transported for life to some parts beyond the seas; and that he was thereupon ordered to be transported to New South Wales, or to some of the islands adjacent; and it appeared that the condition on which mercy was granted was not general, but specific, that he should be transported to New South Wales, or some of the islands adjacent:—Held, a fatal variance. *Rex v. Fitzpatrick*, R. & R. C. C. 512.

An indictment on 56 Geo. 3, c. 27, s. 8, for being at large after sentence of transportation, should set forth the effect and substance of the former conviction; so likewise should the certificate of the former conviction. Therefore an indictment or certificate, under this section of the statute, stating the former conviction to have been for felony only, is insufficient. *Rex v. Watson*, R. & R. C. C. 468; 1 Russ. C. & M. 368.

So, an indictment and certificate stating that the prisoner was convicted of grand larceny without the benefit of clergy, without setting out the effect and substance of such former conviction,

were held insufficient. *Rex v. Sutcliffe*, R. & R. C. C. 469, n.; 1 Russ. C. & M. 402.

The king's sign manual may be given in evidence on an indictment for returning from transportation; and if the condition of it has not been substantially, though literally complied with, the prisoner shall be remitted to his former sentence. *Rex v. Miller*, 1 Leach, C. C. 74; 2 W. Black. 797.

A prisoner convicted of a capital crime, whose sentence is respited during the king's pleasure, and who, on having received pardon on condition of transportation for life, is afterwards found at large in Great Britain, without lawful cause, shall be referred back to his original sentence. *Rex v. Madan*, 1 Leach, C. C. 223.

Quære, whether a person who is convicted of a single felony, and receives judgment of transportation to America, but is pardoned on condition of transporting himself, and giving security so to do, can be convicted of the capital felony, or ought to be remitted to his former sentence, on his breaking the subsequent conditions on which the pardon was granted? *Rex v. Aickles*, 1 Leach, C. C. 390. And see *Rex v. Thorpe*, 1 Leach, C. C. 396, n.

#### XCI. ESCAPE, RESCUE, AND PRISON-BREACH.

[See the statutes collected, *Collier's Crim. Stat.*, tit. ESCAPE, RESCUE, AND PRISON-BREACH.]

A prison-breach, or rescue, is a common-law felony, if the person breaking out of prison, or rescued, is a convicted felon; and it is punishable as a common-law felony by imprisonment, and, under 19 Geo. 2, c. 74, s. 4, by not more than three times whipping in addition. *Rex v. Haswell*, R. & R. C. C. 458.

The offence of aiding a prisoner at war to escape is not complete, if such prisoner is acting in concert with those under whose charge he is, merely to detect the defendant, and has no intention to escape. *Rex v. Martin*, R. & R. C. C. 196.

A person who has been convicted of grand larceny, sentenced to transportation for seven years, but confined in the hulks and discharged at the end of seven years, is a competent witness, such confinement operating as a statute pardon; and that having escaped twice during such confinement, for a few hours each time, did not destroy the effect of it. *Rex v. Badcock*, R. & R. C. C. 248.

An indictment at common law, for aiding a prisoner's escape, should state that the party knew of his offence. *Rex v. Young*, 1 Russ. C. & M. 391.

Where a capital convict had a conditional pardon, and escaped, and the indictment against him stated that the king's pleasure was notified to the court, and the court thereupon ordered, &c., according to the terms of the pardon, and it appeared that the notification was to the judge after the assizes were over, and that he made the order:—Held, that the variance was fatal. *Rex v. Treedwell*, 1 Russ. C. & M. 402.

The stat. 16 Geo. 2, c. 31, which makes it felony to aid and assist any prisoner in an attempt

to make his escape, does not extend to a case of such aiding where an actual escape ensues. *Rez v. Tilley*, 2 Leach, C. C. 662.

An indictment on that statute, charging the prisoner with having aided and assisted in such an attempt, need not state that the party aided did attempt to make the escape; for he could not have been aided if no such an attempt had been made. *Id.*

A prisoner cannot be convicted on the 16 Geo. 2, c. 31, for facilitating an escape, if it appear, either by the indictment or on evidence, that the commitment was for suspicion only. *Rez v. Walker*, 1 Leach, C. C. 97; *S. P. Rez v. Greeniff*, 1 Leach, C. C. 363.

A delivery of instruments to a prisoner to facilitate his escape from jail is within stat. 16 Geo. 2, c. 31, although the prisoner has been pardoned of the offence of which he was convicted on condition of transportation. *Rez v. Shaw*, R. & R. C. C. 526.

A party may be convicted of delivering instruments to a prisoner to facilitate his escape from jail, although there is no evidence that he knew of what specific offence the person he assisted had been convicted. *Id.*

On an indictment on 16 Geo. 2, c. 31, for delivering instruments to a prisoner to facilitate his escape from jail:—Held, that if the record of the conviction of the prisoner, whose escape was to have been effected, is produced by the proper officer, no evidence is admissible to dispute what it states, or to show that it has never been filed amongst the other records of the county, although the indictment refers to it with a prout patet as remaining amongst the records. *Id.*

Throwing down, in attempting to escape, loose bricks at the top of a prison wall, placed there to impede escape and give alarm, is a prison-breach, though they are thrown down by accident. *Rez v. Harwell*, R. & R. C. C. 458.

It would seem that the giving assistance to a person suspected of felony, and pursued by the officers of justice, in order to enable such person to avoid being arrested, is a misdemeanour, as being an obstruction to the course of public justice. *Rez v. Buckle*, 1 Russ. C. & M. 361—*barrow*.

Before the passing of the 1 & 2 Geo. 4, c. 88, rescuing a person under a commitment for burglary, was not a transportable offence, but punishable only as a felony within clergy at common law. *Rez v. Stanley*, R. & R. C. C. 432.

A person committed as a rogue and vagabond under the 23 Geo. 3, c. 88, who breaks jail, and is being committed as an incorrigible rogue under 17 Geo. 2, c. 5, breaks jail a second time, and then commits a new act of vagrancy as a rogue and vagabond, may be indicted for felony and transported under the Vagrant Act. *Rez v. Baillie*, 1 Leach, C. C. 396.

The certificate of the clerk of assize of a former conviction was held not to be evidence on an indictment for an escape before stat. 4 Geo. 4, c. 64, s. 44, as such a document was only evi-

dence in cases when expressly made so by statute. *Rez v. Smith*, 1 Russ. C. & M. 368.

Such certificate should set forth the effect and substance of the conviction, and a mere statement that it was for felony, without anything more, is not sufficient. *Rez v. Watson*, 1 Russ. C. & M. 368; R. & R. C. C. 468; *S. P. Rez v. Sutcliffe*, 1 Russ. C. & M. 402; R. & R. C. C. 469.

A constable of the night is guilty of an indictable misdemeanour in suffering a street-walker, delivered to his custody by one of the nightly watch, to escape. *Rez v. Bootie*, 2 Burr. 864; 2 Ld. Ken. 575.

A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace that an indictment for a misdemeanour had been found against such party, is good, and therefore if upon such a warrant the party be arrested and afterwards rescued, those who are guilty of the rescue may be convicted of a misdemeanour. *Rez v. Stokes*, 5 C. & P. 148—*Park*.

## XCH. ATTEMPT TO COMMIT MISDEMEANOUR.

An attempt to commit a statutable misdemeanour is as much indictable as an attempt to commit a common-law misdemeanour. *Rez v. —*, R. & R. C. C. 107—*Le Blanc*.

## XCIII. OFFENCES AT SEA.

7 Geo. 4, c. 38; 7 Geo. 4, c. 64, ss. 9, 10 & 11; 7 & 8 Geo. 4, c. 28, s. 12; 9 Geo. 4, c. 31, s. 32.]

Accessories before the fact on shore, to the wilful destruction of a ship on the high seas, were not triable by the Admiralty jurisdiction under stat. 11 Geo. 1, c. 29, s. 7. *Rez v. Easterby*, 2 Leach, C. C. 947; 1 East, P. C. Add. xxvi. *But see stat. cited supra*.

The commissioners under the 28 Hen. 8, c. 15, for the trial of murders committed on the high seas, &c., were not restricted to places which were without the body of any county. *Rez v. Bruce*, R. & R. C. C. 243; 2 Leach, C. C. 1093.

When the haven, &c., is within the body of a county, the common-law tribunals have also a concurrent jurisdiction with the Admiralty. *Id.*

If a loaded pistol be fired from the land at a distance of one hundred yards from the sea, and a man is maliciously killed in the water one hundred yards from the shore, the offender shall be tried by the Admiralty jurisdiction; for the offence is committed where the death happened, and not at the place from whence the cause of death proceeds. *Rez v. Coombes*, 1 Leach, C. C. 388; 1 East, P. C. 369.

The Admiralty had no jurisdiction to try an offence against stat. 11 Geo. 1, c. 29, in procuring the destruction of a ship, of which the prisoners were the owners, there being no evidence of any act of procurement done upon the high seas within the jurisdiction of the Admiralty. *Rez v. Easterby*, R. & R. C. C. 37; 1 East, P. C. Add.

xxvi.; 2 Leach, C. C. 947. *But see the stats. cited supra.*

Where a prisoner was convicted capitally at the Admiralty sessions for maliciously stabbing, upon the 43 Geo. 3, c. 58:—Held, that as that statute only made the offence capital if committed in England or Ireland, it was not so if committed at sea, and therefore not triable under the 39 Geo. 3, c. 37. *Rez v. Amarro, R. & R. C. C. 286. But see the stats. cited supra.*

#### XCIV. APPREHENSION OF OFFENDERS.

7 Geo. 4, c. 142; 7 & 8 Geo. 4, c. 29, s. 63; 7 & 8 Geo. 4, c. 30, s. 28; 10 Geo. 4, c. 44, s. 7; 11 Geo. 4, c. 27; 3 & 4 Will. 4, s. 19.

General warrants are illegal, and void. *Money v. Leach, 1 W. Black. 555.*

If the putative father of a bastard child is taken up under a warrant, and brought before a magistrate to find sureties to indemnify the parish, and is let go on promise to find such, quære whether, in case he neglects to do so, he can be again taken up under the same warrant? *Dickinson v. Brown, Peake, 234—Kenyon; 1 Esp. 218.*

A warrant to arrest the party "to the end that he may become bound, &c., at the next sessions," means the next session after the arrest, therefore the officer may justify an arrest after the sessions next ensuing the date of the warrant. *Mayhew v. Parker, 8 T. R. 110; 2 Esp. 683.*

A constable is not justified in taking a person into custody for a mere assault, unless he is present at the time. *Coupey v. Henley, 2 Esp. 540—Eyre.*

Using loud words in the street, though disorderly, is not an offence for which a party should be taken into custody. *Hardy v. Murphy and Wedge, 1 Esp. 294—Eyre.*

If a party be turning towards the wall in a street on a particular occasion, a watchman is not justified in collaring him to prevent his so doing. *Booth v. Hanley, 2 C. & P. 288.*

If a constable is preventing a breach of the peace, and any person stands in his way to hinder him from so doing, the constable is justified in taking such person into custody, but not in giving him a blow. *Levi v. Edwards, 1 C. & P. 40.*

A peace-officer may justify an arrest on a reasonable charge of felony without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot. *Samuel v. Payne, 1 Dougl. 359.*

Where a felony has actually been committed, a constable, or even a private person, acting bona fide and in pursuit of the offender, upon such information as amounts to a reasonable and probable ground of suspicion, may justify an arrest. *Ledwith v. Catchpole, Cald. 291.*

A constable having reasonable cause to suspect a person of felony may arrest him, though it appears no felony was committed. *Beckwith v.*

*Philby, 6 B. & C. 35; Hobbs v. Broadbent, 1 Camp. 420—Ellenborough.*

A constable is justified in apprehending a person charged on suspicion of felony, if he have reasonable or probable cause to believe that the party charged is the felon; and it having been left to the jury to say whether, on all the facts before them, they thought that the constable had reasonable ground to suppose that the party charged was guilty of felony, and whether they would have acted as the constable did:—Held, that this direction was right in substance, and that the constable did not exercise an undue degree of coercion, although he apprehended the party (a female) at night, without any warrant, and conveyed her to prison previously to taking her before a magistrate. *Davis v. Russell, 2 L. & P. 590.*

When a private person apprehends another on suspicion of felony he does it at his peril, and is liable to an action unless he can establish in proof that the party has actually been guilty of felony. *Adams v. Moore, 2 Selw. N. P. 918—Heath.*

If a reasonable charge of felony be made against a person who is given in charge to a constable, the constable is bound to take him, and he will be justified in so doing, although the charge may turn out to be unfounded. *Cowley v. Dabbar, 2 C. & P. 565.*

If a person be taken by a private individual without warrant on suspicion of felony, and conduct himself in a manner to excite suspicion, the only goes in mitigation of damages, if it turns out that no felony was committed. *Id.*

A constable arresting one on suspicion of felony is bound to take him before a magistrate as soon as he reasonably can, and he cannot justify detaining him three days without going before a magistrate in order that evidence may be collected in support of the prosecution. *Wright v. Court, 6 D. & R. 623.*

A constable, having taken a prisoner on suspicion of felony, has no right to handcuff him, except he has attempted to escape, or except it is necessary in order to prevent his escaping. *Id.*

Watchmen and beadle have authority at common law to arrest and detain in prison, for examination, persons walking the streets at night whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. *Lawrence v. Ridge, 3 Taunt. 14.*

Watchmen may imprison any person who encourages prisoners in their custody to mutiny. *White v. Edmunds, Peake, 89—Kenyon.*

Suspicion that a party has on a former occasion committed a misdemeanour, is no justification for giving him in charge to a constable without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanour and another, as breach of the peace and fraud. *Fox v. Gaunt, 3 B. & Ad. 798.*

A woman died after a very short illness; rumours were generally in circulation in the neighbourhood where she had lived that her husband

had poisoned her, and a great crowd was collected in front of his house; upon which the constable of the parish, without any warrant, took him into custody, and conveyed him before a magistrate, who detained him till medical men had reported the cause of death, and then discharged him:—Held, that, if the jury were of opinion that the constable had reasonable ground of suspicion to justify the apprehension, the action could not be maintained. *Nicholson v. Hardwick*, 5 C. & P. 495—Gurney.

A British subject arrested abroad under a warrant upon an indictment for a misdemeanour, brought in custody to England, and there committed to prison, is not entitled to be discharged—Per Lord Tenterden, C. J., and Parke, J.; dubitante, Littledale, J. *Ex parte Scott*, 4 M. & R. 361; 9 B. & C. 446.

Where the crew of a Dutch ship had mastered the vessel and run away with her, and brought her into Deal, it was held that they might be seized and sent back to Holland. *Mure v. Kay*, 1 Taunt. 43.

A wilful trespass on another person's property, without doing any real damage, is not sufficient to justify the apprehension of the parties under 1 Geo. 4, c. 56, s. 3, (since repealed, but re-enacted by 7 & 8 Geo. 4, c. 30); and in an action of trespass for the apprehension, the jury cannot presume damage. *Butler v. Turley*, 2 C. & P. 585—Best; 1 M. & M. 54.

If a man be found attempting to commit a felony in the night, any one may apprehend and detain him until he can be carried before a magistrate. *Rez v. Hunt*, 1 R. & M. C. C. 93.

A charge to a constable, on taking a person into custody, that he has a forged note in his possession, without anything more, is defective, though the defect is immaterial, it not being necessary that the charge should contain the same accurate description of the offence as an indictment. *Rez v. Ford*, R. & R. C. C. 329.

A constable is not justified in apprehending a person as a receiver of stolen goods on the mere assertion of the principal felon. *Isaacs v. Brand*, 1 Stark. 167—Ellenborough.

A, a hawker, went to the house of B. to sell goods, and a dog of B. coming out of the house, L. knocked out one of its eyes, for which B.'s wife caused A. to be apprehended:—Held, that it was for the jury to say whether A. had struck the dog for his own preservation, and fairly to protect himself; or whether it was a wilful and malicious trespass on his part. To justify the apprehension of an offender under the Malicious Injuries Act, 7 & 8 Geo. 4, c. 30, the offender must be taken in fact, or on a quick pursuit. *Lawney v. Boulbee*, 4 C. & P. 350—Tindal; 2 L. & M. 15.

The owner of property arresting a person in the bona fide belief that he was acting in pursuance of 7 & 8 Geo. 4, c. 30, s. 28, is entitled to the notice of action required by sect. 41 of that statute. *Beechey v. Sides*, 4 M. & R. 634; 9 B. & C. 806.

A went to a house at night, demanding to see

the servant. He was told to depart, and would not. A constable was sent for, and A. went from the house to the garden. When the constable arrived, A. said that if a light appeared at the windows he would break them; upon which the constable took him into custody:—Held, that the constable was not justified in so doing. *Rez v. Bright*, 4 C. & P. 387—Parke.

Magistrates have no authority to detain a person known to them till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made. *Rez v. Birnie*, 5 C. & P. 206; 1 M. & R. 160—Tenterden.

#### KCV. EXAMINATION.

On an investigation of a charge of felony before a justice of the peace, an attorney is only permitted to be present as a matter of courtesy; nor can he comment on the evidence, so as to apply the law to it, unless he be desired by such justice to give his opinion and advice on the case. *Rez v. Borron*, 3 B. & A. 432; S. P. *Cox v. Coleridge*, 2 D. & R. 86; 8 B. & C. 37. And see *Rez v. Staffordshire (Justices)*, 1 Chit. 218; see *Collier v. Hicks (Bart.)*, 2 B. & Adol. 663.

#### KCVI. COMMITMENT FOR RE-EXAMINATION.

Trespass will lie against a magistrate for committing a party charged with felony for re-examination for an unreasonable time, but without any improper motive. *Davis v. Capper*, 10 B. & C. 28; 5 M. & R. 53.

Seemingly, that a warrant of commitment for an unreasonable time is wholly void. *Id.*

On charges of felony, a magistrate has a power to commit for re-examination for a reasonable time. What is a reasonable time will greatly depend upon the circumstances of each case—fifteen days is an unreasonable time unless there be circumstances to account for it, and those circumstances it will be incumbent on the magistrate to show. The fact, that a letter addressed to the prisoner, (but which was intercepted, and never was in the hands of the prisoner), mentioned the prisoner as a participator in the felony, and stated that the writer of it would write again in a fortnight, is not sufficient to warrant such a commitment. The question of reasonable time is a mixed question of law and fact. It will be for the jury to say what the facts are, but the judge will direct them upon those facts, whether the time was reasonable or not, as matter of law. If a magistrate commits a party till a certain day for re-examination, it is his bounden duty to be in attendance on that day, to take the further examination, and to discharge the party, if there be not evidence sufficient to warrant a further commitment. If a party is committed for further examination for an unreasonable time, his remedy is by action of trespass against the committing magistrate. If a magistrate commits a prisoner for fifteen days, for further examination, to make the prisoner tell who wrote a letter which was addressed to

the prisoner, but which was intercepted, and never was in the hands of the prisoner, such commitment will be illegal. *Davis v. Capper*, 4 C. & P. 134—Vaughan.

### XCVII. SEARCH WARRANTS.

7 & 8 Geo. 4, c. 29, s. 63; 3 & 4 Will. 4, c. 19.

A positive oath that a felony is actually committed is not necessary to justify a magistrate in granting his warrant to search the premises and apprehend the person of a party suspected of felony. *Elsee v. Smith*, 1 D. & R. 97.

Where a constable, having a warrant to search for certain specific goods alleged to have been stolen, found and took away those goods, and certain others also supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant:—Held, that the constable was liable in an action of trespass. *Crozier v. Cundey*, 6 B. & C. 232; 9 D. & R. 224.

Excise officers went with a search warrant, and, at the desire of the party, gave it him to peruse, when he refused to return it:—Held, that they had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary. *Rez v. Mitton*, 3 C. & P. 31—Tenterden: *S. C. nom. Rez v. Mitton*, 1 M. & M. 107.

As to the proper mode of executing search warrants, see *Entick v. Carrington*, 19 St. Tr. 1067.

### XCVIII. BAIL.

#### 1. In Felony.

7 Geo. 4, c. 64, s. 1.—By stat. 7 Geo. 4, c. 64, the stats. 3 Edw. 1, c. 15, 23 Hen. 6, c. 9, 3 Hen. 7, c. 3, are partially, and 1 & 2 P. & M. c. 13, is wholly repealed.

A prisoner is not entitled to bail when committed on an express charge of felony, unless particular circumstances can be shown. *Anon. Loft*, 281.

Though a warrant of commitment for felony be informal, yet if the corpus delicti appear in the depositions returned to the court, they will not bail, but remand the prisoner. *Rez v. Marks*, 3 East, 157.

Although it is not necessary to state in a warrant of commitment on a charge of felony that the act was done "feloniously," yet, unless it sufficiently appear to the court that a felony has been committed, they are bound to bail the defendant. *Rez v. Judd*, 2 T. R. 255.

In one case, on a charge of rape, the accused was held to bail by himself and three sureties. *Rez v. Booth*, 2 Ld. Ken. 170.

So, in another, bail was taken by the court on a charge of rape both from the principal and accessories, on special affidavits, and particular

circumstances. *Rez v. Griefenberg*, 4 Bar. 2179.

A prisoner brought up on the charge of house-stealing was admitted to bail. *Rez v. —*, 1 Chit. 110.

A prisoner committed for manslaughter was allowed to give bail before a magistrate in the country by reason of his poverty, which rendered him unable to appear with bail in court. *Rez v. Massey*, 6 M. & S. 108.

After defendants have been admitted to bail on a criminal charge, the court will not, on account of aggravating facts, increase the bail. *Rez v. Salter*, 2 Chit. 109.

Now it is an invariable rule to require full bail in cases of felony. *Rez v. Shaw*, 6 D. & L. 154.

An accomplice in felony was held to be bailable, the principal not being taken. *Anon. Ld.*, 554.

An accomplice entitled to a pardon, 1. by improvement; 2. by stats. 10 & 11 Will. 3, and Anne, c. 4; 3. by proclamation: whenever he has a right to it, the court will bail him, that he may apply for it. *Rez v. Rudd*, Cowp. 334.

So, they will if he has only an equitable claim to a recommendation for mercy gained by being admitted evidence for the crown under the practice allowed. *Id.*

Upon an application to bail, the court of K. B. requires to see the depositions, and will then, if they see just cause, discharge bail, or detain the prisoner, without regarding the regularity or irregularity of the commitment. *Rez v. Homer*, Cald. 295.

The court of K. B. in admitting to bail will look into the depositions, and guide their decision by the circumstances of the case. *Rez v. Horner*, 1 Leach, C. C. 270.

In a commitment for felony it is not necessary to allege that the offence was feloniously done, it is sufficient if enough appear for the court to collect whether the charge be felony or not, and they will accordingly bail or remand the prisoner. *Rez v. Judd*, 1 Leach, C. C. 484; 2 East, P. C. 1018.

A prisoner committed to Newgate for high treason in North America, who is only tried before the King's Bench, or under a special commission, cannot be admitted to bail, under the habeas corpus act, by justices of jail delivery, or discharged by their proclamation for want of prosecution. *Rez v. Platt*, 1 Leach, C. C. 151.

Where the court thought that a prisoner ought to be bailed for felony, if he be unable to defray the expense of being brought to Westminster for that purpose, they will grant a rule to show cause why he should not be bailed by a magistrate in the country. *Rez v. Jones*, 1 B. & A. 381.

#### 2. In Misdemeanours and other Cases.

A defendant, brought up for judgment after conviction, stands committed, unless the pro-

entor consents to bail. *Rex v. Waddington*, 1 East, 159.

The court of C. P. cannot apply the forfeited penalties of the recognizances of bail to attachments to the discharge of the debt of the defendant in the original action and costs. *Rex v. Dacey*, 3 Taunt. 112.

The 5 Geo. 2, c. 19, s. 2, requiring the party removing a conviction by a magistrate into K. B. to enter into a recognizance, with two sureties in 50*l.* conditioned to prosecute the writ with effect, &c., is not complied with by the party and his two sureties entering into a recognizance in 25*l.* each, but it must be in the entire sum of 50*l.* *Rex v. Dunn*, 8 T. R. 217.

The sheriff has no authority to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions for a misdemeanour; he can only take a recognizance for their appearance. *Bengough v. Rossiter*, 4 T. R. 505; 2 H. Black. 418, 426, 435.

An attachment upon articles of the peace is bailable before justices of the county. *Rex v. Bomaster*, 1 W. Black. 233.

A motion to bail a defendant for an assault must be made before a judge at chambers. *Rex v. —*, 2 Chit. 110.

Persons committed for forcibly resisting custom-house officers in the execution of their duty cannot demand to be bailed as of right. *Rex v. Duen*, 5 Burr. 2640.

Special bail shall be given to pay the forfeiture, or yield the body, for the defendant having unsealed wrought silk in his custody. *Rex v. Rebord*, 3 Burr. 1569.

Where on error brought it was held that an entry by an inferior jurisdiction did not amount to a judgment, but was merely an order, the court awarded a procedendo to the court below, commanding them to proceed to give the proper judgment, but in the mean time allowed the prisoner to be bailed. *Rex v. Kenworthy*, 3 D. & R. 173; 1 B. & C. 711.

A member of parliament discharged without bail from a committal for writing a seditious libel, by virtue of a general warrant from the secretary of state. *Rex v. Wilkes*, 2 Wils. 151.

The bail of one acquitted of perjury shall be discharged, although the acquittal be not entered of record. *Rex v. Spencer*, 1 Wils. 315.

When the House of Lords had voted the defendant guilty of a breach of privilege, and committed him to prison, the court of K. B. refused to discharge him out of custody. *Rex v. Flower*, 3 T. R. 314.

A commitment by a justice of the peace for a time certain, as for fourteen days, under the Vagrant Act, is a commitment in execution, and he party is not entitled to be bailed. *Rex v. Brooke*, 2 T. R. 190.

A certiorari, removing an indictment from the Old Bailey into K. B., will discharge a recognizance, if a prisoner have been admitted to bail  
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on a charge of perjury. *Rex v. Richardson*, 2 Leach, C. C. 560.

But it is otherwise if the prisoner be in actual custody. *Id.*

#### XCIX. COMMITMENT OF WITNESSES.

7 & 8 Geo. 4, c. 64. s. 2.

A justice of the peace may commit a fame covert, who is a material witness upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennett v. Watson*, 3 M. & S. 1.

In some counties where a child is a witness in a prosecution, and have no one who will enter into a recognizance for his or her appearance at the trial, the practice is for the constable or police officer to enter into a recognizance for the child's appearance, and to take the child to the assizes, he being allowed the expenses for the child's travelling, &c.; and in such a case, where a child was taken away, and the constable could not bring her to the assizes, the judge respited the constable's recognizance that he might bring the child to the next assizes. *M. S.*

#### C. COMMITMENT BY BOROUGH MAGISTRATES.

60 Geo. 3, c. 14.

Where the magistrates of a borough had exclusive jurisdiction within the borough, but concurrent jurisdiction with the county magistrates over the liberties of the borough:—Held, that, for offences committed within the liberties, they might commit to the county jail, and try the prisoners at the borough sessions. *Rex v. Mason*, 9 D. & R. 172.

#### CL. CORONER'S INQUESTS.

A coroner, who is a judicial as well as a ministerial officer, cannot appoint a deputy to hold an inquest. *Rex v. Farrant*, 1 Ch. 745; S. C. nom. *Rex v. Farrand*, 3 B. & A. 260.

And where such inquest has been irregularly assembled and afterwards adjourned, the court will not compel the coroner, by mandamus, to proceed with the inquisition. *Id.*

The jurisdiction of a coroner is only super visum corporis, and the view of the body must be taken by the jury and the coroner at the same time. *Id.*

Where a coroner's clerk, in the absence of his principal, summoned a jury, and charged them super visum corporis, and examined witnesses, and, after sitting several days, the coroner himself proceeded in person with the inquest, and afterwards had a view of the body without the presence of the jury, and then proceeded with the inquest without reexamining the jury or the witnesses previously examined; it was held, that the proceedings were altogether illegal, and that an inquisition found under such circumstances might be quashed. *Id.*

Where an inquisition was signed "A., deputy

steward and coroner." the court refused to quash it in toto as necessarily void for want of authority, as it might mean coroner and deputy steward. *Ex parte Carruthers*, 2 M. & R. 397.

Whether a custom for a coroner to appoint a deputy is bad, quære? *Id.*

Trespass will not lie against a coroner for turning a man out of the room where he is about to hold an inquisition. *Garnett v. Ferrard*, 6 B. & C. 611; 9 D. & R. 657.

A coroner's inquisition must be on parchment, and not on paper. *Rex v. Beavers*, 1 East, P. C. 383.

It must be signed by all the jury as well as the coroner. *Rex v. Norfolk (Justices)*, 1 East, P. C. 383.

It is usual for them to seal it also. *Id.*

If the names of the jurors be not set out in the caption of a coroner's inquisition, and the inquisition be not signed by the jurors with their names at length, the inquisition is bad. *Rex v. Bowen*, 3 C. & P. 602—Park.

If some of the jurors sign with their marks, such marks ought to be verified by an attestation. *Id.*

It is no objection to a coroner's inquisition that one of the jurors did not sign his Christian name at length, if the names of the jurors be set out at length in the body of the inquisition. *Rex v. Bennett*, 6 C. & P. 179—Gurney.

After a verdict, the court will presume that a coroner's inquisition was found by twelve jurors, if twelve were necessary. *Taylor v. Lambe*, 6 D. & R. 188; 4 B. & C. 138.

Quære, whether it be necessary at all that the inquisition should be found by twelve jurors? *Id.*

A coroner's inquest omitted to state the place where the death happened, or where the body was found: the names of the jurors were not inserted in the body of the inquisition, and it was subscribed by them with the initials only of their Christian names:—Held, that these were defects in substance, and could not be amended, and the inquisition was quashed. *Rex v. Ewett*, 6 B. & C. 247; 9 D. & R. 237.

If the inquisition found that the death was occasioned by a coach and horses, the property of A. and B. and Co.:—Held, that this finding could not be altered, upon affidavit that the property was in A. and B. alone. *Id.*

It is no objection to a coroner's inquisition for murder that the offence is stated to have been committed on the 26th day June, omitting the word "of." *Rex v. Huggins*, 3 C. & P. 414—Vaughan.

A coroner is guilty of an indictable offence in taking a sum of money for not holding an inquest; whether he have any pretence for holding the inquest or not, he is equally criminal in having extorted money to refrain from doing his office. *Rex v. Harrison*, 1 East, P. C. 482.

A coroner on an inquisition super visum corporis ought to hear evidence on oath, not only on the part of the crown, but on the part of the

person accused. *Rex v. Sorey*, 1 Leach, C. C. 43.

A coroner's inquisition may be quashed a part for uncertainty, and stand good for the residue. *Ex parte Carruthers*, 2 M. & R. 397.

The court of King's Bench will quash a coroner's inquest in which the facts of the case are stated, and the verdict found is not warranted by such facts. *In re Cully*, 2 Nev. & M. 61.

It is the duty of a coroner, in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death. *Rex v. Quinch*, 4 C. & P. 571—Alderson.

On all inquests held on the bodies of dead bastard children, it is the bounden duty of the coroner to tell the jury, in all cases where there is not the most clear and decisive proof that the child was born alive, that they ought never to think of returning a verdict of wilful murder against the mother. *Rex v. Bayley*, Car. C. L. 243—Vaughan.

#### CIL TRIAL ON A VERDICT IN A CIVIL CASE.

If a verdict be found for the defendant in an action of slander; or on a justification of words of felony, the plaintiff may be arraigned without grand jury. *Cook v. Field*, 3 Esp. 133—Mayne.

In an action for money had and received, if it appear that the defendant received the money from the plaintiff to carry to a bank, and that instead of so doing the defendant kept it, the judge at the assizes will leave it to the jury to say, whether the defendant received it with an intent to steal it, and then feloniously converted it; and if the jury find this in the affirmative, the judge will direct a verdict to be entered for the defendant, and that the defendant shall be tried for the felony on this finding. *Prosser v. Ross*, 10 C. & P. 421—Park.

#### CIII. PRESENTMENTS BY CONSTABLE.

The presentment of constable for any offence whether at the assizes or quarter sessions, must be made upon oath before the grand jury. *Rex v. Somersetshire (Justices)*, 1 M. & R. 372. *See* 7 & 8 Geo. 4, c. 38.

Where a high constable presents persons as a nuisance in a highway, he must go before the grand jury and give his evidence on oath. *Rex v. Bridgewater Canal Company*, 7 B. & C. 84.

#### CIV. INDICTMENT.

##### 1. For what it lies, and of quashing.

An indictment will not lie for a mere civil injury. *Rex v. Storr*, 3 Burr. 1698.

As for pulling off the thatch of a man's dwelling-house. *Rex v. Atkins*, 3 Burr. 1708.

Or for selling, as two chaldrons of coals, a less quantity. *Rex v. Osborn*, 3 Burr. 1687.

That which is declared by statute to be a misdemeanour cannot be a felony. *Res v. Walford*, 5 Esp. 62—Hotham.

Indictment lies not upon an act of Parliament which creates a new offence, and prescribes a particular remedy. *Res v. Wright*, 1 Burr. 543.

The court refused to quash upon motion an indictment for selling by false weights. *Res v. Crookes*, 3 Burr. 1841.

So they refused to quash an indictment against several for entering a lead mine and carrying away lead, on the ground that it was a mere trespass. *Res v. Johnston*, 1 Wils. 325.

An indictment cannot be quashed after the prisoner has pleaded. *Res v. Frith*, 1 Leach, C. C. 11.

But the court may, in its discretion, quash an indictment at any time before the jury are charged with the trial of the prisoner. *Id.*

Where a defendant was indicted with an alias dictus, and pleaded in abatement that he was not known by such name:—Held, that the plea must be demurred to, and could not be quashed on motion. *Res v. Clark*, 1 D. & R. 43.

The court will never quash an indictment for a serious offence but upon the clearest and plainest grounds. *Res v. Wetherill*, Cald. 432.

Erroneous style of the sessions is a sufficient cause for quashing an indictment. *Res v. Roysted*, 1 Ld. Ken. 255.

It seems that the court will, on motion, quash an indictment for perjury, for the want of an addition to the defendant's name, if the exception be properly taken; but they refused to quash such an indictment where the defendant produced no affidavit stating his proper addition. *Res v. Thomas*, 3 D. & R. 621. *But see the stat. 7 Geo. 4, c. 64, s. 19.*

An indictment for converting a house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women, quashed. *Res v. Macdonald*, 3 Burr. 1645.

Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. But, except in certain cases, where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation: and if the sense of any word be in ordinary acceptation ambiguous, it shall be construed according as the context and subject-matter require it to be, in order to make the whole consistent and sensible. The word "until" may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. *Res v. Stevens*, 5 East, 244; 1 Smith, 437.

Indictment quashed for unlawfully tanning contrary to 1 Jac. 1, c. 22, s. 5, because several defendants were joined in it. *Res v. Tucker*, 4 Burr. 2046.

An indictment for a conspiracy "to defraud J. W. of divers goods, and in pursuance of the conspiracy defrauding him of divers goods, to

wit, of the value of 100l.," cannot be quashed for not specifying the particular goods of which the prosecutor had been defrauded; and it seems that the court in such a case will not call upon the prosecutor to deliver to the defendant a particular of the goods referred to in the indictment. *Res v. —*, 1 Chit. 698.

The statutes of jeofails do not extend to criminal prosecutions. *Atcheson v. Everitt*, Cowp. 392.

Terms may be imposed on a prosecutor before he is allowed to quash his own indictment. *Res v. Webb*, 3 Burr. 1468; 1 W. Black. 460.

An indictment against the defendant, standing first in order in the paper, was moved to be quashed on the usual terms; but the court only allowed it to be quashed on disclosing the name of the prosecutor, and that the substituted indictment should stand in the same situation as the first would have done. *Res v. Glenn*, 3 B. & A. 373. *And see Res v. —*, 1 Chit. 698.

The court will not quash a defective indictment on the motion of the prosecutor, after plea pleaded, before another good indictment be found. *Res v. Wynn*, 2 East, 226.

## 2. Change of Venue.

The court will remove an indictment for a misdemeanour from one county to another, if there is reasonable cause to apprehend or suspect that justice will not be impartially administered in the former county. *Res v. Hunt*, 3 B. & A. 444; 2 Chit. 130.

Therefore, on an indictment for a conspiracy, the court permitted a suggestion to be entered, for the purpose of awarding a venire into an adjoining county, where it appeared on affidavit that there was a reasonable ground for believing that a fair trial could not be had in the county where the venue was laid, and held that such suggestion need not state the facts from whence it was drawn. *Res v. Hunt*, 3 B. & A. 444; 2 Chit. 130.

It is no reason for changing the venue in an indictment for a conspiracy in destroying foxes and other noxious animals, that the gentry of the county in which the indictment was found are addicted to fox-hunting. *Res v. King*, 2 Chit. 217.

Evidence of partiality must be extremely strong to induce the court to change the venue in a criminal information. *Res v. Harris*, 3 Burr. 1330; 1 W. Black. 378.

## 3. Venue.

In murder and manslaughter, 9 Geo. 4, c. 31, ss. 7 & 8; near boundaries, &c., 7 Geo. 4, c. 64, s. 12; on journeys or in navigation, 7 Geo. 4, c. 64, s. 13.

The 26 Hen. 8, c. 6, s. 6, which made felonies committed in Wales triable in the adjoining English county, extended to felonies created since the 26 Hen. 8. *Res v. Wyndham*, R. & R. C. C. 197; 3 Camp. 78—Le Blanc.

A felony committed in Anglesea might have



been tried in the county of Salop, as the next adjoining English county to Wales. *Rez. v. Parry*, 1 Leach, C. C. 108; 2 East, P. C. 773.

An information at common law for a conspiracy between the captain and purser of a man of war, for planning and fabricating false vouchers to cheat the crown, (which planning and fabrication were done upon the high seas,) is well triable in Middlesex, upon proof there of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he there received. *Rez. v. Brisac, and Seme v. Scott*, 4 East, 164.

Indictments on 5 Eliz. c. 4, might be found at a city or at a borough sessions. *Rez. v. Strong*, 1 Burr. 251.

The venue of an information on 24 Geo. 2, c. 19, for being both a tanner and a shoemaker, need not be laid in the county where the offence was committed. *Att.-General v. Ferris*, 3 Anst. 871.

An indictment in the next adjoining county, for an offence within an inferior county, need not aver that the former is the next adjoining county. *Rez. v. Geff*, R. & R. C. C. 179.

But when the record is regularly drawn up, it may be stated in the memorandum or caption. *Id.*

But the indictment must state the offence to have been committed in the inferior county. *Id.*

Two prisoners indicted for horse-stealing in county A. were found in joint possession of two horses in that county, which they had jointly taken at different times and places in county B:—Held, that evidence could be given of one only of the takings in county B, each taking being a separate felony, and that the prosecutor's counsel must elect on which to proceed. *Rez. v. Smith*, 1 R. & M. 295—Littledale.

In an indictment for felony, it is not necessary to prove affirmatively for the prosecution that such a parish as that laid in the indictment exists in the county. *Rez. v. Dowling*, 1 R. & M. 433—Littledale.

On an indictment for breaking and entering a house in the day-time, G. N. and others being therein, and stealing to the value of 40s. The house was laid to be in the parish of "St. Botolph, Aldgate." It appeared that the parish where the house was situate was "St. Botolph without Aldgate:" the prisoner was acquitted of the capital charge, and convicted of larceny: the twelve judges held that he was rightly convicted, as there was no proof that there was no such parish in the county as that named. *Rez. v. Bullock*, Car. C. L. 282.

An indictment for stealing "a brass furnace," in the county of Hereford, is not supported by evidence of stealing a brass furnace in the county of Radnor, and breaking it there, and bringing the fragments into Herefordshire, as the prisoner had merely certain pieces of brass in that county. *Rez. v. Holloway*, 1 C. & P. 127—Hullock.

A felony was committed in the county of the city of London, (on London Bridge,) and within 500 yards of that part of the county of Surrey which consists of the borough of Southwark:—Held, that this was not a case triable at the sessions of the borough of Southwark. *Rez. v. Welsh*, Carr. Supp. 21; R. & M. C. C. 175.

#### 4. Caption.

The caption of an indictment must show that the court where it was found had jurisdiction. *Rez. v. Fearnley*, 1 Leach, C. C. 425.

In the Nisi Prius record of an indictment, removed by certiorari, the names of the grand jurors who found the indictment need not be inserted in the caption. *Rez. v. Davis*, 1 C. & P. 470—Park.

#### 5. Description of the Party accused.

7 Geo. 4, c. 64, s. 19.

If the name of a prisoner is unknown, and he refuses to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before the jurors by the keeper of the prison, will be sufficient. *Rez. v. —*, R. & R. C. C. 469.

But an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, is insufficient. *Id.*

An indictment against A. by the addition of "servant" is ill; but if A. plead in abatement he must give a better addition. *Rez. v. Chisholm*, 1 M. & S. 88.

An indictment was quashed before plea, because the addition was placed after the alias status, and not after the first name. *Rez. v. Smith*, 1 Leach, C. C. 420.

But where the prisoner had pleaded, the court held that the error had been cured. *Rez. v. Hannam*, 1 Leach, C. C. 420, n.

#### 6. Time and Place.

7 Geo. 4, c. 64, s. 20.

The time at which the offence charged took place must be positively averred, or the indictment is bad, and judgment may be arrested. *Anon. Loft*, 228.

Time and place must be added to every material fact in an indictment. *Rez. v. Holland*, 3 F. R. 607.

It is no objection on the plea of not guilty that there is no such place in the county as that in which the offence is stated to have been committed, and the fact that there is no such place in the county can only be taken advantage of by plea in abatement. *Rez. v. Woodward*, 1 C. C. R. 323.

Statuting the defendant to be late of W., and laying the offence to be at the parish of Radnor, was held not sufficiently certain. *Rez. v. Macken*, 5 T. R. 162.

But quare, whether it is necessary to lay the act in a particular place within the county. *Goldsmith's case*, 3 Camp. 77—Lawrence.

In an indictment, alleging a dwelling-house to be "situate at the parish aforesaid," the parish last mentioned must be intended. *Rex v. Richards*, M. & Rob. 177—Park.

A crime alleged to have been committed in the time of the late king, and charged to be against the peace of the now king, is fatal, and a conviction on such an indictment was reversed. *Rex v. Lookup*, 3 Burr. 1901.

An indictment for a rape, stated to have been committed the 9th of March, 1 Geo. 4, concluded "against the peace of our said late lord king:"—Held, that the word "late" might be rejected as surplusage. *Rex v. Scott*, R. & R. C. 415; 1 Russ. C. & M. 562.

Where an indictment for perjury stated the oath to have been taken, and the perjury to have been committed, tempore Geo. 2, and concluded against the peace of Geo. 3, it was held a fatal objection, and judgment reversed. *Rex v. Lookup*, 3 Burr. 901; R. & R. C. C. 176, n. See the case of *Rex v. Taylor*, post, 841, and the stat. 7 Geo. 4, c. 64, s. 20.

An indictment tried at the summer assizes, 1 Geo. 4, stated that the prisoner, 20th of July, in the fourth year of the reign of King George the Fourth, stole a mare, against the peace of our lord the now king:—Held, that the words "fourth year of the" might be rejected as surplusage, and that the prisoner was properly convicted in this indictment. *Rex v. Gill*, R. & R. C. C. 31.

Where time and place are material, the time and place stated shall be taken to be the true time and place. *Rex v. Nepper*, 1 R. & M. C. C. 4; 2 Russ. C. & M. 37.

Therefore, in an indictment for stealing in a dwelling-house, if it is not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the place named in the indictment by way of venue. *Id.*

An indictment which lays an offence to have been committed "at the Guildhall of the city of London" is bad, for the venue should be laid in some parish or ward. *Rex v. Harris*, 2 Leach, C. C. 800.

Where to constitute a statutable offence time material, the time stated in the indictment must in arrest of judgment be taken to be the true time, without a substantial averment; thus the stat. 6 Geo. 4, c. 108, s. 52, having made it a misdemeanour to exhibit lights to persons at sea between the months of September and April; legislation, that the party did so on the 9th of March, is sufficient, without a specific averment at he did between September and April. *Rex v. Brown*, 1 M. & M. 163—Littledale and Gaselee.

Where a statute makes an offence committed after a given day triable in the county where the offence is apprehended, and authorizes laying it as committed in that county, and does not vary the nature and character of the offence, it is no objection that the day laid in the indictment is before the day the statute mentions, if the offence were in fact committed after that day. *Rex v. Beharne*, M. C. C. R. 298.

An indictment for larceny had the words

"London to wit" in the margin, and described the prisoner as "late of London," and charged the offence to have been committed in the "parish of St. Mary-le-Bow" without averring that parish to be in London:—Held, bad, and that this was not aided by the stat. 7 Geo. 4, c. 64, s. 20. *Rex v. Minter Hart*, 6 C. & P. 106—Littledale and Bosanquet.

### 7. Value.

An indictment for stealing a sheep, or any other cattle, must lay it to be of some value, for unless its value exceeds twelve pence, the stealing is not capital. *Rex v. Peel*, R. & R. C. C. 407. But *querre*, as that case turned on it not being necessary for him to pray his clergy, as the thing stolen was not of twelve-pence value?

Where value is essential to constitute an offence, and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles, the grand jury having ascribed that value only to all those articles collectively. *Rex v. Forsyth*, R. & R. C. C. 274.

### 8. As to the Allegations.

If an indictment be in itself good, tautologous words shall be rejected as surplusage. *Rex v. Morris*, 1 Leach, C. C. 109.

A bad indictment may be made good by rejecting as insensible and useless such words as obstruct the sense of it. *Rex v. Redmond*, 1 Leach, C. C. 477.

A relative referring with equal uncertainty to two antecedents will vitiate an indictment. *Rex v. Graham*, 1 Leach, C. C. 87.

A statement in an indictment may be either according to the fact or the legal operation. *Rex v. Healey*, 1 R. & M. C. C. 1.

The words, "in manner and form following, that is to say," do not bind the party to recite an instrument, &c., verbatim. *Rex v. May*, 1 Leach, C. C. 193.

The words "as follow, that is to say," when introductory to a recital in an indictment, do not bind the party to an exact and verbatim recital. *Rex v. Hart*, 1 Leach, C. C. 145; 2 East, P. C. 978; 1 Doug. 193; Cowp. 229; S. P. *Rex v. May*, 1 Leach, C. C. 192.

The word "chattels," improperly inserted in a count against an accessory, may be rejected as surplusage. *Rex v. Sadi*, 1 Leach, C. C. 468.

Where an evil intent, accompanying an act, is necessary to constitute such act a crime, the intent must be alleged in the indictment, and proved; though it be sufficient to allege it in the prefatory part of the indictment. But where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecutor. *Rex v. Phillips*, 6 East, 464; 2 Smith, 550.

An indictment, which may apply to either of two different definite offences, is bad. Thus, where clergy was taken away from several descriptions of compound larcenies, it was held that the

indictment must specify the description charged, in order to assist the party of his clergy; and that a charge of robbing a dwelling-house in the day time to the value of five shillings, not showing whether any person was in the house or not, would not warrant a capital conviction, although as the law then stood it was, if no one was in the house, a capital offence under one statute, and a capital offence under another statute, if some one was in the house. *Rex v. Marshall, R. & M. C. C. R. 158.*

### 9. Name of the Party injured.

A prosecutor may be described by a name he has assumed, although it be not his right name, if he has been known by that name for several previous years. *Rex v. Norton, R. & R. C. C. 510; 2 Russ. C. & M. 169.*

A peer of Ireland cannot sue or prosecute by his name of dignity, but must be described by his proper name, with the addition of his degree and title. *Rex v. Graham, 2 Leach, C. C. 547.*

An indictment for manslaughter described the deceased, who was a peer of Ireland, as "H. S., Baron M. of C. in the county of R., in that part of the United Kingdom called Ireland." It was proved that H. was his Christian name, S. his family surname, and Baron M. &c., his title:—Held, no variance, and that the court was not bound to construe H. S. to be one Christian name. *Rex v. Brinklett, 5 C. & P. 416.*

On an indictment for committing an unnatural offence on one John Whyneard, the conviction was held right, although it was proved the name was Winyard, and pronounced Winnyard. *Rex v. Foster, R. & R. C. C. 412.*

If the name of a party killed be not known, he may be stated to be "a certain person to the jurors unknown." *Rex v. Clark, 1 Russ. C. & M. 466; R. & R. C. C. 358.*

A bastard must not be described by his mother's name till he has acquired that name by reputation. *Rex v. Clark, 1 Russ. C. & M. 466; R. & M. C. C. 358.*

The deceased was an illegitimate child twelve days old, and it was not even suggested that it had been baptized, but the prisoner, its mother, had said that she should like to have the child named "Mary Anne," and on two occasions afterwards called the child "Mary Anne," and on another occasion "Little Mary." The prisoner's master, who was the father of the child, had stated to one of the witnesses for the prosecution that he was a Baptist. The indictment alleged the child to be "a certain female child, whose name to the jurors was unknown." The prisoner was convicted, and the fifteen judges held the conviction right. *Rex v. Mary Smith, 6 C. & P. 151.*

In an indictment the property was laid in J. H. It appeared that the prosecutor's name was J. W. H.:—Held not material, if he was generally known by the name of J. H. *Rex v. Berriman, 5 C. & P. 601—Parks.*

If in a first count the property be laid in persons specifically named, and in the second as in

persons unknown; and at the trial the witnesses do not know the Christian names of some of the persons mentioned in the first count, the prosecutor cannot resort to the second count because the owners were known, but the evidence was defective. *Rex v. Robinson, Holt, 595—Richard.*

If goods be laid in an indictment as the property of "A. W. G., esq.," the addition is not material, and if he is not an esquire, it is no ground for an acquittal. *Rex v. Ogilvie, 2 C. & P. 328—Burrough.*

In an indictment for bigamy, the second wife was described as "E. C., widow." She was in fact not a widow, nor had she ever been represented or reputed to be so:—Held, a fatal variance. *Rex v. Deeley, 4 C. & P. 579; M.C.C. 303.*

If an act of parliament enacts that certain persons shall be called "directors of the poor, &c." Quære, whether in an indictment, property may be laid in them by the name of the "directors of the poor, &c.," they not being a corporation aggregate? *Rex v. Beacall, 1 C. & P. 313—Fid.*

### 10. Contra Pacem and Contra Formam Statuti

7 Geo. 4, c. 64, s. 20.

In an indictment for an offence at common law, a conclusion of contra formam statuti may be rejected as surplusage. *Rex v. Mathews, 51 R. 162; Nolan, 202.*

It is an offence at common law to obstruct the execution of powers granted by statute, and an indictment for such offence need not, and ought not, to conclude contra formam statuti. *Rex v. Smith, 2 Dougl. 441.*

Where an indictment set out the title of an act statute agreeably to Ruffhead, which differed from a copy of the act printed by the king's printer, the court refused to direct a nonsuit without proof of an examination of the parliament roll. *Rex v. Barnitt, 3 Camp. 344—Ellenborough.*

Seemingly, that every indictment for a misdemeanour must conclude contra pacem, &c. *Rex v. Taylor, 5 D. & R. 422.*

If one statute subjects an offence to a pecuniary penalty, and a subsequent statute makes it felony, an indictment for the felony concluding against the form of the statute (in the singular number only) is right. *Rex v. Pim, R. & L. C. 425.*

An indictment for a common-law felony must contain a "contra pacem." *Rex v. Cook, R. & L. C. C. 176; 2 Russ. C. & M. 172.*

So must an indictment for stealing articles, the stealing of which is made felony by statute; and in this case the laying the offence to have been against the form of the statute will not supply the defect. *Id.*

An indictment preferred in 2 Will. 4, for a felony committed on the 12th of March, 1834, charged the offence to have been "against the peace of our lord the king." This was objected to as soon as the case for the prosecution had closed. The prisoner was convicted, and the B.

teen judges held the conviction right. *Rex v. Chalmers*, 5 C. & P. 331 : M. C. C. 352.

The judges held that a bad contra pacem is as no contra pacem. *Id.*

### 11. Of joining Offences and Electing.

[See *Young v. Rex*, (in error), 3 T. R. 106, and *Rex v. Kingston*, 8 East, 41.]

A person may be charged with several offences of the same nature in the same indictment, and he judge will not, in cases of misdemeanour, require the prosecutor to confine himself to one offence. *Rex v. Jones*, 2 Camp. 131—Ellenb.

A count for embezzling bank-notes upon the statute may be joined with a count for larceny. *Rex v. Johnson*, 3 M. & S. 539.

A count charging the prisoner with having counterfeit money in his possession at the time he uttered other counterfeit money, must contain a distinct averment of the fact of uttering. *Rex v. Kelly*, 3 Esp. 28—Buller.

It is no objection in arrest of judgment that the indictment contains several charges of the same nature in the different counts. *Young v. Rex*, (in error), 3 T. R. 98. And see *Rex v. Bivole*, 2 Marsh. 466.

If one endeavour to commit two separate offences, a count in an indictment charging that endeavour may contain those two offences. *Rex v. Fuller*, 1 B. & P. 181.

If an indictment contain two counts, one charging the offence as a larceny, the other as a receiving, the judge will put the prosecutor to elect which he will go upon. *Rex v. Flower*, 3 C. & P. 413—Vaughan.

If two bills of indictment be preferred for the same offence, the one charging it capitally, the other as a misdemeanour, and both be found, the judge will put the party upon his election which to go upon, and direct an acquittal on the other. *Rex v. Smith*, 3 C. & P. 412—Vaughan.

It is no objection in point of law that an indictment charges the prisoners in one count as principals in stealing, and in another count as receivers, or that the prisoners are tried without saving the prosecutor put to his election on which charge to proceed, though the prisoners asked it. The judges were equally divided as to whether the prosecutor should have been put to his election, but all agreed that directions should be given to the clerks of indictments not to put both charges in the same indictment. *Rex v. Alloway*, R. & M. C. C. R. 234.

The officers ought not to join in the same indictments, counts charging prisoners as principals in stealing and also as receivers. *Rex v. Ladden*, M. C. C. R. 277.

Where several felonies are so connected together as to form part of one entire transaction, evidence of them all may be given in order to prove a party indicted guilty of one. *Rex v. Ellis*, 6 C. & P. 145; 9 D. & R. 174.

If several felonies be charged in the same indictment, it is not objectionable, either upon de-

murrer or in arrest of judgment, for on the face of the indictment every count imports to be for a different offence. *Anon.* 2 Leach, C. C. 1105, n.

But if it appear before plea, or the jury are charged that they are separate offences, it is usual to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his right of challenge. *Anon.* 2 Leach, C. C. 1105, n.

And if not discovered before plea, the court in its discretion may put the prosecutor to elect on which he will proceed. *Id.*

Two indictments for the same offence, one for the felony under a statute, and the other for the misdemeanour at common law, ought not to be preferred or found at the same time. *Rex v. Doran*, 1 Leach, C. C. 538.

A prosecutor will not be permitted to give in evidence several distinct offences, involving different transactions, under one indictment. *Rex v. Young*, R. & R. C. C. 280, n.—Le Blanc.

But several offences connected with each other may. *Id.* And see *Rex v. Thomas*, 2 East, P. C. 934.

On an indictment against two, charging them with a joint offence, either may be found guilty; but they cannot be found guilty separately of separate parts of the charge. *Rex v. Hempstead*, R. & R. C. C. 344; 2 Russ. C. & M. 54, 311.

And if they are found guilty separately, upon a pardon or nolle prosequi as to the one who stands second upon the verdict, the judgment may be given against the other. *Id.*

If two men are indicted, and one of them appear to be innocent and the other guilty, but the prosecutor cannot identify them respectively, both must be acquitted. *Rex v. Richardson*, 1 Leach, C. C. 387.

If an indictment contains a count for robbery, and a count for an assault with intent to rob, the judge will put the prosecutor to his election which he will go upon. *Rex v. Gough*, 2 M. & M. 71—Park.

Seemle, that such counts ought not to be joined. *Id.*

On an indictment for felony, a matter, which was the subject of another indictment for felony, was material to be given in evidence, as it formed a part of the facts of the case. The judge received the evidence, and did not direct the second prosecution to be abandoned. *Rex v. Salisbury*, 5 C. & P. 155—Patteson.

On an indictment for forgery, if a second uttering be made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. *Rex v. Smith*, 2 C. & P. 633—Vaughan.

A prisoner was indicted for night-poaching, and it was proposed to show that on the occasion in question one of the prosecutor's gamekeepers had lost his coat, and that it was found in the prisoner's house. There was another indictment against the prisoner for stealing the coat:—Held, that this evidence was inadmissible, unless the prosecutor consented to acquittal, on the in-

dictment for the larceny. *Rex v. Westwood*, 4 C. & P. 547—Patteson.

A. was indicted for shooting at B., a game-keeper: there being another indictment against A. for night-poaching:—Held, that although both indictments related to the same transaction, yet these were offences quite distinct from each other, and that the prosecutor ought not to be put to his election to go upon one indictment and abandon the other. *Rex v. Handley*, 5 C. & P. 565—Parker.

[See *Rex v. Ellis*, ante, 839.]

#### CV. ARRAIGNMENT AND PLEA.

7 & 8 Geo. 4, c. 28, s. 1.

Arraignments may be without holding up the hand. *Rex v. Ratcliffe*, 1 W. Black. 3.

Where a prisoner, on being arraigned, stated that he was deaf, on which the indictment was read over to him, and he apparently did not hear it: the judge directed a jury to be impanelled to try whether he stood mute by the act of God, or out of malice. *Rex v. Hulton*, 1 R. & M. 78—Gifford.

If a person indicted for felony stand mute upon his arraignment, the court may direct the sheriff to return a jury instantler, to try whether he stand mute obstinately, or by the visitation of God; and if they find that he stand obstinately mute, sentence may be passed without further inquiry. *Rex v. Mercier*, 1 Leach, C. C. 183.

If a prisoner will not plead but stands mute, and a jury are impanelled to try whether it be by the visitation of God, his counsel has a right to address the jury and call witnesses for him, as it is an issue with the affirmative on the prisoner. *Rex v. Roberts*, Car. C. L. 57—Park and Abbott.

A prisoner, mute by the visitation of God, may be arraigned, tried, sentenced, and transported. *Rex v. Steel*, 1 Leach, C. C. 451.

A prisoner, mutus et surdus à nativitate, may be arraigned for a capital offence, if intelligence can be conveyed to him by signs and symbols. *Rex v. Jones*, 1 Leach, C. C. 102.

#### CVI. TRAVERSE.

60 Geo. 3 & 1 Geo. 4, c. 4, ss. 3 & 5.

If a party has been held to bail, or committed for more than 20 days, on a charge of felony, and the grand jury ignore the bill for the felony, and find a bill for a misdemeanour in attempting it, the party is entitled to traverse. *Rex v. James*, 3 C. & P. 222—Vaughan.

On an indictment being found for an assault, if the defendant enter into a recognizance, to appear, enter, and try his traverse, he cannot be tried without entering his traverse under the jail delivery, although in custody by surrender in discharge of his bail, except he withdraw his plea, or give the prosecutor notice. *Rex v. Fry*, 1 Leach, C. C. 111; 1 Russ. C. & M. 611.

The notice of a defendant's intention to try traverse is not a condition precedent to his being tried, and the prosecutor, if he appears, takes all defects in it, and he is not allowed to appear for the purpose of objecting to the notice. *Rex v. Hobby*, 1 C. & P. 660; 1 R. & M. 241—Lit.

#### CVII. PLEA IN ABATEMENT.

7 Geo. 4, c. 64, s. 19.

[See *Description of the Party Accused*, ante, 836.]

One indicted for a misdemeanour may plead in abatement a misnomer of his surname, Shakespeare for Shakespeare, which shall not be taken for idem sonans; and the plea concluding with praying judgment of the said indictment, that he may not be compelled to answer the same, is good. *Rex v. Shakespeare*, 10 East, 83.

Where the defendant was indicted with an alias dictus, and pleaded in abatement that he was not known by such name:—Held, that the plea must be demurred to, or issue taken thereon; and it could not be quashed on motion. *Rex v. Clark alias Jones*, 1 D. & R. 43; 8 P. R. 2; *Cooke*, 4 D. & R. 114; 2 B. & C. 618.

Where a defendant pleads in abatement an indictment for a misdemeanour, that he is a peer, such plea is bad on demurrer, for not stating that he is a peer of the United Kingdom, and showing in what manner he derived his title. *Rex v. Cooke*, 4 D. & R. 592; 2 B. & C. 871.

A dilatory plea to an indictment was set aside for want of an affidavit to verify it. *Rex v. Grainger*, 3 Burr. 1617.

A defendant in an indictment for a misdemeanour cannot plead over to the charge, or a plea in abatement for a misnomer, on which issue is taken and found against him. *Rex v. Gibson*, 8 East, 107, 111.

In what manner a misnomer may be pleaded and tried, and a convict deprived of his clergy by means of a counterplea. *Rex v. Don*, 1 Leach, C. C. 476.

#### CVII. PLEA OF AUTREFOIS ACQUIT.

A plea of autrefois acquit cannot be pleaded unless the facts charged in the second indictment would, if true, have sustained the first. *Rex v. Vandercomb*, 2 East, P. C. 519; 2 Leach, C. C. 708.

The plea of autrefois acquit must state the record of acquittal. *Id.*

A plea of autrefois acquit of a burglary, when the felony is laid as actually committed, cannot be pleaded to an indictment for the same burglary laid with intent to commit the felony, as they are two distinct and different offences. *Id.*

If, in a plea of autrefois acquit, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But even that if he insisted on the wrong, the court would, in a capital case, take care that he did not suffer by it. *Rex v. Sheen*, 2 C. & P. 635—Barrow and Littledale.

If the prisoner could have been legally convicted on the first indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. *Id.*

A prisoner, acquitted of forgery on a variance between the instrument produced in evidence and that recited in the indictment, cannot plead autrefois acquit to another indictment for the same offence, except the instrument be again mis-cited in the same manner. *Res v. Coogan*, 1 Leach, C. C. 448.

A prisoner may plead "not guilty," after his special plea of autrefois acquit is found against him. *Res v. Welch*, Car. C. L. 56.

Seemly, that he may plead them both at the same time. *Id.*

In a counterplea of clergy it is not necessary to set out the tenor of the indictment on which he prisoner was convicted and received his clergy; nor can any defects in such indictment be taken advantage of on such a plea. *Res v. Abbott*, 1 Leach, C. C. 401.

The first count of an indictment for murdering a male bastard child, stated that the prisoner gave and administered a large quantity of oil of vitriol, and forced the child to take into his mouth and throat a large quantity of the said oil of vitriol, the prisoner knowing that the said oil of vitriol would occasion the death of the child, whereby he became disordered in his mouth and throat, and by the disorder, choking, suffocating, and strangling occasioned thereby, languished and died. The second count was for murdering the child, by administering a certain acid called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat, by means whereof he became injured and disordered in his mouth and throat, and incapable of swallowing his food, and died of the inflammation, injury, and disorder occasioned thereby. Plea, that the prisoner had been acquitted for murdering a base infant male child, by giving and administering a certain deadly poison, to wit, oil of vitriol, and by forcing the child to take, drink, and swallow down a large quantity of the said oil of vitriol, the prisoner knowing it to be a deadly poison, whereby the child became sick and distempered in his body, and, by the sickness and distemper occasioned thereby, languished and died:—Held a good bar to the indictment. *Res v. Clark*, 1 B. & B. 473.

One was indicted in Middlesex for perjury committed in an affidavit, which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a prout patet by the affidavit affiled in the court of K. B. at Westminster, &c., and on this he was acquitted; after which he was indicted again in Middlesex for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in London; which was traversed by an averment that in fact the defendant was so sworn in Middlesex, and not in London: the court of

K. B. held that he was entitled to plead autrefois acquit, for the jurat was not conclusive as to the place of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment, and therefore the defendant had been once before put in jeopardy for the same offence. *Res v. Emden*, 9 East, 437.

Indictment, that the defendant, in the reign of the present king, kept a common gaming-house: plea, that defendant in the reign of the present king was acquitted upon an indictment for keeping a common gaming-house in the reign of the late king, against the peace of our said lord the king; and averring the identity of the offences: demurrer, concluding with a prayer of judgment of respondent ouster:—Held, 1st, that the plea was bad, because the indictment on which the acquittal was founded, charged an offence committed in the reign of the late king, and defendant could not by averment show that the offence charged in both indictments was the same; and 2nd, that the judgment on demurrer was final, although the demurrer concluded with a prayer of judgment of respondent ouster. *Res v. Taylor*, 5 D. & R. 423; 3 B. & C. 502.

A plea of autrefois acquit, which does not state the record of acquittal, is bad. On writ of error, brought on a judgment of conviction for felony at the general quarter sessions, the court will only look to the record of conviction, although the justices return also the record of a former acquittal. *Res v. Willey*, 1 M. & S. 183.

#### CIX. DEMURRER.

Upon a demurrer to an indictment found in an inferior court, objections may be taken as well to the jurisdiction of such court, as to the subject-matter of the indictment. *Res v. Fearley*, 1 T. R. 316.

And where the caption of the indictment states the court of quarter sessions, where such indictment was found, to have been held on an impossible day, it is fatal. *Id.*

It is no objection on demurrer, that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the court to quash the indictment. *Res v. Kingston*, 8 East, 41.

An indictment for nuisance is not to be quashed, but demurred to. *Res v. Sutton*, 4 Burr. 2116.

On demurrer to an indictment, the superior court will look into the whole record. *Res v. Fearley*, 1 Leach, C. C. 425.

It being questioned whether a particular count in an indictment for felony was not bad on demurrer, upon an objection that would be aided by verdict, and this being pointed out to the judge before plea pleaded, his lordship, to save the public time, directed the trial to proceed, saying that if the prisoner should be convicted on evidence which, in his opinion, was applicable to this count only, he would consider it as de-

murred to, and allow the demurrer to be argued, putting the prisoner in the same situation as if the count had been demurred to in the first instance. *Rex v. Cordy*, 3 C. & P. 425—Vaughan.

Besides the common four-day rule on a defendant in misdemeanour, to join in demurrer to his plea, there must be a peremptory rule, giving him a certain day in the discretion of the court, without which judgment cannot be signed against him. *Rex v. Johnson*, 6 East, 583.

#### CX. OF JURIES AND CHALLENGES.

6 Geo. 4, c. 50; 7 & 8 Geo. 4, c. 28, s. 2.]—The stat. 6 Geo. 4, c. 50, repeals a great number of statutes relating to jurors.

An Irish peer ought not to serve on a grand jury, unless he is a member of the House of Commons, he then being to all intents and purposes a commoner. *In re Headley (Lord)*, R. & R. C. C. 117.

A person may serve on the grand jury although he is not a freeholder. *Anon.* R. & R. C. C. 177.

If witnesses go before the grand jury without being sworn, and the bill is found, and the prisoner tried and convicted, it is proper to recommend him for a free pardon. *Rex v. Dickinson*, R. & R. C. C. 401.

In criminal cases twelve jurors must appear on the record. *Rex v. St. Michael (Inhabitants)*, 2 W. Black. 718.

The master of the crown-office, in nominating the jury, selected the names of the jurors, and did not take them by mere hazard or chance from the freeholders' book. He also selected those only who had the addition of "esquire," and included some persons who were in the commission of the peace for the county:—Held, that he was perfectly right in so doing. *Rex v. Edmonde*, 4 B. & A. 483.

And he also included in his original nomination several persons who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were then substituted in their places:—Held, that he was wrong in his opinion, but that there was no ground for presuming partiality. *Id.* [This is now regulated by 6 Geo. 4, c. 60.]

Where the sheriff's officer had neglected to summon one of the special jurymen returned on the panel:—Held, that this was no ground of challenge to the array for unindifferency on the part of the sheriff. *Rex v. Edmonde*, 4 B. & A. 483.

Upon a challenge for cause, the person making the challenge must be prepared to prove the cause. *Rex v. Savage*, 1 R. & M. C. C. 51.

It is no objection in arrest of judgment that the sheriff, who was the prosecutor, returned the jury; it ought to have been taken by way of challenge. *Rex v. Sheppard*, 1 Leach, C. C. 101.

There can be no peremptory challenges in collateral issues. *Rex v. Ratcliffe*, 1 W. Black. 1.

No challenge, either to the array or to the polls, can be taken until a full jury shall have appeared; therefore where the challenges are taken previously they are irregularly made, and out of season. *Rex v. Edmonde*, 4 B. & A. 471.

The disallowing a challenge is not a ground for a new trial, but for a venire de novo; and every challenge, either to the array or to the polls, ought to be propounded in such a way that it may be put at the time upon the Nisi Prius record; so that when a challenge is made, the adverse party may either demur or counterplead, or he may deny what is alleged for matter of challenge, and it is then only that triers can be appointed. *Id.*

There can be no challenge to the array, that is, of the whole special jury panel, for the supposed unindifferency of the master of the crown-office, he being the officer of the court expressly appointed to nominate the jury. *Id.*

It is not competent to ask jurymen, whether special or talesmen, if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground, but such expressions must be proved by extrinsic evidence. *Id.*

Where the sheriff's officer had neglected to summon one of the special jurymen returned on the panel:—Held, that this was no ground of challenge to the array for unindifferency on the part of the sheriff. *Id.*

Alienage is a ground of challenge to a juror; but if the party has an opportunity of making his challenge, and neglect it, he cannot afterwards make the objection. *Rex v. Sutton*, 1 R. & C. 417; S. C. nom. *Rex v. Despard*, 2 M. & L. 406.

Semble, that since 6 Geo. 4, c. 60, s. 2, alienage is not a ground of challenge of a special juror. *Id.*

Where, on an indictment for the publication of a libel (appointed to be tried by a special jury), a tales panel was quashed for unindifferency in the sheriff:—Held, that a writ of venire facias juratores might be awarded to the coroner of the county, although two of the special jurors summoned attended on a former occasion; and upon a prayer for an award of a tales de coronantibus at Nisi Prius, it is not compulsory on the coroner or sheriff to select the talesmen from among the by-standers accidentally in court; but on the contrary, they may be chosen from among persons previously appointed by the coroner or sheriff to be in attendance, in expectation that a tales would be necessary. *Rex v. Dalby*, 3 D. & L. 311; 2 B. & C. 104. See also 1 D. & L. 141.

Where a special jury were nominated, and a change of sheriffs had happened before they were struck by the parties:—Held, that this did not prevent the master from proceeding to do so without any directions from the court. *Rex v. Black*, Cowp. 412.

Where the place of abode of a jurymen was stated to be Grafton Street, it was held sufficient, though there are several places of the same name. *Res v. Stone*, 6 T. R. 531.

On the trial of an information for a libel only ten special jurymen appeared, and two talesmen were accordingly sworn to fill up the jury:—Held, to be no ground for a new trial that two of the non-attending special jurymen named in the panel had not been summoned to attend, although it appeared that this fact was unknown to the defendant until after the trial was over. *Res v. Hunt*, 4 B. & A. 430.

Since the stat. 7 & 8 Will. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the by-standers. *Res v. Hill*, 1 C. & P. 667—Garrow.

On the trial of an information in nature of a quo warranto, which has been made a special jury cause, jurors who have been summoned to try the prisoners on the crown side of the assize are not thereby qualified to act as talesmen. *Res v. Tipping*, 1 C. & P. 668—Garrow.

The warrant for a tales on a trial in a county palatine must come from the king's attorney-general. *Res v. Lamb*, 4 Burr. 2171.

The venire facias on a traverse of an inquisition must be returnable upon a general return, and not upon a day certain. *Res v. Roberts*, 1 Wils. 77.

Upon the trial of an indictment for a misdemeanor, which continued more than one day, he jury, without the knowledge or consent of the defendants, separated at night:—Held, that the verdict was not therefore void. *Res v. Kinnes*, 2 B. & A. 462.

The dispersion of the jury during the interval of an adjournment in case of a misdemeanor does not vitiate their verdict, where there is no suggestion of their having been improperly practised upon in the interim. *Res v. Woolf*, 1 Chit. 401.

And whether the jury shall or shall not be permitted to separate before verdict, in cases of misdemeanor, is a matter of discretion with the judge. *Id.*

The court will only under particular circumstances grant a view in an indictment for perjury; a view will be refused if there be any risk of its misleading the jury. *Anon.* 3 Chit. 422.

In an information for duties against the proprietors of a glass manufactory, the court of Exchequer will not grant a view of the premises, where the question may be tried by the production of a model. *Att.-General v. Green*, 1 Price, 30.

In general the assent of all the jury to the verdict pronounced by the foreman in their presence and hearing is to be conclusively inferred; and no affidavit can in any case be admitted to be contrary. *Res v. Wooller*, 2 Stark. 111—Abbott.

A jury's representation in favour of a criminal,

after conviction, censured. *Res v. Thickett*, 3 Burr. 1696.

If, after indictment, arraignment, the jury charged, and evidence given, on a capital offence, one of the jurymen becomes incapable through illness of proceeding to verdict, the court of oyer and terminer may discharge the jury, and charge a fresh jury with the prisoner, and convict him. *Res v. Edwards*, 4 Taunt. 309; 3 Camp. 207.

If a juror be taken ill during the trial of a prisoner for felony, the jury may be discharged, and the remaining eleven, together with a new juror, re-sworn to try the prisoner. *Res v. Scalbert*, 2 Leach, C. C. 620.

If a jurymen is taken so ill as to be incapable of attending through the trial, another jurymen returned in the panel may be added to the eleven; but the prisoner should be offered his challenges over again as to the eleven, the eleven should be sworn de novo, and the trial begin again. *Res v. Edwards*, R. & R. C. C. 234; 2 Leach, C. C. 621, n.; 3 Camp. 207, n.; 4 Taunt. 309.

## CXI. EVIDENCE.

### 1. Confession.

Unless a confession is obtained by telling the prisoner it would be better for him to confess, or worse for him if he did not, and unless it comes within the broad rule of threat or promise, it ought to be received, for the law has gone far enough as to rejecting confessions. *Res v. Miles*, Car. C. L. 61—Park.

A prisoner ought to be told by the magistrate, that, if he makes any statement, it may be used as evidence against him; and that he must not expect any favour if he confesses; but the magistrate ought not to dissuade him from confessing. *Res v. Green*, 5 C. & P. 312—Gurney.

Confessions, obtained in consequence of promises or threats, cannot be given in evidence; but evidence of facts resulting from such inadmissible confessions may be received. *Res v. Warickshall*, 1 Leach, C. C. 263; 2 East, P. C. 658; *S. P. Res v. Mosey*, 1 Leach, C. C. 265, n.

A confession induced by saying, "unless you give me a more satisfactory account, I will take you before a magistrate," or by saying, "tell me where the things are, and I will be favourable to you," cannot be given in evidence. *Res v. Thompson*, 1 Leach, C. C. 291; *S. P. Res v. Case*, 1 Leach, C. C. 293, n.

Where a prisoner said to the officer in whose custody he was, "if you will give me a glass of gin I will tell you all about it:"—Held, that a confession made in consequence of his having received some gin was inadmissible. *Res v. Sexton*, 2 Russ. C. & M. 645.

A girl, accused of poisoning, was told by her mistress, that if she did not tell all about it that night a constable would be sent for in the morning to take her before a magistrate; she then made a statement, which was held to be not ad-



inadmissible in evidence. Next day, a constable was sent for, and as he was taking her to the magistrate, she said something to him, he having held out no inducement to her to do so:—Held, that this was receivable, as the former inducement ceased on her being put in the hands of the constable. *Rex v. Richards*, 5 C. & P. 318.—Bosanquet.

The committing magistrate had told a prisoner that he would do all that he could for him if he would make a disclosure; after this, the prisoner made a statement to the turnkey of the prison, who held out no inducement to the prisoner to confess:—Held, that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution. *Rex v. Cooper*, 5 C. & P. 535.—Parke.

A man and woman being apprehended on a charge of murder, another woman, who had the female prisoner in custody, told her, that she "had better tell the truth, or it would lie upon her, and the man would go free."—Held, that a declaration of the female prisoner, made to this woman afterwards, was not receivable in evidence; *Rex v. Enoch*, 5 C. & P. 639.—Parke.

Where the prosecutor asked the prisoner, on finding him, for the money which the prisoner had taken out of the prosecutor's pack; but before the money was produced said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" upon which the prisoner took 11s. 6d. out of his pocket and said, "it was all he had left of it."—Held, by five against four of the judges, that the confession could not be received. *Rex v. Jones*, R. & R. C. C. 152; *S. P. Rex v. Clarke*, Car. C. L. 59.—Vaughan.

Where a prisoner was charged with stealing a guinea and two promissory notes, and the prosecutor told him that it would be better for him to confess:—Held, that, after this admonition, the prosecutor might prove that the prisoner brought him a guinea and a 5*l.* note, which he gave up to the prosecutor, as the guinea and one of the notes that had been stolen from him. *Diss. Lawrence*, J., and *le Blanc*, J. *Le Blanc* being of opinion that the production of money by the prisoner was alone admissible, and not his saying at the time he produced one of the notes "that it was one of the notes stolen from the prosecutor." *Rex v. Griffin*, R. & R. C. C. 152.

Where, on the apprehension of a prisoner for larceny, persons having nothing to do with the apprehension, prosecution, or examination of the prisoner, advised him to tell the truth and consider his family:—Held, that such admonition was no ground for excluding a confession made an hour afterwards to the constable in prison. *Rex v. Row*, R. & R. C. C. 153.

The confession of a prisoner is evidence, although previously to it an inducement to confess had been held out by another person, if that person had no authority to do so. *Rex v. Gibbons*, 1 C. & P. 97.—Parke.

So a confession by a prisoner to a constable, who had held out no inducement, is evidence,

although an inducement had been previously held out by a person in no office or authority. *Rex v. Tyler*, 1 C. & P. 129.—Hullock.

Any person's telling a prisoner that it will be better for him to confess, will exclude a confession made to that person, although that person was not in any authority, as prosecutor, constable, or the like. *Rex v. Dunn*, 4 C. & P. 543.—Bosanquet; *S. P. Rex v. Slaughter*, 4 C. & P. 544.

A constable said to a person charged with felony, "it is of no use for you to deny it, for there is the man and boy who will swear they saw you do it."—Held, that this was such an inducement as would exclude evidence of what the prisoner said. *Rex v. Mills*, 6 C. & P. 146.—Gurney.

Several persons, one of whom was the prisoner, were summoned before the committing magistrate touching the poisoning of A. B. No person was then specifically charged with the offence. The prisoner was sworn and made a statement:—Held, that this statement was not receivable in evidence against the prisoner. *Rex v. Davis*, 6 C. & P. 177.—Gurney.

A girl was charged with administering poison, with intent to murder. The surgeon said to her, "you are under suspicion of this, and you had better tell all you know." After this she made a statement to the surgeon:—Held, that that statement was not admissible in evidence. *Rex v. Kingston*, 5 C. & P. 387.—Littledale and Park.

The captain of a vessel said to one of his sailors, suspected of having stolen a watch, "that unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is pointed in your face."—Held, that a confession made by the sailor after this threat was not receivable in evidence on his trial for the felony. *Rex v. Parratt*, 4 C. & P. 570.—Alderson.

A prisoner was in the custody of A, a constable; B, another constable, coming into the room, A left it, and the prisoner immediately made a confession to B:—Held, that if this prisoner was in custody as an accused party, that A must be called to prove that he had held out no inducement to the prisoner to confess, before the confession made to B is receivable in evidence; but if it appear that the prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it will not be necessary to call A. If a prisoner makes a confession to a constable, who takes down what he says, and the prisoner signs it, this paper will be read by the officer of the court. *Rex v. Sweeney*, 4 C. & P. 548.—Patteson.

Where a prisoner, committed on a charge of murder, sent for the chaplain to pray with him, who told him, that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair as far as he could any injury he had done. The chaplain had no interviews with the prisoner, and considered he

had made a great impression on him, but distinctly told him he did not wish him to confess. After this the prisoner made two confessions to the jailor and the mayor, after having been warned of the consequences by both these persons.—Held, these confessions were good evidence and rightly received. *Rex v. Gilham*, Car. C. L. 51; R. & M. C. C. R. 186.

A confession obtained without threat or promise from a boy fourteen years old, by questions put by a police officer in whose custody the boy was on a charge of felony, and when he had no bed for nearly a whole day, held rightly received. *Rex v. Thornton*, 1 R. & M. C. C. 27.

A voluntary confession of felony made by a prisoner on his examination before a magistrate, and reduced by the magistrate into writing, may be given in evidence on the trial, though the magistrate has neglected, and the prisoner has refused, to sign it. *Rex v. Lamb*, 2 Leach, C. C. 552.

A prisoner before the committing magistrate made a statement, which by mistake was written in the information book, and headed "the information and complaint of R. B.," &c.:—Held, that it was not receivable in evidence, although the mistake could have been explained by the magistrate's clerk. *Rex v. Bentley*, 6 C. & P. 148—*Jurney*.

The confession of a prisoner before a magistrate is a sufficient ground to warrant a conviction, although there is no positive proof aliunde that the offence was committed. *Rex v. White*, L. & R. C. C. 508; S. P. *Rex v. Tippet*, R. & R. C. 509.

At least if there is probable evidence that it was committed. *Id.*

A magistrate may give evidence of what a prisoner said at examinations before him, although such of what he said was in answer to questions put by the magistrate, no threat or promise being used, and the prisoner had refused to sign the magistrate's notes of the examination, on the ground that they were an incorrect account of the transaction. *Rex v. Jones*, Car. C. L. 13—*Keyley*, Gaselee, and Vaughan.

And the magistrate may refresh his memory on the notes. *Id.*

Minutes taken by the solicitor for a prosecution, on the examination of a prisoner before a magistrate, and by his direction, may be read in evidence at the trial, though not signed either by the prisoner or the magistrate. *Rex v. Thomas*, Leach, C. C. 637; S. P. *Rex v. Bradbury*, 2 Leach, C. C. 639, n.

A prisoner charged with felony made a statement before the committing magistrate, which was taken down in writing, but not signed by the prisoner:—Held, that the magistrate's clerk might give evidence of what the prisoner said, and that which was taken down to refresh his memory. *Rex v. Pressly*, 6 C. & P. 183—*Patt.*

A prisoner charged with felony made a statement before the committing magistrate, which was taken down and signed by the prisoner, but there was nothing on the face of the paper to

show that at the time the prisoner made the statement he was under examination on charge of felony:—Held, that this examination could not be used as such, but that the clerk to the magistrate might state what the prisoner said, using the paper to refresh his memory. *Rex v. Tarrant*, 6 C. & P. 182—*Patteson*.

Confessions are strong evidence against a prisoner, if they be voluntary, and made without threat or promise; and if they are not so, they cannot be received. *Hall's case*, 1 Phil. Evid. 103.

And if a confession has been obtained from a prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be received. *Rex v. White*, 1 Phil. Evid. 104.

But it is no objection that it was made after an admonition from a stranger that he ought to tell the truth. *Rex v. Row*, 1 Phil. Evid. 104.

Nor under a mistaken supposition that some of his accomplices were in custody. *Rex v. Barley*, 1 Phil. Evid. 104.

Nor that the prosecutor first desired him to speak the truth, and suggested that he had better speak out, if the magistrate or his clerk checked the prosecutor, and desired the prisoner not to regard him, but say what he thought proper. *Rex v. Edwards*, 1 Phil. Evid. 104.

Nor that the constable's assistant told him it would be better to confess, if the magistrate before whom he was examined on the following day frequently cautioned him to say nothing against himself. *Rex v. Lingate*, 1 Phil. Evid. 105.

Nor where a constable had held out hopes which, upon inquiry, were dissipated by the magistrate, the prisoner, although he at first declined to confess, afterwards did so to another constable. *Rex v. Roeier*, 1 Phil. Evid. 105.

Nor that the wife of the constable had induced him to confess by holding out hopes, because she could not be supposed by him to have any power. *Rex v. Hardwick*, 1 Phil. Evid. 105.

An examination of a prisoner charged with a felony taken without threat or promise, by questions put by the magistrate, is notwithstanding admissible in evidence. *Rex v. Ellis*, 1 R. & M. 432—*Littledale*.

Where a prisoner in a jail on a charge of felony asked the turnkey of the jail to put a letter in the post for him, and after his promising to do so the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmitted it to the prosecutor:—Held, that the letter was admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained. *Rex v. Derrington*, 2 C. & P. 418—*Garrow*.

After the examination of a prisoner before a magistrate on a charge of felony had been taken down and read over to him, and he was told that he might sign it or not, but he declined to do so:—Held, that it could not be read in evidence against him. *Rex v. Telicote*, 2 Stark. 483—*Wood*.

A prisoner's confession is sufficient ground for a conviction, although there is no other proof of his having committed the offence, or of the offence having been committed, if that confession was in consequence of a charge against the prisoner. *Res v. Eldridge*, R. & R. C. C. 440.

Especially if there is evidence that he had been desirous to keep out of the way of the person upon whom the offence is supposed to have been committed: or if any of his companions under the same charge have attempted to do so. *Res v. Falkner*, R. & R. C. C. 481.

A prisoner, indicted for stealing two heifers, said: "I drove away two heifers from 'the World's End Drovers,'" (i. e. Fen.) The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—Held, insufficient to warrant a conviction. *Res v. Tuffs*, 5 C. & P. 167—Lyndhurst.

Where a knowledge of any fact is obtained by means of a confession which cannot be received, the party should be acquitted; unless the fact would be sufficient to warrant a conviction without any confession leading to it. *Res v. Harvey*, 2 East, P. C. 658—Eldon.

If a confession be improperly obtained, it is a ground for excluding evidence of the confession, and of any act done by the prisoner in consequence towards discovering the property, unless the property is actually discovered thereby. *Res v. Jenkins*, R. & R. C. C. 492.

A. gave a mortal blow to B. his master, who took out a warrant against A. for an assault. The charge of assault was heard under this warrant before Mr. D. and another magistrate, who summarily convicted A. of the assault. What was said by A. and B. before the magistrates was not taken down in writing. B. died:—Held, that on the trial of A. for the murder of B., Mr. D. might give evidence of what B. said in the presence of A. at the hearing before the magistrates of the charge of assault, and of what A. said in answer to it. *Res v. Edmunds*, 6 C. & P. 164—Tindal.

If the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt, the judge will leave the whole of the conflicting statements to the jury for their consideration; but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the judge will direct an acquittal. *Res v. Jones*, 2 C. & P. 629—Bosanquet.

If a prosecutor prove in evidence a declaration made by a prisoner, it becomes evidence for the prisoner as well as against him, but like all other evidence, the jury may give credit to one part of it and not to another. *Res v. Higgins*, 3 C. & P. 603—Parke.

If a prosecutor give in evidence a declaration made by a prisoner exculpatory of himself, the jury are not bound to take this to be true merely

because the prosecutor gives it in evidence; but they ought to consider how far it is consistent with the rest of the evidence, and whether they believe it to be really true. *Res v. Steple*, 4 C. & P. 397—Park & Garrow.

A. was indicted for the murder of H. He opened that A., having malice against P., hired H. to murder him, and that H. did so, but that H. being detected, A. had murdered H. to prevent a discovery of his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P.; and it was held that the prosecutor might also give evidence to show that H. was, in fact, the person by whom P. had been murdered. *Res v. Cleave*, 4 C. & P. 221—Littledale.

A person charged with murder made a confession before the coroner. It appeared that, before he made this confession, B., who was both a clergyman and a magistrate, had had an interview with him:—Held, that the prosecution was not bound to call B. before they put in the confession, but that it would be fair for them to do so; and that if the prosecutors did not call B., the prisoner might call him before the coroner:—Held, that the confession was read, to prove that some inducement was held out. *Id.*

A., a prisoner charged with murder, was tried by B., who was both a magistrate and a clergyman; B. told him, that if he was not the person who struck the fatal blow, and he would tell if he knew, he (B.) would use his good offices and influence to prevent anything from happening to him; and that if he (A.) did not make a disclosure, some one else would probably do so. After this B. wrote to the secretary of state, who returned an answer that mercy could not be extended to A.; which answer was communicated by B. to A. After this A. sent for the coroner, and wished to make a statement. The coroner told him that if he did so, it would be evidence against him. The prisoner made a confession:—Held, that this confession was admissible. *Id.*

If a prisoner, in a confession made before a coroner, which is taken down in writing, mentions the names of two other persons who are charged with the same offence, the confession when read in evidence, must be read with the names in it, just as it is, and the officer of the court must not say "another person," and "a third person," instead of reading the names. *Id.*

If a prisoner, charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him; but the judge will not direct an acquittal, as the jury may believe one part of the confession and disbelieve another: however, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that. *Id.*

If a prisoner is brought before a magistrate, his statement ought not to be taken till the evidence against him is gone through, and he should

hen be asked if he has anything to say in answer to the charge. *Res v. Fagg*, 4 C. & P. 166—Garrow.

A prisoner, when before the committing magistrate, was sworn by mistake, he being supposed to be a witness; as soon as the mistake was discovered, the deposition which was begun was destroyed, and the prisoner cautioned. After this he made a statement:—Held, that such statement was receivable in evidence. *Res v. Webb and Teddard*, 4 C. & P. 564—Garrow.

A statement relating to an offence, made upon oath by a person not at the time under suspicion, is admissible in evidence against him, if he be afterwards charged with the commission of it. *Res v. Tubby*, 5 C. & P. 530—Vaughan.

When before the committing magistrate one of the prisoners was examined as a witness against the other:—Held, that what that prisoner said before the magistrate could not be given in evidence on the trial. *Res v. Davis*, 6 C. & P. 90—Gurney.

On the trial of a prisoner who has made before magistrate a voluntary confession of his guilt, previous to the conclusion of the evidence against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk, the proper course is, for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written aper. *Res v. Bell*, 5 C. & P. 162—Tenterden and Gaslee.

A prisoner being under examination before a magistrate on a charge of felony, a statement was made in his presence by the solicitor for the prosecution, which the witness called to prove it said he believed had been taken down in writing:—Held, that under these circumstances parole evidence of the statement was not admissible on the trial of such prisoner. *Res v. Hollingshead*, 4 C. & P. 242—Vaughan.

It is to be presumed that what is stated on oath before a magistrate is taken down in writing, and therefore parole evidence of such a statement is not receivable, unless it be first shown that it was not so taken down. *Phillips v. Wimmer*, 4 C. & P. 273—Tindal.

Where the examination of a prisoner by a coroner was inadmissible on account of an irregularity in the mode of taking it, the coroner was allowed to give parole evidence of what the prisoner said on the occasion of his examination. *Res v. Reed*, 1 M. & M. 403—Tindal. [As to what was the nature of this irregularity, the report gives no information.]

If a letter, written by one of several prisoners, is read in evidence, and in this letter the names of the other prisoners be mentioned, these names must not be omitted in the reading of the letter, but the judge will tell the jury to pay no attention to the letter, except so far as it affects the writer. *Res v. Fletcher and others*, 4 C. & P. 50—Littledale.

If a witness give evidence of a conversation with a prisoner, in which that prisoner says some-

thing implicating another prisoner, the witness, in giving his evidence, must not omit the name of such other prisoner and say "another person," but must give the conversation exactly as it occurred, and the judge will tell the jury that is not evidence against such other prisoner. *Res v. Hearne, Cotton, and Cox*, 4 C. & P. 215—Littledale: *S. P. Res v. Walkley*, 6 C. & P. 175—Gurney.

Parol evidence may be given to add to the written examination of a prisoner taken by a magistrate. *Res v. Harris*, M. C. C. R. 338.

## 2. Accomplices.

A prisoner ought not to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *Res v. Noakes*, 5 C. & P. 326—Littledale, Bolland, and Alderson.

Although all persons present at and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as to require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter. *Res v. Hargraves*, 5 C. & P. 170—Tenterden.

An accomplice may give evidence before a grand jury to support an indictment against a particeps criminis; and a bill so found is good, although the accomplice be not previously admitted a witness for the crown, and was carried from prison before the grand jury by means of a surreptitious and illegal order. *Res v. Dodd*, 1 Leach, C. C. 155.

For the necessity of some legal authority for the removal only regards the justification of the jailor. *Id.*

If the jury believe the testimony of an accomplice, they may convict of a capital offence, though such testimony stands uncorroborated. *Res v. Attwood*, 1 Leach, C. C. 464.

An accomplice does not require a confirmation as to the person he charges, if he is confirmed as to the particulars of his story. *Res v. Birkett*, R. & R. C. C. 251.

The practice of not calling upon a prisoner to defend himself against the single uncorroborated testimony of an accomplice, is rather a matter of discretion with the court, than a general rule of law; and a prisoner may be convicted on such testimony if the jury believe the witness. *Res v. Durham*, 1 Leach, C. C. 478.

On an indictment against principals and accessories, the case against the principal was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal. The jury were directed to acquit the prisoners. *Res v. Bell*, 1 M. & M. 326—Littledale.

The information of a dead accomplice may be read in evidence against a prisoner. *Res v. Westbeer*, 1 Leach, C. C. 12.

An accomplice, who is a witness for the crown, is not entitled as a matter of right to be exempt from being prosecuted for other offences at the

same assizes, at which he had been such witness. *Rex v. Lee, R. & R. C. C. 361: S. P. Rex v. Brunton, R. & R. C. C. 454.*

An accomplice who has been admitted by the magistrate as a witness for the crown is not thereby exempted from prosecution, and it depends upon his making a full disclosure of the joint guilt of himself and his companions whether the King's Bench will admit him to bail that he may apply for a pardon. *Rex v. Rudd, 1 Leach, C. C. 115.*

For it depends upon the bona fide behaviour of an accomplice who has turned King's evidence, whether the court of K. B. will admit him to bail that he may apply for a pardon. *Id.*

If the testimony of an accomplice be confirmed so far as it relates to one prisoner, but not as to another, the one may be convicted on the testimony of the accomplice, if the jury deem him worthy of credit. *Rex v. Dawber, 3 Stark. 34, 35, n.—Bayley.*

And the corroboration of the evidence of an accomplice need not be on every material point, but must be so confirmed as to convince the jury that his statement was correct and true. *Rex v. Barnard, 1 C. & P. 88—Hullock.*

A person indicted for a misdemeanour may be legally convicted upon the uncorroborated evidence of an accomplice. *Rex v. Jones, 2 Camp. 139—Ellenborough.*

And where there is not sufficient evidence to criminate a prisoner on the depositions taken before a magistrate, an accomplice may be admitted as king's evidence, before the bill is presented to the grand jury. *Rex v. Barnard, 1 C. & P. 87—Hullock.*

The equitable claim of an accomplice to a pardon, on condition of his making a full and fair confession, does not extend to prosecutions for other offences in which he was not concerned with the prisoner; with respect to such offences, therefore, he is not bound to answer on cross-examination. *Lee's, Duce's, and West's cases, 1 Phil. Evid. 37.*

An accomplice, who, in a case out of the statutes, is, under the practice allowed, admitted by the justices of peace as a witness, and is afterwards prosecuted, has only a claim to the mercy of the crown, founded on an express or implied promise of the magistrate on a condition performed; and it depends on his conduct fully and fairly disclosing the joint guilt of himself and his companions, whether the court will admit him to bail, that he may apply for a pardon. *Rex v. Rudd, Cowp. 331.*

In cases out of the statutes, an accomplice fully and fairly disclosing the joint guilt of himself and his companions, and who is admitted a witness, and does give evidence, ought not to be prosecuted for his own guilt, so disclosed; nor perhaps for any other offence accidentally omitted by him. *Id.*

But if prosecuted, he cannot plead this in bar, nor avail himself of it upon his trial; but he may apply to the court to put off the trial, that he may have time to apply for a pardon. *Id.*

### 3. Depositions.

It is the duty of a magistrate to return to the judge, not only the depositions of witnesses, but also any confession taken down as made by the prisoner; and it is no excuse for not doing so, that the confession was wanted to be sent before the grand jury. *Rex v. Fellows, 5 C. & P. 58—Vaughan.*

A grand jury cannot, on a suspicion that the witness has been tampered with by the prisoner, receive in evidence his written explanation in lieu of his parol testimony, for the purpose of finding a bill. *Denby's case, 1 Leach, C. C. 514.*

A deposition of the deceased is admissible in a case of murder, although taken when the prisoner was charged with another offence, and although the greater part of it had been related into writing during his absence, it appearing that the deceased was afterwards re-sworn in the prisoner's presence, the deposition then read out and stated by the deceased to be correct, and the prisoner asked whether he had any questions to put.—*Dias. Abbott. Rex v. Smith, R. & R. C. C. 339; 2 Stark. 208.*

An information before a justice, made by the deceased on oath in the presence of the prisoner, may be given in evidence on the trial, though the informant was not apprehensive of death, and though the information be signed by one magistrate only. *Rex v. Radbourne, 1 Leach, C. C. 458; 1 East, P. C. 356.*

Parol evidence cannot be received of an information before a magistrate, either in felony or misdemeanour, unless evidence be given that it was not reduced into writing. *Rex v. Farnish, 1 Leach, C. C. 262.*

Parol evidence cannot be given of the examination of a prisoner taken before a magistrate for it must be intended that it was put in writing as the law requires. *Rex v. Jacobs, 1 Leach, C. C. 309; S. P. Rex v. Hinzman, 1 Leach, C. C. 310, n.*

Depositions taken before the coroner on aquisition of murder, cannot be read in evidence on the trial of the indictment, though the deponents are dead, if they are not signed by the coroner, or if signed, and his hand-writing cannot be proved. *Rex v. England, 2 Leach, C. C. 770.*

The depositions of a deceased witness, though not taken wholly in the prisoner's presence, are admissible, if the party was re-sworn, and the depositions read and signed in his presence. *Rex v. Smith, 2 Stark. 208—Richards; Holt, 64.*

The deposition of a witness taken in a judicial proceeding, in the presence of the party then charged, is not admissible on another proceeding against that party, on the ground that he was present, and had the opportunity of cross-examination. *Malin v. Andrews, 1 M. & M. 336—Parke.*

If, in a case of felony, a witness for the prosecution is too ill to attend the assizes, this is a good ground for postponing the trial, but will not authorize the reading the deposition of the witness taken before the magistrate. *Rex v. Seavege, 5 C. & P. 143—Patteson.*

But where the prosecutrix in a case of felony was bedridden, and there was no probability that she would be even able to leave her house, the judge admitted her deposition before the magistrate, the same as if she were dead. *Rex v. Hogg*, 6 C. & P. 176—Gurney.

A justice of the peace should not allow depositions to be framed in the words of a clause in a statute under which the party is committed. *Mills v. Collett*, 3 M. & P. 242.

#### 4. Competency of Witnesses.

9 Geo. 4, c. 32, s. 2.

If two be guilty of a murder, and one be indicted and the other not, the party not indicted is a good witness for the crown. *Rex v. Tinckler*, 1 East, P. C. 354.

A principal felon was a competent witness on the stat. 22 Geo. 3, c. 58, against an accessory for receiving stolen goods. *Rex v. Haslam*, 1 Leach, C. C. 418; 2 East, P. C. 732.

A person convicted on an indictment for a conspiracy cannot be a witness. *Rex v. Priddle*, 1 Leach, C. C. 442.

A convict on the 31 Geo. 2, c. 10, for taking a false oath, &c., who is pardoned before judgment, is a competent witness against the person who suborned him to take such oath; for by the allowance of the pardon he is restored to his former competency and credit. *Rex v. Reilly*, 1 Leach, C. C. 454.

[See *Rex v. Collins*, 2 Leach, C. C. 829, *ante*, OFFENCES RELATING TO THE COIN.—Competency of Witness, 730.]

In all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other. *Rex v. Jagger*, 1 East, P. C. 455—Buller.

To give evidence against a prisoner under a hope that the conviction of such prisoner will tend to procure the pardon of a husband convict, goes to the credit and not to the competency of the witness. *Rex v. Rudd*, 1 Leach, C. C. 115, 127.

A person who is discovered (though by means of an improper confession) to have purchased stolen property, is a competent witness to prove that fact. *Rex v. Lockhart*, 1 Leach, C. C. 386.

An informer, entitled under the stat. 17 Geo. 2, c. 40, s. 10, to a moiety of the penalty for embezzling naval stores, is not a competent witness for the prosecution, unless he will release his interest. *Rex v. Blackman*, 1 Esp. 95—Kenyon.

But afterwards held, on the ground of the discretionary power of punishing under the statute, that he was admissible. *Rex v. Cole*, 1 Esp. 169—Kenyon; Peake, 217. And see *Rex v. Bland*, 5 T. R. 370.

The persons who are supposed to have been the seconds at a duel may refuse to give evidence on the trial of the principals. *Rex v. England*, 2 Leach, C. C. 767; Car. C. L. 232.

But their testimony may be received as the testimony of persons admitted witnesses for the crown. *Id.*

And if once sworn whole truth, although selves in the guilt of th

On an indictment for receiver who is not ind to give her evidence ag v. Ast, Car. C. L. 66—

A married woman ca a conversation between band, which goes to sh the prisoner committed prisoner is tried. *Rex Udale and Taunton*.

The wife of one of a missible as a witness.

281: S. P. *Rex v. Smith*

J. G. was indicted for E. G. his brother was c and her evidence went t as principals:—Held, s ness against J. G. *Rex*

Where two are indic and both identified, and defence of alibi:—Held, not an admissible witne other, although it was qu of her own husband, bec did not give evidence testimony went to shake for the prosecution who v. Smith, Car. C. L. 66.

A woman who is living as his wife, is a co *Bathews v. Galindo*, 3 C

Persons who cohabit marriage de facto, suppo marriage in law, may, a to be a nullity, give in justice, statements mac the cohabitation. *Well 12—Patteson*.

#### 5. Declarations i

See *anti*

#### 6. Swearing and ex

A person indicted wi but against whom the b may, if he be in custody of the others, be placed s as one who was in their ing, 5 C. & P. 165—Gar

It becoming necessary to identify three other same indictment with th that the counsel for the in the most direct terms soners was the person *Watson's case*, 2 Stark. ]

A witness for the cr amination be compelled channel he made a dis either immediately or m

And where a witness was subpoenaed by a defendant indicted for a conspiracy, and before he was examined requested to have its expenses paid, and stated that no money was paid to him at the time he was served, he was obliged to give evidence, although the defendant refused to pay such expenses, and although the indictment was removed by certiorari, and came down for trial at the assizes as a civil record. *Res v. Cooke*, 1 C. & P. 322—Park.

A subpoena may be issued from the crown office, requiring a witness to attend at the assizes in the country, to give evidence in support of an intended prosecution for a felony; and the court of King's Bench will grant an attachment against him for not attending in obedience to the subpoena. *Res v. King*, 8 T. R. 585.

In a criminal case, a person, who is present in court, when called as a witness is bound to be sworn and to give his evidence, although he has not been subpoenaed. An indictment for stopping a way is a criminal case for this purpose. *Res v. Szidler and others*, 4 C. & P. 218—Littledale.

The defendant on an information on stat. 24 Geo. 3, c. 25, s. 64, must make his application for a mandamus, for the examination of witnesses, within the four first full days after plea pleaded. *Res v. Holland*, 4 T. R. 662.

A person who has no notion of eternity, or of a future state of rewards and punishment, cannot be examined as a witness, but the trial may be postponed until the witness is instructed in the nature of this obligation. *Res v. White*, 1 Leach, C. C. 430.

A Scotch covenanter may be sworn in as a jurymen in a court of criminal law by the ceremony of holding up his hand, without kissing the book. *Walker's case*, 1 Leach, C. C. 498.

A Scotch covenanter may give evidence in a criminal prosecution, on being sworn according to the custom of this sect, without kissing the book. *Mildrone's case*, 1 Leach, C. C. 412.

A Mahometan may be sworn on the Alcoran in a prosecution for a capital offence. *Res v. Morgan*, 1 Leach, C. C. 54.

An infant cannot, under any circumstances, be admitted to give evidence, except upon oath. *Res v. Powell*, 1 Leach, C. C. 110.

A witness, though deaf and dumb, may be sworn and give evidence on an indictment for felony, if intelligence can be conveyed to, and received by him, by means of signs and tokens. *Ruston's case*, 1 Leach, C. C. 408: *S. P. Res v. Jones*, 1 Leach, C. C. 452, n.

When a witness, upon a trial, gives evidence contradictory to facts contained in a deposition made by such witness in a former proceeding in the same case, the judge may order such deposition to be read, in order to impeach the credit of the witness. *Res v. Oldroyd*, R. & R. C. C. 88.

Seemingly, that the prosecutor also has a right to call for such depositions for the same purpose. *Id.*

It is not a sufficient ground for discharging a jury, that the material witness against the prisoner is not sufficiently acquainted with the na-

ture and obligation of an oath, though this appears as soon as the jury is charged, and before any evidence is given. The prisoner should be acquitted. *Res v. Wade*, 1 R. & M. C. C. 88.

Where a witness for a prosecution remains in court after an order for the witnesses to withdraw, the judge may still allow him to be examined, subject to observation on his conduct for disobeying the order. *Res v. Colley*, 1 M. & M. 329—Littledale and Gascolee.

Although the counsel in a prosecution for felony is not bound to call every witness whose name is on the back of the indictment; yet the judge may do so, to allow the prisoner's counsel an opportunity of cross-examining them. *Res v. Simmonds*, 1 C. & P. 84—Hullock.

Where an indictment is tried at Nisi Prius, the Nisi Prius record does not show what names were on the back of the indictment. *Res v. Smith*, 5 C. & P. 107.

If counsel for the prosecution call a witness whose name is on the back of the indictment, but do not examine him, and such witness be examined by the prisoner's counsel, any question put by the prosecutor's counsel after this must be considered as a re-examination, and therefore the prosecutor's counsel cannot ask anything that does not arise out of the previous examination by the prisoner's counsel. *Res v. Bandy*, 4 C. & P. 220.

If the counsel for a prosecution decline calling a witness whose name is on the back of the indictment, it is in the discretion of the judge who tries the case, whether the witness shall or shall not be called, for the prisoner's counsel to examine him before the prisoner is called on for his defence. *Res v. Bedle*, 6 C. & P. 188.

If the witness be so called, the judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow the prisoner's counsel to call any witness to contradict him. *Id.*

On an indictment of a female prisoner for stealing a watch from the person of the prisoner in a private house, he cannot be asked, in cross-examination, "whether anything improper passed between him and the prisoner at such house." *Res v. Pitcher*, 1 C. & P. 85—Hullock.

On an indictment for a larceny, if the prosecutor rests his case on the prisoner's recent possession of the goods, and the prisoner call a witness to prove that he (the prisoner) bought them of J. T.; if the prosecutor call J. T., he can only ask him as to such matters as go to support the prisoner's case, and cannot prove by him that he saw the prisoner commit the theft. *Res v. Simpson*, 2 C. & P. 415—Garrow.

On an indictment for a robbery, an alibi is set up:—Held, that evidence that witness was near the spot when the robbery was committed, about the time of the robbery, was inadmissible as evidence in reply, as it might have formed part of the original case for the prosecution. *Res v. Hilditch*, 5 C. & P. 299—Taunton.

That which is a confirmation of the original case is not receivable as evidence in reply, but

that which goes to negative the defence, and yet is distinct from the case for the prosecution, is receivable as evidence in reply. *Id.*

In a case of felony, where the defence was an alibi, the witnesses for the prisoner stated that they respectively saw him at various places on his route from Gloucestershire to Worcestershire for two days before, and up to the time of the felony committed:—Held, that the counsel for the prosecution might call a witness in reply to prove that the prisoner had said he was at home on those days. *Rex v. Findon*, 6 C. & P. 132—Tindal.

If several be charged with the same offence, and no evidence be given against one of them, he is entitled to an acquittal before the others are called upon for their defence, to enable them to call him as a witness. *Bowsey case*, 1 East, 313, n. And see *Rex v. Rowland*, 1 R. & M. 401.

On the trial of three persons upon an indictment for a conspiracy, where, after the case for the prosecution was closed, one only called a witness, and examined him as to a conversation between himself and another of the defendants, the counsel for the crown may cross-examine such witness, as to any other conversations between the two defendants, although the evidence tends chiefly to criminate one only. *Rex v. Kreckel*, 2 Stark. 343—Abbott.

A witness is not only not bound to answer that which will criminate him, but he is not bound to answer anything that tends to criminate him. In a prosecution for libel, a witness was held not bound to answer whether he had written a particular paragraph in a newspaper, but that he must answer whether he knew whose writing it was, but that he was not bound to name the person whose writing he knew it to be. *Rex v. Slaney*, 5 C. & P. 213—Tenterden.

If a witness objects to answer questions on the ground that they tend to criminate him, the counsel on the opposite side cannot argue in support of the witness's objection. *Rex v. Adey*, 2 M. & M. 94.

#### 7. Variance.

9 Geo. 4, c. 15.

In setting forth the tenor of an instrument, a mere literal variance will not vitiate the indictment, as the word "Mess." for "Messrs." in the name of the drawers of a bill. *Rex v. Oldfield*, 2 Russ. C. & M. 360.

A variance of "reicevd," instead of "received," is not fatal; and the words "as follow (that is to say)" do not bind the party to an exact recital. *Rex v. Hart*, 1 Leach, C. C. 145; 2 East, P. C. 978.

It is no variance in an indictment on stat. 7 Geo. 3, c. 50, s. 1, to describe a letter as addressed to certain persons, using the name and firm of Messrs. B. & Co., although those persons never themselves used the word "Messrs." but others directed bills and letters to them by that description. *Rex v. Dawson*, 2 East, P. C. 605.

An indictment stating that A. B. gave certain justices to understand and be informed that C.

D., being a brewer neglect, &c., is not containing no allegs of beer or ale for sale of his being such by R. 119.

An indictment for deceased, who was Baron of M., of C., part of the united proved, that H. was family surname, and Held, no variance, bound to construe H *Rex v. Brinklett*, 3 (

The misdescriptive drawer of a navy pa *Randall*, R. & R. C

An averment in a a commission issued Britain, is sufficient issued under the gr Ireland. *Rex v. Ba*

Where the omission not change the wor word, the variance i material. *Rex v. E* 194.

In an indictment word "undertood" f material. *Rex v. B* 1 T. R. 237, n.

If it be alleged in issued under the gre evidence be given of the great seal of the variance. *Rex v. E*

If an indictment t out the substance and recites the bill as for agreement between (inter alia) for a lease "houses," and in the joining the new hou riance, although the anything sworn as a lar clause. *Rex v. E*

It was held not a v perjury, that it state rected to Robert, Lc was to Sir Robert *Lookup*, 1 T. R. 240

On an indictment been committed by t a civil action, it app on that trial by the matter charged as p not varying the ser matters set out:—I though in the indict to have been given mon, 1 R. & M. 259

So, it was held to dictment stated that between two person names), and it appes



duced that the defendant was sued by a wrong name. *Res v. Windus*, 1 Camp. 406, n.—Ellenb.

But it was held a fatal variance where an indictment for perjury in articles of the peace exhibited to a magistrate, stated that the defendant swore "in substance and effect," that the prosecutor assaulted her, and at the same time threatened to shoot her, and the word "time" had been omitted in the articles. *Res v. Taylor*, 1 Camp. 404—Ellenborough.

If an indictment state that an issue was joined at the "General Sessions" of our lord the king, holden for the county of G., before his majesty's justices of the court of Great Sessions, this will not be proved by showing that such an issue was joined at the Great Sessions of that county; and if it is laid, that the issue was joined in an ejectment, in which "John Doe, on the demise of W. R. and D. T., was the plaintiff," and it appears that John Doe was plaintiff on the joint demise and also in two several demises of the same lessors, this will be a fatal variance, as this is a description of how he was plaintiff, and not an allegation only. *Res v. Thomas*, 1 C. & P. 472—Park.

Where the indictment alleged that the cause was tried at the assizes before E. W., one of the judges, &c., and it was stated in the *Nisi Prius* record, in the usual form, that the cause was tried before the then two judges of assize, one of whom was E. W.:—Held, to be no variance. *Res v. Alford*, 14 East, 218.

An indictment for perjury, in setting out the record of a conviction at the Middlesex Sessions, stated an adjournment to have been made by F. Const. Esq., and A., B., C., and D., and others their fellows, &c., justices. An examined copy of the record of conviction, when produced, stated the adjournment to have been made by F. Const. Esq., and E., F., G., and others, &c.:—Held, that this defect might be cured by parol evidence of an adjournment made by the persons named in the indictment, but that no such evidence being given the variance was fatal. *Res v. Bellamy*, 1 R. & M. 171—Abbott.

Where an indictment for perjury, assigned on evidence given in the Palace Court, described the court as "the court of the King's Palace at Westminster," and it appeared from the record of the trial below that it was called "the Court of the King's Palace of Westminster":—Held, to be no variance. *Res v. Israel*, 3 D. & R. 234. And see *Pippet v. Hearn*, 1 D. & R. 266; 5 B. & A. 634.

The word "commission," according to the context of the sentence in which it is used, may mean either the instrument by which authority is given to "commissioners," or the persons to whom the authority is given; therefore, where in an indictment for perjury, assigned on a petition to the Lord Chancellor to supersede the commission of bankrupt, the indictment, professing to set forth only the substance of the petition, stated "that at the several meetings before the commission, the petitioner declared openly, and in the presence and hearing of A. B., as assignee," so and so, and it appearing from the petition it-

self that the allegation therein was, "that at the several meetings before the commissioner" the petitioner declared so and so:—Held, that this was not a fatal variance. *Res v. Dudman*, 7 D. & R. 324.

It is no variance in an indictment to state that a bill was directed to Messrs. A., B. & Co. without the *r*, instead of Messrs. A., B. & Co. with it. *Res v. Oldfield*, Bayl. Bills, 310.

Where a bill of exchange was addressed to, and purported to be accepted by Messrs. "W. & Co., bankers, Birchin Lane," and in the corner, at the foot of the address to them, the figure "3" was written in a small character, but it was not proved to have been on the bill at the time of its being uttered or dishonoured. On an indictment for forgery professing to set out the bill in terms, the figure "3" was inserted as it appeared on the bill when it was produced at the trial. *Quæ*, whether this was a variance? *Res v. Watts*, 6 Moore, 442; 9 Price, 620.

Where in an indictment on an answer, a bill was described as having been exhibited against three persons only, and on the production of the bill it appeared to be against four:—Held, to be no variance. *Res v. Powell*, 1 R. & M. 14—Abbott.

Where an indictment on statute 17 Geo. 3. c. 26, s. 7, charged A. for taking a particular sum exceeding 10s. per cent. as brokerage on an annuity, and it was proved that the sum included a demand for preparing the deeds, &c.:—Held to be no variance. *Res v. Gilliam*, 6 T. R. 266; 1 Esp. 265.

An averment that an issue was joined on information is supported by the production of information containing two counts, upon each of which issue was separately taken. *Res v. Jones Peake*, 38—Kenyon.

Where an indictment for perjury, committed at the trial of an information, averred that issue was joined upon facts, some of which were merely laid as an inducement, though necessary to be proved at the trial, and there was only a plea of not guilty, the variance is fatal. *Res v. Hunkin Peake*, 8—Buller.

An indictment for not repairing a road leading from A. to B., and from thence to C., is not supported by evidence of the not repairing a road from A. to C., not passing through B., though communicating with it. *Res v. Great Capfild*, 6 Esp. 136—Ellenborough.

It is no variance in an indictment for perjury, which sets out an indictment for an assault, which had the words "whereby his life was greatly despaired of," that the former omitted the word "despaired." *Res v. May*, 1 Dougl. 183; 17 R. 237, n.

It is not a fatal variance (after verdict) when an information, professing to set out the title of an act of parliament, described it as intimated an act, (&c.) for repealing duties on salt, and the drawbacks, (&c.) thereon, the title being (in fact) in the same words, with the exception of having the word thereout instead of "therein," (and adding) "and for granting other duties, &c."

thereon;" the concluding word being the same. *Att.-Gen. v. Horton*, 4 Price, 237.

Where an information stated that "an order was made for the landing of goods on a quay or wharf," and the order produced was to deliver "at the king's warehouse:"—Held, a fatal variance, though it appeared that the warehouse stood on the quay. *Rex v. Cassano*, 5 Esp. 231—Ellenborough.

The evidence in a conviction stated that the Coburg Theatre was in the parish of Lambeth, and the adjudication of the penalty was, to the poor of the parish of St. Mary, Lambeth:—Held, that this was no variance, it not appearing that there were two distinct parishes so named. *Rex v. Glossop*, 4 B. & A. 616.

Where an inquisition found that the crown debtor was indebted in a sum certain for duties, &c., due between two given periods; and on the trial of a traverse of the crown's debt, modo et forma, it was proved that the debtor was indebted, at the time of the inquisition, in a different sum for duties accruing for a different period; it is not a fatal variance, because the allegation of the amount of the debt, and of the period for which it was due, is superfluous, and not of the substance of the issue, and may be rejected as surplusage: it is enough, to sustain the proceedings, if there was any debt in fact due to the crown at the time of taking the inquisition, for the being indebted to the crown is the basis of the extent. *Rex v. Franklin*, 5 Price, 614.

In an indictment for bigamy, the second wife was described as E. C., widow; she was, in fact, not a widow, nor had she ever been represented or reputed to be so:—Held, a fatal variance. *Rex v. Deesley*, 4 C. & P. 579.

#### 7. Evidence as to other Points.

It cannot be shown on the trial of an indictment that the prisoner has a general disposition to commit the same kind of offence as that charged against him; therefore an admission by a prisoner, charged with an infamous crime, that he had committed the same offence at another time, and with another person, and that he had a tendency to such practices, was rejected. *Rex v. Cole*, 1 Phil. Evid. 170.

Evidence to the character of a defendant is not admissible upon the trial of an information in the Exchequer. *Att.-Gen. v. Bowman*, 2 B. & P. 532, n.

But it is no objection to evidence on an indictment for felony, that it also goes to show the prisoner guilty of another felony. *Rex v. Moore*, 2 C. & P. 235—Burrough.

Immaterial averments in an indictment need not be proved. *Rex v. Holt*, 2 Leach, C. C. 593.

Where several felonies are so connected together as to form part of one entire transaction, evidence of them all may be given in order to prove a party indicted guilty of one. *Rex v. Ellis*, 6 B. & C. 145; 9 D. & R. 174.

A. was charged with setting fire to the ricks of B., C., and D., upon the oath of E., an accessory before the fact, and a warrant to apprehend

A. was granted, mentioned, and stating them to be. The person who appeared "a very serious oath" by E. on these. A. made a statement of defence. *Rex v. Long*,

A. set fire to the ricks immediately after the indictments, one for the burnt last was the subject tried. An accessory and proved the whole ricks. *Id.*

The post-office marks proved to be such, are which they are were in marks belong at the *Rex v. Plumer*, R. & M. 241.

A mark of double postage, not of itself evidence of inclosure, but the person paid the postage, and should be called. *Id.*

Though a letter found read, it is no evidence must be proved by other

Letters which have been of a prisoner, or any were intercepted at the post to him, cannot be read. *Rex v. Hevey*, 1 Leach,

If prisoners be charged with receiving stolen strictness, any receiving in the indictment which given in evidence, although another indictment; but other indictment ought, given up. *Rex v. Davis*,

A person who has not to come from a party, letters, may prove the *Rex v. Slaney*, 5 C. & P.

In a prosecution for force into the county place. *Rex v. Gordon*,

The Gazette purporting king's printer is good state therein contained. C. C. 593.

The daily-book of a prisoner to prove the time *Rex v. Aickles*, 1 Leach,

The king's proclamations been represented that committed in different and offering a reward for apprehension of offenders, prove an introductory averment for a libel that divers committed in those part act of parliament, recited outrages, and making

admissible for the same purpose. An introductory averment that outrages had been committed in and in the neighbourhood of N. is divisible, so that it need not be proved that they were committed in both places; and fourteen or fifteen miles from N. may be considered in the neighbourhood. An introductory averment that the persons engaged in such outrages had been reputed to act under the direction of some supposed and unknown person, called, &c., does not necessarily import that the person is an existing person; but proof that he was a fictitious person, set up for the purpose, is sufficient. *Rex v. Sutton*, 4 M. & S. 532.

A letter of instruction from the lords of the Treasury, signed by three lords of the Treasury, is admissible evidence upon proof of the hand-writing of the three persons whose names were subscribed to it, without producing the commission. *Rex v. Jones*, 2 Camp. 131—Ellenborough.

An allegation in an indictment, "that at the general quarter sessions of the peace holden at U., in and for the said county of M., on Monday, the 10th day of July, 1826, before certain of his Majesty's justices of the peace assigned, &c., a certain bill of indictment against S. H. G. was duly preferred and found," &c., is only proved by a regular record of the indictment and caption; and an examined copy of the mere indictment without any caption, together with the minute-book of the sessions, produced by the deputy clerk of the peace, and from which he read entries in his own hand-writing showing the time and place of holding the sessions, is not sufficient, although no record had in fact been drawn up. *Rex v. Smith*, 8 B. & C. 341; Car. C. L. 189.

Seemingly, that a minute-book, in which an entry of the proceedings at the sessions are made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence, as a proof of the fact there stated. *Rex v. Belamy*, 1 R. & M. 171—Abbott.

An indictment for perjury, alleged to have been committed on the hearing of a parish appeal at the quarter sessions, stated that "at the general quarter sessions," &c., "holden," &c., the appeal came on to be heard:—Held, that the minute-book of the sessions produced by the clerk of the peace was not sufficient to prove the hearing of the appeal, and that a regular record ought to have been drawn up. *Rex v. Ward*, 6 C. & P. —Park.

A magistrate may commit a feme covert who is a material witness, upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennett v. Watson*, 3 M. & S. 1.

A prisoner's hand-writing may be proved by witnesses who have seen him write. *Rex v. Hensley*, 2 Ld. Ken. 366.

The record of a conviction before magistrates, setting out the depositions of the witnesses, cannot be read to contradict the evidence of a witness on the trial of a subsequent information. *Rex v. House*, 1 Camp. 461—Ellenborough.

The false denial of the husband by the wife,

though not directly proved to have been by his authority, or in his hearing, to custom-house officers, coming to his house to search for untaxed goods, immediately after discovered by them on his premises, is admissible evidence, as a part of the res gesta, on the trial of an information for penalties against the husband, for possessing the goods with a guilty knowledge. *Att.-Gen. v. Good*, 1 McClell. & Y. 286.

An information on 51 Geo. 3, c. 87, (for prohibiting brewers from receiving certain articles), charging a "receiving and taking into possession," is not maintainable, where it is proved that the act of receiving was antecedent to the statute, although the possession has continued ever since. *Att.-Gen. v. King*, 5 Price, 195.

Proof that a tanner, after certain hides had been taken out of the woods, and weighed by the surveying officer, and marked by him as having been charged with the excise duty, which was accordingly entered in his book, had substituted other hides of less weight, also so marked on a former day, which was detected by the surveyor on re-weighing the hides, and who found the hides which had been withdrawn on stated premises:—Held, to be sufficient evidence to sustain counts in an information, charging the manufacturer, in the words of the act 56 Geo. 3, c. 110, s. 4, with first "taking hides out of the woods, &c., so that the duty payable thereon might not be duly charged, accounted for, &c. paid;" secondly, "with concealing hides, &c." &c., (repeating the same words); and then under the sixth section of that statute with "hanging up hides, taken out of the woods to dry, separate and apart from hides taken out to dry on a former day; and a rule to set aside a verdict found for the crown on those counts, so charging the offence, and entering it on others charging another offence, subjecting the party to a smaller penalty, on objections that they were not proved by the evidence, was discharged on cases being shown. *Att.-Gen. v. Cartice*, 9 Price, 459.

A charge under 11 & 12 Will. 3, of "a thing being found in the custody of the defendant," is an information by the attorney-general on the statute:—Held, to be supported by proof of its having been in his possession knowingly and illegally, and exhibited by him as his property, at any time and under any circumstances. *Att.-Gen. v. Delano*, 6 Price, 383.

If the defendant be charged in an information with knowingly receiving divers gallons of foreign spirits, which had been untaxed before the duties imposed by 27 Geo. 3, c. 32, were paid, evidence that several tubs containing it were on different sides of a hedge in a field, and that the defendant was there with several other persons, and that he had one tub in his hands, is sufficient to convict him of having the whole in his possession, within the meaning of the statute. *Rex v. Constable*, Nolan, 232.

The master of a homeward-bound vessel coming up the river Thames, proved to have hired and sent off a boat and men, accompanied by one of his own crew, to bring away certain boxes of foreign and British glass, lying on the bank

the Essex coast, to be landed at Woolwich, which they found and brought as far as Gravesend, where the whole was seized by the custom-house officers:—Held, on an information, to be sufficient evidence for a jury of being concerned in unshipping foreign glass without payment of duty, and in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction. *Att-Gen. v. Towns*, 6 Price, 198.

If a doubt arise upon the construction of a phrase in a written instrument, it is to be decided by the court upon inspection, and not by the jury. *Rex v. Hucks*, 1 Stark. 531—Ellenborough.

On an indictment on the statute for disturbing a congregation of Protestant dissenters, it is not necessary to prove that the minister has taken the oaths prescribed by the Toleration Act. *Rex v. Hube, Peake*, 131—Kenyon.

An averment, that a person is now legally settled in a particular parish, is supported by evidence that he was so settled a short time before the bringing of the indictment. *Rex v. Tunner*, 1 Esp. 304—Ashurst.

If on the trial of an indictment for publishing an obscene snuff-box, a witness prove that the defendant exhibited to him the box produced on the trial, or a box exactly similar, this is not sufficient, if the witness cannot identify the very box exhibited to him. *Rex v. Rosenstein*, 2 C. & P. 414—Park.

Exemptions from a penal law may be given in evidence on not guilty; and the negative need not be set forth in the indictment. *Rex v. Pemberton*, 1 W. Black. 230. And see *Rex v. Banks*, 1 Esp. 144.

Under an indictment on stat. 9 Ann. c. 14, s. 5, for gaming, a smaller sum than that named in the indictment under a *videlicet* may be proved. *Rex v. Hill*, 1 Stark. 359—Ellenborough.

Bills of exchange must be proved precisely as stated. *Id.*

On an indictment on stat. 42 Geo. 3, c. 107, s. 1, for killing deer in an inclosed park, without leave of the owner, the prosecutor must have proved that such consent was not given. *Rex v. Rogers*, 2 Camp. 654—Lawrence.

Two persons were indicted on the 6 Geo. 3, s. 36, for lopping and topping an ash timber tree, without the consent of the owner; the owner died before the trial, having first given orders for the apprehension of the prisoners on suspicion: the offence was committed at eleven o'clock at night, and the prisoners when detected ran away: the and-steward of the owner proved that he had not given any consent, and did not believe that his master had:—Held, that this was evidence from which the jury might infer that no consent had been given by the owner. *Rex v. Hary*, 2 C. & P. 458—Bayley.

[The stats. 6 Geo. 3, c. 36, and 42 Geo. 3, c. 107, are now repealed, and in prosecuting those offences

it is not necessary to prove that the owner did not consent.]

In cases where there must be proof of the allegation of "without the consent of the owner," the jury may find the party guilty where the evidence satisfies them that the thing occurred without the consent of the owner, and it is not absolutely necessary that the owner should be called as a witness. *Rex v. Allen*, R. & M. C. C. R. 154.

If an agreement, or other written instrument, be charged to be part of a fraud or other crime, it is immaterial whether it is stamped or not. *Rex v. Foote*, 4 C. & P. 592—Tenterden.

Where an indictment is founded on a written instrument, and where the instrument itself is the crime, it is receivable in evidence, although not stamped; but where the indictment is for an offence distinct from the instrument, and the instrument be only introduced collaterally, it cannot be received unless it be properly stamped. *Rex v. Smyth*, 5 C. & P. 201—Tenterden.

It is not essential that witnesses, who state that they would not believe another person on his oath, should have ever heard such person give evidence upon oath; as the real question is, whether the witnesses have such a knowledge of the person's character and conduct as enables them conscientiously to say that it is impossible to place any reliance on any statement that such person may make. *Rex v. Bispham*, 4 C. & P. 392—Garrow and Parke.

## XCII.—PRACTICE.

### 1. Addressing the Jury.

In opening a case of felony the counsel for the prosecution ought not to state any particular expressions supposed to have been used by the prisoner, nor the precise words of any confession, but he may state the general effect of what the prisoner said. *Rex v. Swothins and others*, 4 C. & P. 548—Bosanquet and Patterson.

A counsel for the prosecution, on opening a case of felony, has in strictness a right to state in his own way a conversation supposed to have passed between the prisoner and a witness whom he intends to call; but, in correct practice, the statement ought to be confined to the general effect of the conversation. *Rex v. James Deering and John Atkinson*, 5 C. & P. 165—Garrow.

Observations made by a wife to her husband upon a subject, which afterwards become matter of criminal charge against him, and to which he gave no direct reply, may be opened to the jury by the counsel for the prosecution. *Rex v. Smithies*, 5 P. & C. 332—Gaselee & Parke.

A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel. *Rex v. Brice*, 2 B. & A. 606; 1 Chit. 352: *S P. Rex v. Milne*, 2 B. & A. 606, n.

But in the trial of an indictment for perjury, the judge will allow the defendant to address the

jury and cross-examine the witnesses, and his counsel to argue points of law, and suggest questions to him for the cross-examination of the witnesses. *Res v. Parkins*, 1 C. & P. 548—Abbott; 1 R. & M. 166.

If two defendants are indicted for a conspiracy, the judge will, under certain circumstances, permit one of the defendants, who conducts his own cause, to cross-examine before the counsel for the other defendant, and, after the conclusion of the prosecutor's case, to address the jury and call his witnesses before the counsel for the other defendant opens his case. *Res v. Cooke*, 1 C. & P. 321—Park.

If the counsel for the defendant, on the trial of an indictment for a misdemeanour, opens new facts in his address to the jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is notwithstanding entitled to a general reply. *Res v. Bignold*, 4 D. & R. 70; 1 D. & R. N. P. C. 59.

Where, on an information for a misdemeanour, the defendant conducts his own defence, counsel may be heard on any point of law which arises. *Res v. White*, 3 Camp. 98—Ellenborough.

But he cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury. *Id.*

Held, in criminal prosecutions instituted by the crown, that the counsel for the crown have not in all cases the right to a general reply. *Res v. Smith, Peake*, 236, n.—Kenyon.

Upon the trial of a criminal information for a misdemeanour the privilege of replying, when the defendant does not call witnesses, is confined to the attorney-general, *comme semble*. *Res v. Abington (Lord)*, Peake, 236—Kenyon. 1 Esp. 226.

The attorney-general may reply with new matter in collateral issues, though no evidence be given for the prisoner. *Res v. Ratcliffe*, 1 W. Black. 3.

Where the attorney-general or king's counsel states that he appears officially to conduct a prosecution on an indictment for misdemeanour, he is entitled to reply, though the defendant calls no witnesses. *Res v. Marsden*, 1 M. & M. 439—Tenterden.

## 2. As to Swearing, and Examining Witnesses, *see ante*, 849.

### 3. As to the Trial.

Where the defendant, on being taken into custody on the 8th June, under a judge's warrant issued against him on an indictment for a blasphemous libel, entered into a recognizance to appear and plead within the first eight days of the ensuing Trinity term, and to try the cause at the Middlesex sittings after that term, and pleaded not guilty, but did not give notice of trial or make up the record, either for the sittings after Trinity or Michaelmas term, nor was

any rule obtained for respiting the entering of the recognizances; and the prosecutors gave notice of trial after Trinity and Michaelmas terms, but the causes were not tried in either; but such remnants to the sittings after Hilary, and the defendant was ready to take his trial on both these occasions; and the recognizances were estreated in Hilary term, without any notice having been given to the defendant, or any motion made by the prosecutors:—Held, that the estreat was regular, and conformable to the ordinary practice. *Res v. Clark*, 5 B. & A. 732.

On an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness. *Res v. Ireland*, 1 R. & M. 401—Abbott. *And see Res v. Kroehl*, 2 Stark. 343: and 11 East, 313, n.

It is not imperative on a commissioner of jail delivery to discharge all the prisoners in the jail who were not indicted; it being discretionary in him to continue on their commitments such prisoners as appeared to him committed for trial, but against whom the witnesses did not appear, having been bound over to the sessions. *Ann R. & R. C. C. 173.*

Prisoners triable under special commission may be discharged by jail delivery. *Res v. Platt*, 1 Leach, C. C. 157, 170.

A prisoner in custody under a defective commitment may be discharged under a jail delivery. *Id.*

Where indictments were found against a prisoner at the quarter sessions of the N. E. of Yorkshire, and transmitted to the assizes by the justices at the sessions:—Held, that although the indictments were not removed by certiorari, the judge of assizes should try the prisoner on these indictments, and he should not be discharged by proclamation without such trial. *Res v. Webbrell*, R. & R. C. C. 381.

Although the counsel for the prosecution of a prisoner has closed his case, and the prisoner's counsel has pointed out a defect therein, the judge is at liberty to put what questions he may think fit to answer the objection. *Res v. Beniant*, R. & R. C. C. 136.

Whether, on the trial of an information to recover penalties under the game laws, it is necessary that a defendant in custody, who has not employed either attorney or counsel, should be brought into court at the time of the trial, and if it is necessary that he should, whether he should be brought up by an order of the judge of the Prius, or by habeas corpus—*quære*. *Dennis v. Binst*, 1 C. & P. 439—Littledale.

In indictments for misdemeanours, in the case of private prosecutions, when both the defendant and the prosecutor have brought down their records, and entered them with the marshal, and the defendant's stood first, and the prosecutor's lower in the list:—Held, that the trial must be taken according to the order of entry in the marshal's list. *Res v. Halee*, 1 R. & M. 20—Abbott.

## 4. Trial where Indictment not good.

A judge at Nisi Prius will not take notice of an objection to an indictment, although it fully appears on the face of the record. *Rez v. Souler*, 2 Stark. 423—Abbott.

A jury sworn on an indictment for a forcible entry, which was clearly bad in point of law, as there was no averment that the entry was made manu forti, and no conclusion contra formam statuti, may be discharged by the judge from trying the indictment, as the defendant ought either to have demurred or moved to quash it. *Rez v. Deacon*, 1 R. & M. 27—Abbott.

An indictment consisting of two counts, one for a riot, indorsed by the jury "ignoramus," the other for an assault, returned "billa vera," was held good. *Rez v. Fieldhouse*, Cowp. 325.

A judge at Nisi Prius may refuse to try an indictment clearly bad in point of law. An indictment for perjury, not averring the matters falsely sworn to be material, nor showing them to be so, is within this authority. *Rez v. Tremaine*, 5 D. & R. 413; 3 B. & C. 761; 1 R. & M. 147—Garrow.

At Nisi Prius, the judge refused to try an indictment for perjury, on the ground of the gross imperfection of the record; and the defendant being again indicted for the same cause, was found guilty, but obtained a new trial in K. B. Instead of taking down the old record again, the prosecutor preferred a third indictment, and removed it into the Court of K. B.:—Held, that the defendant was not entitled to have the proceedings stayed, until the costs of the former proceedings were paid by the prosecutor. *Rez v. Tremaine*, 8 D. & R. 590.

Counsel are not allowed to argue at length at Nisi Prius the invalidity of an indictment for the purpose of inducing the court to refuse to try it. But it is sometimes convenient for counsel to suggest a point on which an indictment is clearly bad, to save the time of the court. *Rez v. Abraham*, 2 M. & M. 7—Tenterden.

## 5. Postponing Trial.

If, in a case of felony, a witness for the prosecution is too ill to attend the assizes, this is a good ground for postponing the trial, but will not authorize the reading the deposition of the witness taken before the magistrate. *Rez v. Savage*, 5 C. & P. 143—Patteson.

No putting off a trial on a collateral issue, unless the defendant will purge himself of the accusation by affidavit. *Rez v. Ratcliffe*, 1 W. Black. 3.

Trial of information postponed on application by rule, enlarged to the last day of the term, on the ground of absence of a material witness, on payment by defendant of such costs incurred by the crown in preparing for the trial of this cause at the next ensuing sittings as would not serve again, and of the crown appearing upon this application. *Att.-Gen. v. Phillips*, 13 Price, 592.

A defendant in an information may apply by

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motion to the court, trial given, on the material witness, upon the necessary at 13 Price, 258.

An application for last day of term, was on notice of trial set, and the rule was not made, nor would they make defendant should payings as would not do

The court of Exchequer trial of an information defendant, on the examine witnesses turned, if they think sufficient time for its return 3 Price, 221.

If there have been between the first defendant, and the filing him, and during that on his duty, as well that court will post *Att.-Gen. v. Thacker*,

Where an information general, under the against an army accounts, from 1792 to the account, by clear having been overruled amend the plea, and that the attorney-general, might be ordered, accounts, &c., return period by the defendant there deposited, and were material to his the particular circumstances upon the information the documents were *Brooksbank*, 1 Y. & J.

A defendant indicted misdemeanours committed in a public car, 3, c. 85, is not entitled an affidavit in the case a trial upon the absence put off his trial till return damus to the courts, witnesses, which are such cases at the discretion Bench; but he must special grounds by affidavit induce them to think to be examined are made the prosecutor in such to writs of mandamus *Rez v. Jones*, 8 East, 31.

The court of Exchequer application for a bill of peace *Att.-Gen. v. Lambirth*, 5

A trial will not be put off on the ground of absence of a material witness, and the witness

resident abroad, never likely to return to England. *Rex v. D'Eon*, 3 Burr. 1513; 1 W. Black. 510.

But a trial will be put off till a commission can go to examine a material witness, who is out of England, and has refused to attend the trial. *Id.*

An issue upon the identity of a person is to be tried instantler. *Rex v. Rogers*, 3 Burr. 1809.

A judge at the assizes may postpone a trial until the next assizes, if he finds the principal witnesses wholly incompetent to take an oath from ignorance, and order the witness to be instructed in the mean time by a clergyman in the principles of his duty, and the nature and obligation of an oath. *Rex v. White*, 1 Leach, C. C. 430.

In a case of manslaughter, after the jury were charged it was ascertained that the surgeon who examined the body was absent, the prisoner's counsel asked that the jury should be discharged:—Held, that if the prisoner asked that the jury should be discharged, the judge had authority to order it to be done. *Rex v. Stokes*, 6 C. & P. 151—Tindal and Gurney.

If the trial of an indictment for felony is postponed on account of the illness of a witness for the prisoner, the prisoner is never required to pay the costs of the prosecutor. *Rex v. Hunter*, 3 C. & P. 591—Park.

Where the trial of a case of felony is postponed, the court will not make any order for the expenses till after the trial has actually taken place. *Rex v. Hunter*, 3 C. & P. 541—Park.

If the trial of a prisoner indicted for felony be postponed, on the ground of the absence of the prosecutor who is a material witness for the prosecution, the prisoner will not be allowed his costs, but the judge will discharge him on his own recognizance. *Rex v. Crowe*, 4 C. & P. 251—Littledale.

#### 6. Illness of Prisoner during Trial.

If a prisoner indicted for a felony, with whom the jury are charged, be by sudden illness during the trial rendered incapable of remaining at the bar, the jury may be discharged from the trial of that indictment, and the prisoner, on his recovery, tried by another jury. *Rex v. Stevenson*, 2 Leach, C. C. 546.

If at the assizes a prisoner is tried for a misdemeanour under the commission of jail delivery, and during the trial becomes ill, and is obliged to be assisted out of court, the judge will discharge the jury; and the consent of his counsel, that the trial shall proceed in his absence, is considered not sufficient to authorize the trial to proceed. If the prisoner recovers during the assize, he may be tried, the whole of the proceedings of the trial being commenced de novo. *Rex v. Streek*, 2 C. & P. 413—Park.

#### 7. Practice on other Points.

Service of an order of a court of general jail delivery, calling on the editor of a newspaper "to answer for contemptuously publishing the proceedings of a trial there," at the office where

the newspaper was published, is good service within the 38 Geo. 3, c. 78, s. 12, and the editor not having appeared, the fine was held to be properly imposed upon him in his absence. *Rex v. Clement*, 4 B. & A. 218.

Exhibiting in an assize town an inflammatory publication, respecting a crime about to be tried at the assizes, is not a contempt which the judge can interfere to stop, by committing the party exhibiting. *Rex v. Gilham*, 1 M. & M. 165—Littledale and Gascolee.

The court will direct money found upon a prisoner to be restored to him before trial, if it appear by the depositions that it is in no way material to the charge upon which he is to be tried. *Rex v. Barnett*, 3 C. & P. 600—Park.

The court of K. B. will not grant a habeas corpus to discharge out of custody a person who has been convicted of libel, at the commission of oyer and terminer, at the Old Bailey, on the ground that when the verdict was returned only one commissioner was present instead of two, as required by law. *Rex v. Carlile*, 4 C. & P. 415.

#### CXIII. VERDICT.

The jury cannot be charged at the same time to try the two issues of "autrefois acquit" and "not guilty." *Rex v. Roche*, 1 Leach, C. C. 134.

Though a verdict is recorded, yet, if it appear promptly, that it is not according to the intention of the jury, it may be vacated and set right. *Rex v. Parkin*, 1 R. & M. C. C. 45.

Where, upon an information for printing and publishing a seditious libel, the jury found the defendant "guilty of printing and publishing only," a venire facias de novo was ordered. *Rex v. Woodfall*, 5 Burr. 2661. And see *Rex v. Williams*, 2 Camp. 646.

If two persons are jointly indicted for obstructing a highway, and on the evidence no joint act of obstruction appears, the judge will, as soon as the case for the prosecution is closed, put the prosecutor's counsel to elect which of them they would proceed against, and then take an acquittal for the other. *Rex v. Lynn*, 1 C. & P. 538—Littledale.

If two defendants are indicted for jointly making a corrupt contract with a third person for the procuring an East-India cadetship, one of the defendants may be convicted, though the other is acquitted. *Rex v. Taggart*, 1 C. & P. 201—Abbott.

#### CXIV. NEW TRIAL.

The 4 & 5 Anne, c. 16, s. 8, does not apply to criminal cases, so that there can be no rule for a new trial, without mutual consent. *Anon.* 1 Burr. 252; *S. P. Rex v. Redman*, 1 Ld. Ken. 384.

A verdict for the defendant in a criminal prosecution shall not be set aside. *Rex v. Freed*, 4 Burr. 9256.

No new trial can be granted in cases of felony. *Rex v. Mowbray*, 6 T. R. 638.

But with respect to misdemeanours, it is entirely discretionary in the court whether they will grant or refuse a new trial. *Id.*

Although it was formerly held, that in all cases of a criminal nature no new trial should be granted; and therefore an application was refused when the defendant had been acquitted on an indictment for not repairing the highway. *Rez v. Silvertown*, 1 Wils. 298.

Not granted where the charges are of a criminal nature, and the defendant has been once acquitted. *Anon. Lofft*, 451.

Where a special case has been reserved, a new trial has been granted, without previously setting aside the former verdict. *Id.*

The grant of a new trial supposes either that the verdict was against evidence, or that evidence was improperly received. *Rez v. Curriel, Lofft*, 156.

And quære, whether a new trial may not be granted on proper grounds in criminal cases not of felony? *Id.*

So, a new trial will be granted for a defendant in a criminal case upon a report of the judge and affidavits of the jury, that the verdict was taken contrary to their meaning and to the judge's direction in point of law. *Rez v. Simmonds*, 1 Wils. 329.

No new trial can be granted on an indictment for perjury, where the defendant was acquitted. *Rez v. Brice*, 2 B. & A. 606; 1 Chit. 352.

A new trial may be granted on an information in nature of a quo warranto. *Rez v. Francis*, 2 T. R. 484.

Where the defendants in a joint information employ two different attorneys and clerks in court, if notice of trial be served on one of them only, and a verdict be obtained, the court of Exchequer will set it aside, and award a new trial as to both, notwithstanding the offence charged be one which would affect them both as partners in trade, the costs of the trial already had to abide the event of the second verdict. *Att.-Gen. v. Stevens*, 3 Price, 72.

The court of Exchequer will not, after verdict, arrest a judgment on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial. Nor does it seem that a conviction would be sufficient ground for sending a cause back to a jury for re-investigation. *Att.-Gen. v. Woodhead*, 2 Price, 3.

Where, upon trial of an indictment for a misdemeanour, a witness examined before the grand jury was not examined at the trial, and a witness not examined before the grand jury was examined at the trial:—Held, that it was not such a surprise upon the defendants as entitled them to a new trial. *Rez v. Hollingberry*, 6 D. & R. 345.

Upon the trial of an indictment for a misdemeanour, which continued more than one day, the jury, without the knowledge or consent of the defendants, separated at night:—Held, that the verdict was not therefore void; and that it formed no ground for granting a new trial, it not ap-

pearing that there was any suspicion of improper communication having taken place. *Rez v. Kinnear*, 2 B. & A. 462.

New trial refused after verdict for do upon not guilty to an indictment for a to a highway. *Rez v. Mann*, 4 M. & S.

A new trial was refused after a verdict guilty, upon an indictment for not repairing a road, where the verdict did not bind the. *Rez v. Burbon*, 5 M. & S. 392.

Where the defendant has been acquitted on an indictment for not repairing a road, the court will not grant a new trial; yet they will, in very special circumstances, suspend the judgment, so as to enable the parties to the question reconsidered upon another indictment without the prejudices of the former indictment. *Rez v. Wandsworth*, 1 B. & A. 63; 2 Cl.

Not granted even for a misdirection, on an acquittal on an indictment for a misdemeanour. *Rez v. Cohen*, 1 Stark. 516—Ellenborough.

It is not a misdirection if the judge directs the jury to their own knowledge of any facts which have been proved, as matter of instruction only, and not as matter of evidence. *v. Sutton*, 4 M. & S. 532.

The defendant having been indicted for a nuisance for erecting stalls in the High-street, the removal of the market, the judge on trial left it to the jury to say whether the stalls were owners of this market, adding that if they were, the right of removal was in the grant; the jury having found in the affirmative, the court refused to grant a new trial. *v. Cotterill*, 1 B. & A. 67.

The court refused to grant a rule nisi for a new trial after a verdict for the defendant on an indictment for non-repair of a church fence, which was moved on the ground of the verdict being against evidence. *Rez v. 16 East*, 315; 2 Smith, 406.

Refused on an indictment for killing a person because the indictment charged it to have been caused by misfortune, arising from carelessness. *Rez v. Grey, Lofft*, 391, 42.

If on an information the jury find a sum certain, according to a calculation does not warrant the amount, it is a ground for a new trial. *Rez v. Grimwood*, 1 Price, 36.

But if all the jury were not present at the verdict of guilty was delivered against a defendant for the publication of a libel, and it is certain whether they all heard such verdict pronounced by the foreman, the court will, at the consent of the defendant, grant a new trial. *v. Woolley*, 2 Stark. 111—Abbott.

Upon the trial of an information for a nuisance, only ten jurymen appeared, and two talesmen were sworn to make up the jury:—Held, that there is no ground for a new trial, that two of the attending special jurymen named in the indictment had not been summoned, though it appeared that this fact was unknown to the defendant until after the trial. *Rez v. Hunt*, 4 B. & A. 430.

Where, on the trial of an indictment for



jury, it was necessary to swear talesmen from the common-jury panel, and one J. Williams being called, his son R. H. Williams (at the request of his father, and without collusion) appeared for him, and was sworn and served on the jury, he not being of age, neither having a qualification, nor being on the panel:—Held, that there was a mis-trial, and that a rule obtained for a new trial must be made absolute. *Rex v. Tremaine*, 7 D. & R. 684; 5 B. & C. 254.

Where several defendants are tried at the same time for a misdemeanour, and some are acquitted and some convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. *Rex v. Mawbey*, 6 T. R. 619.

A defendant, convicted on a criminal prosecution, cannot move for a new trial after the first four days of the next term; though, if it appear to the court at any time before judgment, that injustice has been done by the verdict, they will interpose and grant a new trial. *Rex v. Holt*, 5 T. R. 486.

All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is made on behalf of any of them. *Rex v. Teal*, 11 East, 307; *S. P. Rex v. Askew*, 3 M. & S. 9; *Rex v. Cochrane (Lord)*, 3 M. & S. 10, n.

Where a defendant convicted of a misdemeanour at the assizes was committed to the county jail to abide the judgment of K. B., and was detained for no other cause; on a suggestion of his inability to pay the expense of bringing himself up, the court allowed a motion for a new trial to be made without his personal attendance. *Rex v. Boltz*, 6 D. & R. 65.

It seems that the consent of the counsel for the prosecution cannot dispense with the rule which requires the presence of defendants convicted upon a criminal proceeding, during a motion for a new trial. *Rex v. Fielder*, 2 D. & R. 46.

A defendant in the actual custody of the marshal upon criminal process, in consequence of an indictment in this court, need not be present when a motion for a new trial is made on his behalf. *Rex v. Hollingberry*, 6 D. & R. 344; 4 B. & C. 329.

Affidavits of new facts are not in general admissible in criminal cases, on a motion for a new trial, unless there was some surprise on the defendant at the trial: but affidavits of the death of a person may be received to account for his not having been examined as a witness. *Rex v. Bowditch*, 2 Chit. 278.

#### CKV. JUDGMENT AND EXECUTION.

As to MURDER, see ante, p. 744.—See *Rex v. Smarton*, ante, p. 777.

An act from its passing repeals a former act, which ousted clergy from a certain offence, and imposes a new punishment on the same offence from and after its passing. An offence committed before the passing of the new act, but not tried till after, is not liable to be punished under either

of these statutes. *Rex v. McKensie*, R. & R.C. C. 429.

A statute which takes away clergy from the offender, and all who assist him, includes aids and abettors present. *Rex v. Gregory*, 1 R. & C. M. 29—Bayley; R. & R.C. C. 343.

A person was convicted of manslaughter in Feb. 1819, and had his clergy. In April following, he was indicted for the murder of another person, but again found guilty of manslaughter; the act which occasioned death in both cases was on the same day, and at the same time:—Held, that the former allowance of clergy protected him against any punishment on the second indictment. *Rex v. Jennings*, R. & R.C. C. 332.

The record in a case of felony at the quarter sessions, after stating that the defendants were indicted for stealing oats, to which they pleaded not guilty, and a verdict of guilty thereon added, "that because it appeared to the justices, that after the jury had retired, one of them had conferred from the other jurors, and conversed respecting his verdict with a stranger, and it was considered that the verdict was bad," and it was therefore quashed, and a venire de novo awarded to the next sessions: and it then proceeded to set out the appearance of the parties at such sessions, and the trial and conviction by the second jury, "whereupon all and singular the premises being seen and considered, judgment was given," &c.:—Held, on a writ of error, that such judgment was right. *Rex v. Fowler*, 4 B. & A. 273.

If a defendant demur to an indictment, whether in abatement or otherwise, the court will not give judgment against him to answer out, but final judgment. *Rex v. Gibson*, 8 East, 111.

After conviction on a criminal information, to which objections were taken, the defendant must stand committed, pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out on bail. *Rex v. Waddington*, 1 East, 159.

Where upon an indictment an act is charged to have been committed feloniously, and the jury find a verdict of guilty, although the charge is laid, does not amount to felony; yet, if it does amount in law to a misdemeanour, the court will pronounce judgment as for that offence. *Rex v. Scofield*, Cald. 397.

The first count of an indictment charged an assault with intent to ravish; the second a common assault. The jury found the defendant guilty of the misdemeanour and offence in the said indictment specified, and the court adjudged him, for the said misdemeanour, to be imprisoned two years and kept to hard labour:—Held, upon writ of error, that the word misdemeanour was nomen collectivum, and that the finding of the jury, therefore, was, in effect, that the defendant was guilty of the whole matter charged in the indictment, and consequently that the judgment was warranted by the verdict. *Rex v. Powell*, 2 B. & Ad. 75.

When a defendant is brought up for judgment

his acts subsequent to the trial may be considered either by way of aggravating or mitigating the punishment even though they be separate and distinct offences, for which he may be afterwards punished. But in such cases the court will take care not to inflict a greater punishment than the principal charge itself will warrant. *Rex v. Withers*, 3 T. R. 428.

Affidavits are not admissible in aggravation in a case of felony, although the record has been removed into K. B. by certiorari. *Rex v. Ellis*, 9 D. & R. 174; 6 B. & C. 145.

The compliance of a party, convicted of a nuisance with the prosecutor's proposal for payment of costs, goes in mitigation of a fine. *Rex v. Martha Gray*, 2 Ld. Ken. 307.

Where the court refuse to discharge a recognizance, they have power to mitigate the penalty. *In re Hooper*, M'Clel. 578.

A witness being indicted for perjury is not a reason for postponing judgment against the person convicted. *Rex v. Haydon*, 1 W. Black. 404; 3 Burr. 1387.

Indictment against A., B., C., and D., for a conspiracy, charging that they conspired together, with divers other persons unknown. A. and B. were tried. A. was found "not guilty," and B. was found "guilty of conspiring with C." C. had pleaded before the trial of A. & B., but neither he or D. appeared to take their trials. On motion to arrest the judgment against B., or suspend it till C. should be tried:—Held, that the verdict was conclusive against B. as a general verdict of guilty, and that judgment might be given against him without reference to what the verdict might be on the trial of C. *Rex v. Cooke*, 7 D. & R. 673; 5 B. & C. 538.

A regular judgment in a crown cause cannot be set aside on payment of costs. *Rex v. Hunter*, 1 Wills. 463.

A judgment of imprisonment against a defendant to commence in future, i. e. from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law. *Wilkes v. Rex (in error)*, 4 Bro. P. C. 367.

Where a fixed fine by statute for a misdemeanor is miscalculated in the verdict and the judgment, the court, upon a rule served on all parties interested, will alter the rule for judgment against the prisoner, and the entry roll, as to so much of the punishment, but they will not alter the judgment and verdict. *Rex v. Stevens*, 3 Smith, 366.

A sentence of corporal punishment cannot be pronounced on a person in his absence. *Rex v. Harw*, 3 Burr. 1786; S. P. Anon, Loft, 400.

But on certain occasions the court will dispense with the personal appearance of delinquents to receive judgment. *Anon*, Loft, 28.

The court refused to dispense with the personal appearance of the defendants to receive judgment in a case of aggravated assault. *Anon*, Loft, 42.

It may be done by

A justice convicted office must attend in judgment of the court; but and infirmity, the personal attendance.

R. 663.

Personal appearance defendants were in Ire no aggravating circum

On an indictment f wall across a road (n nuisance), it is not nec nuisance be abated. (*Justices*), 7 T. R. 46

Secus, where it is s be an existing nuisan 142.

If the court be satis ed is already effectual is prayed upon the in their discretion give j they refused to give s dictment for an obstru which highway, after fendant, was regularly gistrates, and a certifi way was fit for the pe affidavits that so much was still retained was *Rex v. Incedon*, 13 E Commerell, 4 M. & S.

The court cannot ex the expense of bringin up to receive judgmen if the defendant is to own expense, they wil sencc. *Rex v. Boltz*, 334.

Where a defendant, ment for a libel, was co stance of the prosecu wards bring him up fi the prayer of the defen his absence. *Id*.

When a defendant is after verdict, the defe first read, and then 11 after which, the defe heard, and lastly the c *Rex v. Bunts*, 2 T. R.

But where a defend tence, after judgment t affidavits shall be first after which the counse be heard, and lastly th ant; if no affidavits sh sel for the defendant sh the counsel for the pro

Where several defen sentence, some after others after verdict, th be heard in mitigation, the crown in aggravati & R. 406.

If a defendant would move in arrest of judgment after conviction for a misdemeanour, he must be present in court. *Rex v. Spragg*, 2 Burr. 928.

Judgment for a trespass in taking away an instrument which concerns the realty cannot be given on an indictment for stealing it. *Rex v. Westbeer*, 1 Leach, C. C. 14.

Where an indictment charges an act to have been done with a felonious intent, and the jury find a verdict of guilty; if the charge as laid do not in law amount to a felony, but is only a misdemeanour, the court will pronounce judgment as for the latter offence. *Rex v. Scofield*, 2 East, P. C. 1028; Cald. 397.

Judgment for a misdemeanour cannot be given on an indictment for felony, bad for want of a material averment of a fact which makes the offence, which would otherwise be a misdemeanour, into a felony. *Rex v. Turner*, 1 R. & M. C. C. 47.

A man upon whom sentence of death has passed, ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder. *Rex v. Brady*, R. & R. C. C. 268.

The time and place of the execution of a convicted felon form no part of the sentence. *Rex v. Doyle*, 1 Leach, C. C. 67.

It is not the practice of any court of criminal jurisdiction to make the day upon which execution of any corporal punishment is to be done a part of the original sentence. The time of inflicting such punishment is usually left either to the discretion of the officer to whom the execution of the sentence belongs, or is appointed by a particular rule of the court which awards the punishment. *Atkinson v. Rex* (in error), 3 Bro. P. C. 517.

A peeress convicted of a clergyable offence shall be discharged without burning or imprisonment. *Kingston's (Duchess) case*, 1 Leach, C. C. 146; 1 East, P. C. 468.

A sentence of transportation may be a second time passed upon a prisoner, although, the term for which he was before transported is unexpired. *Rex v. Batle*, 1 Leach, C. C. 441.

Upon an indictment for a misdemeanour under the 22 Geo. 3, c. 58, the punishment should be fine, imprisonment, or whipping; imprisonment and fine, or imprisonment and whipping, cannot be inflicted. *Rex v. Howell*, R. & R. C. C. 253.

Although it appears, upon a case reserved, that evidence has been admitted at the trial which ought not to have been received; yet, if the judges are of opinion that there is ample evidence to support the indictment, after rejecting such improper evidence, they will not set aside the conviction. *Rex v. Ball*, R. & R. C. C. 132; 1 Camp. 324.

Where, on the trial of an offence, evidence had been received which was not strictly admissible, and the prisoner was convicted upon that and

other evidence, but the case appeared otherwise clear against the prisoner:—Held, that this was no ground to stay execution. *Rex v. Oldred*, R. & R. C. C. 88; S. P. *Rex v. Tinkler*, 1 East, P. C. 354.

So where the credit of the witness is impeached. *Id.*

If a prisoner did not pray his clergy in a clergyable felony, and sentence of death is passed upon him, he might be brought up at a subsequent assizes and have his clergy. *Rex v. Armstrong*, 1 R. & M. C. C. 21.

A convict might be allowed the benefit of general pardon though he had neglected to pay it in proper time. *Rex v. Haines*, 1 Leach, C. C. 40.

Semble, that if a person be tried at the assizes, on an indictment removed by certiorari, the judge would, under very special circumstances, receive affidavits in mitigation, before he proceeded to pass sentence, under the stat. 1 W. 4, c. 70, s. 1, but not in ordinary cases. *Rex v. Carr*, 4 C. & P. 538—Patteson.

By the stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 2, upon trials for felony or misdemeanour on a B. record, judgment may be pronounced at the assizes, and shall have the effect of a judgment in the court above, unless the court in the first six days of term grant a rule nisi for a new trial or for amending the judgment. A defendant on such record having been sentenced at the assizes cannot apply to the court to amend the judgment by diminishing the punishments upon ordinary affidavits in mitigation, or without showing some specific defect in the sentence, or some matter which could not have been adduced at the assizes. *Rex v. Lloyd*, 4 B. & Ad. 135.

The king's coroner has authority to remove fines imposed on defendants convicted on indictments or criminal information in the court of King's Bench. *Rex v. Shackle*, M'Clel. & Y. 514.

It is not necessary to specify the names of the grand jury in the record of the caption of an indictment: it is enough to aver that the indictment was found by twelve good and lawful men, for the party indicted has an opportunity of ascertaining the original caption, where the names of the jurors appear. *Aylett v. Rex* (in error), 3 Bro. P. C. 529.

#### CVI. ERROR.

After judgment the record can only be removed by a writ of error. *Rex v. Sater*, 7 T. R. 373.

Where there was in a case of perjury a judgment, it was ordered that the defendant should be transported "to the coast of New South Wales or some one or other of the islands adjacent" for seven years. This was held, on error, to be no judgment, and a procedendo was awarded that the court below should give judgment, and in the mean time the defendant was bailed. *Rex v. Kenworthy*, 3 D. & R. 173; 1 B. & C. 711.

A return to a writ of error, directed to the

commissioners of oyer and terminer of the city of London, set out the record of an indictment found against the defendant before the lord mayor and others, and stated that he was tried upon the said indictment by a jury of the country at the next session holden before the lord mayor and several of the judges, aldermen, recorder, and others, assigned by certain letters patent under the great seal directed to them, or any two or more of them, to inquire of certain offences; and that he was, by the verdict of such jury, found guilty, and that thereunto judgment was given by the court against him. Upon this return the defendant assigned, as errors in law, that the judgment was insufficient, and should have been for the defendant, and, as errors in fact, first, that when the jury gave their verdict there was but one of the justices named in the commission present in court; and, secondly, that the verdict was not at the time it was so given entered of record. The king's coroner and attorney answered, "in nullo est erratum," and prayed that the judgment might be affirmed:—Held, as to the first error in fact, that, as it appeared by the record that the verdict was given at a session holden before several of the commissioners and justices, the plaintiff in error could not be allowed to aver, in contradiction of the record, that only one of the justices was present when the jury gave their verdict, and the answer "in nullo est erratum" is no admission of the fact assigned for error, unless it could lawfully be assigned, and is well assigned in point of form:—Held, also, that the second error in fact assigned was no error, inasmuch as it was impossible that a verdict should be recorded at the time when it was given, the recording of it being necessarily an act subsequent to the delivery of the verdict by a jury. *Rex v. Carlile*, 2 B. & Ad. 362.

Error was brought in K. B. upon a judgment at the Old Bailey, and one ground assigned was that a material fact stated on the record was not true. The court held such an averment inadmissible, and affirmed the judgment. The fact being as alleged by the defendant below, the court of oyer and terminer afterwards ordered the record to be amended, and their clerk, by a rule of the court of K. B., came into the latter court and made the amendment there. Upon motion afterwards that the case might be again set down for argument:—Held, that the court of K. B. could not rehear it after the expiration of the term in which judgment was given, though the attorney-general consented, and that the only remedy was by writ of error to the House of Lords. *Rex v. Carlile*, 2 B. & Ad. 971.

#### CXVII.—COPY OF INDICTMENT.

A prisoner upon his acquittal is not entitled *ex debito justitiæ* to a copy of his indictment. *Rex v. Brangan*, 1 Leach, C. C. 27.

The court will not grant a copy where the acquittal arises from the incompetency of a witness. *Rex v. Quick*, 1 Leach, C. C. 28, n.

In the case of an acquittal, on a prosecution for felony, the prisoner is not entitled to a copy

of the indictment in any case, without an assent of the court. *Reg. v. Kelly*, 1 W. Bl. 104.

But he is so entitled as a matter of right to the court. *P. 952*; 1 Phil. Ev.

A prisoner is entitled to enable him to defend himself. *Reg. v. Vandercom*, 1 P. C. 519.

A copy of an indictment of an action if the court will not order it, it was obtained by the court. *M. & R. 275*.

If the plaintiff, in prosecution, offer to record of the indictment a copy thereof, such though there were of the attorney-general copy of such record out such authority, a copy of it to the contempt of court. *Nisi Prius* would not record in evidence, *gatt v. Tollervey*, 1

Where a party has obtained virtue of the attorney's mis-statement as judge before whom court refused to stave the plaintiff copy so obtained. *R. 118*; 10 B. & C.

Quere, that the i to a copy of the re

CX

#### 1. Expenses of

7 Geo. 4, c. 64, s. 64, repeals the statute c. 3; 18 Geo. 3, c. 1 far as they relate to

In frivolous cases allow the prosecutor be bound over to pay. *Powell*, 1 C. & F.

The statute 58 the court to order the prosecutor or w have been active in son, and who shal person accused of fi costs of prosecuti grand jury; and their loss of time at sion. Where a per and incurred an ex endeavouring to bri

tice, and had succeeded in apprehending them:—Held, that under that statute he was not entitled to any compensation for the money so expended. *Rex v. Austen*, 1 D. & R. N. P. C. 24—Park.

Where the treasurer of the county of Surry refused to pay the expenses of a witness in a case of felony, pursuant to an order from the borough of Southwark sessions, under the 58 Geo. 3, c. 70, the proper remedy was held to be by indictment, or by an attachment in the inferior court, and not by mandamus. *Rex v. Surry Treasurer*, 1 Chit. 650.

The costs of a prosecution in the borough court of Liverpool, for a felony committed within the borough, may be ordered by the court to be paid by the treasurer of the county of Lancaster, the borough of Liverpool not having exclusive jurisdiction, nor any treasurer like a county treasurer, nor any rate in the nature of a county rate, but contributing as a part of the county to the county rate. *Rex v. Johnson*, 4 M. & S. 515.

The expenses of a witness going to identify stolen property cannot be allowed, as the statute 58 Geo. 3, c. 70, is confined to the allowance of the expenses of the prosecution and apprehension. *Rex v. Millington*, 1 C. & P. 83—Hullock.

The stat. 18 Geo. 3, c. 19, which enabled the court in certain cases to make an order on the treasurer of the "county, riding, or division," where the offence was committed, to pay the prosecutor and his witnesses their expenses, extended to inferior districts having jurisdiction to try felons, and raising their own rates similar to the county rates. *Rex v. Myers*, 6 T. R. 237. *And see Rex v. Johnson*, 4 M. & S. 515.

Where an indictment for felony is removed by a certiorari, and tried at Nisi Prius, neither the judge at Nisi Prius nor the court of K. B. has authority to award costs to the prosecutor under 7 Geo. 4, c. 64, s. 22, whether the indictment be removed by the prosecutor or the prisoner. *Rex v. Treasurer of Exeter*, 5 M. & R. 167.

On the trial of an indictment for manslaughter, the surgeon will only be allowed for his attendance on the trial, and not for his fee for opening the body by order of the coroner. *Rex v. Taylor*, 5 C. & P. 301—Littledale.

The judge, on a trial for murder, has no power to allow the expenses of the witnesses for their attendance at the coroner's inquest. *Rex v. Rees*, 5 C. & P. 302—Littledale.

A prosecutor and his witnesses were bound by recognizances to prosecute and give evidence at the assizes. They attended there, and preferred an indictment, which was found. The prisoner had been by mistake discharged by proclamation at an adjourned sessions which preceded the assizes, and had absconded. The judge allowed the expenses. But semble, that, if the prosecutor and witnesses had merely appeared at the assizes, and had not preferred any indictment, the judge would have had no power to allow any expenses. *Rex v. Robey*, 5 C. & P. 552—Taunton.

## 2. Expenses of Prosecution in Misdemeanours.

7 Geo. 4, c. 64, s. 22.—Where the prosecutor of an indictment for a misdemeanour found at sessions removes it into K. B. by certiorari, he is not entitled to costs under 7 Geo. 4, c. 64, s. 23. *Rex v. Richards*, 2 M. & R. 405; 8 R. & C. 420; *S. P. Rex v. Johnson*, Car. C. L. 118; R. & M. C. C. 173.

Justices of the peace at the quarter sessions have no authority, by an act of parliament, to order the costs of a prosecution for a misdemeanour, carried on under the direction of magistrates, to be allowed out of the county rates. *Rex v. W. R. Yorkshire*, 7 T. R. 377.

Where to an indictment at the assizes in a misdemeanour the defendants consented to plead guilty, upon an understanding that they were not to be brought up for judgment; and no stipulation or agreement having been then expressly made by the prosecutor for the payment of his costs:—Held, that he was not afterwards entitled to a rule on the crown side to have his costs taxed. *Rex v. Rawson*, 4 D. & R. 194; 2 B. & C. 598.

## 3. Costs in other Cases.

The court of K. B. has no power to award costs to prosecutors by indictment, nor to compel a defendant to go before the master. *Rex v. Richardson*, 6 D. & R. 141.

A judge could not certify for the costs of a special jury, under stat. 24 Geo. 2, c. 18, s. 1, in criminal cases. *Rex v. Abingdon (Lord)*, 1 Esp. 226—Kenyon.

Costs for not going to trial shall be paid to a defendant, by the course of the court, on informations for misdemeanours, where the prosecutor does not countermand his notice of trial in time. *Rex v. Heydon*, 3 Burr. 1304.

But a prosecutor is not to pay costs for not going to trial according to his notice, if it be not occasioned by his own default. *Rex v. Righton*, 3 Burr. 1694.

If a sessions' case be sent down to be retried, and the prosecutor abandon it when it is returned, the court will discharge his recognizance for the costs given under stat. 5 Geo. 2, c. 13, but if he dispute the amended order, they will not. *Rex v. Edgeworth*, 4 T. R. 218.

Where there is a new trial, the costs of the trial already had are generally directed to abide the event of the second verdict. *Att. Gen. v. Stephens*, 3 Price, 72.

A prisoner suing as a party grieved on the Habeas Corpus Act, and having been refused a copy of his warrant of commitment, is entitled to costs if he recover a penalty. *Ward v. Ash*, 1 H. Black. 10.

If a clerk of assize draw an indictment with unnecessary prolixity, he may be ordered to pay the extraordinary expense. *Rex v. Bury*, 1 Leach. C. C. 210.

He has no lien on the records in his custody for his fees. *Id.*

If a clerk of the peace in drawing an indictment introduce unnecessary recitals, the court will order him to pay the expense thereby incurred. *Rez v. May*, 1 Dougl. 193: S. C. not S. P. 1 T. R. 237, n.

How costs of amending a plea, with liberty to the adverse party to reply de novo, are to be taxed, and what allowance to be made. *Rez v. Philpotts*, 2 Burr. 757.

Where justices of the peace are complained of without reason, they shall have costs. *Rez v. Palmer*, 2 Burr. 1162.

After a cause is called on, if the defendant puts off the trial on account of the absence of witnesses, he must pay the costs of the day, as well in criminal cases as in civil. *Rez v. Doyle*, 1 Esp. 125—Kenyon.

Persons indicted for not repairing roads, ratione tenuræ, shall pay the costs of the prosecutor. *Rez v. Wingfield*, 1 W. Black. 602. And see *Rez v. Cheshunt*, 1 W. Black. 295.

The sessions, before whom a parish is acquitted upon the trial of an indictment for not repairing a highway, may by their order award C. and E. to pay costs to the parish, although the names of C. and E. be not on the back of the indictment, and although the indictment originated in a presentment of A. and B. constables, whose names are on the indictment; and it is enough if the order is intitled as in the prosecution of C. and E., without showing further that C. and E. are prosecutors; neither need it appear on the face of the order that the indictment was tried, if that appear by the record of the proceedings; and the order is good in form, if it be for the payment of the costs to the solicitor of the parish. *Rez v. Commerell*, 4 M. & S. 203.

If the judge, on the trial of an indictment for not repairing a road, certify that the defence was frivolous, without also awarding costs in express terms, under stat. 13 Geo. 3, c. 78, the prosecutor is entitled to costs. *Rez v. Clifton*, 6 T. R. 344. And see *Rez v. St. John, Margate*, 6 M. & S. 130.

If a person gives notice of his intention to appeal to the quarter sessions against the poor-rate, but do not enter his appeal, the sessions cannot award costs to the other party under the stat. 17 Geo. 2, c. 38. *Rez v. Essex, (Justices)*, 8 T. R. 583.

So the costs to be paid by offenders under stat. 6 G. 1, c. 48, s. 1, must be ascertained by the conviction, or it is bad. *Rez v. Hall, Cowp.* 60.

So the costs to be paid by offenders under the Stage Coach Act, 50 Geo. 3, c. 48, must be ascertained by the conviction, or it is bad. *Rez v. Payne*, 4 D. & R. 72.

Though a local act says, that "all moneys paid, expended by, or recovered against the commissioners or their treasurer, &c., by means of an action, prosecution, &c., or appeal for any cause relating to the act, or anything done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer;" it does not extend to discharge the commissioners

from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them, however they may afterwards reimburse themselves out of the fund in the treasurer's hands. *Rez v. Kingston*, 8 East, 41.

And they may be indicted for non-payment of such costs. *Id.*

## 2. After Removal by Certiorari.

[See *Rez v. Midlam*, and *Rez v. Emden*, 3 Burr. 1720.]

Where the expenses of an indictment for a misdemeanour are defrayed by subscription, and the nominal prosecutors incur no expense, they are not entitled to costs as prosecutors within 5 W. & M., c. 11, s. 3. *Rez v. Cook*, 1 M. & R. 526.

Quære, whether the near relations of a person whose body has been disinterred for the purposes of dissection are parties grieved within that statute? *Id.*

Rated inhabitants of a parish, who were prevented by rioters from entering the vestry-room to attend a meeting called for the purpose of imposing a church-rate, and who afterwards prosecuted the offenders, are parties grieved within the meaning of the stat. 5 W. & M., c. 11, s. 3; and, therefore, entitled to costs, on conviction of the defendants after removal of the indictment by certiorari. *Rez v. Thompkins*, 2 B. & Ad. 287.

Where a defendant who removes an indictment into K. B. by certiorari is convicted, he shall not pay costs on the stat. 5 & 6 W. & M., c. 11, to the prosecutors. *Rez v. Ingleton*, 1 Wils. 139.

Under the third section of W. & M., c. 11, for regulating the removal of indictments from the sessions by certiorari, the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand was ever made by him. *Rez v. Chamberlayne*, 1 T. R. 103.

Where a defendant had removed an indictment from the sessions into K. B. by certiorari, and was convicted, but died before he could be brought up for judgment:—Held, that his bail were liable to pay the taxed costs of the prosecution, under 5 & 6 W. & M., c. 11, s. 3. *Rez v. Turner*, 4 D. & R. 816; 3 B. & C. 160: S. P. *Rez v. Finmore*, 8 T. R. 409.

Where an indictment was removed by certiorari at the instance of the defendant, and he was found guilty, the costs of conveying him to jail, on his receiving sentence of imprisonment, are reasonable costs within the statute 5 & 6 W. & M., c. 11, s. 3, to be allowed to the prosecutor on the taxation of costs. *Rez v. Gilbie*, 5 M. & S. 520; 2 Chit. 159.

The court granted a rule to refer it to the master of the Crown Office, to tax in favour of the defendant the costs of a certiorari, the record having been withdrawn without notice. *Rez v. —*, 2 Chit. 159.

Where on removing an indictment from the sessions, by certiorari, a recognizance is given by two in 20l. each, under stat. 5 & 6 W. & M., c.

11, ss. 2, 3, to secure the costs, such recognizance shall not be discharged till all the costs are paid, though they exceed 40*l*. *Rez v. Teal*, 13 East, 4.

Upon an indictment for perjury, removed into K. B. by certiorari, if the prosecutor gives notice of trial to the defendant, and withdraw his record countermanding his notice in time, he shall pay costs to the defendant. *Rez v. Bartrum*, 8 East, 269.

If the defendants, in an indictment for not repairing a road, (and which is removed by certiorari), be acquitted for want of prosecution, the court has no power to award costs to the defendants on the ground of its being a vexatious prosecution under stat. 13 Geo. 3, c. 78, s. 65, but the application must be made to the judge at Nisi Prius. *Rez v. Chadderton*, 5 T. R. 272.

The stat. 5 & 6 W. & M., c. 11, directing, by s. 2, that no certiorari shall be granted on the part of a defendant to remove an indictment for a misdemeanour from the sessions before he shall enter into a recognizance, &c., in 20*l*. to try at the next assizes, &c.; and by s. 3, that, "if the defendant prosecuting such certiorari be convicted, the court of K. B. shall give reasonable costs to the prosecutor, and that the recognizance shall not be discharged till the costs taxed shall be paid;" attaches only upon a defendant convicted by judgment; and therefore if, after a verdict of guilty, the judgment be arrested, no costs can be taxed for the prosecutor. *Rez v. Turner*, 15 East, 570.

A justice of the peace, who has prosecuted a jailor to conviction for suffering a prisoner to escape, committed by him on a charge of felony, is not entitled to the costs of the conviction under stat. 5 & 6 W. & M., c. 11, s. 3. *Rez v. Sharpness*, 2 T. R. 47.

Persons dwelling near a steam-engine, which emitted volumes of smoke, affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for it, are parties grieved, and entitled to have their costs taxed under the stat. 5 W. & M., c. 11, s. 3, upon removal of the indictment by certiorari from the sessions into the court by the defendants, and their subsequent conviction. *Rez v. Dewsnapp*, 16 East, 194.

The prosecutor of an indictment for obstructing a highway must show himself to be the party grieved, in order to obtain costs under the 5 & 6 W. & M., c. 11, s. 3; therefore, where the prosecutor did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and whilst it was stopped declared he did not care about it:—Held, that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expense. *Rez v. Ingleton*, 1 M. & S. 268.

Several persons were held entitled to costs under stat. 5 W. & M., c. 11, as prosecutors of an indictment, removed by certiorari, for not repairing a highway, one as constable of the manor within which the highway lay, the other as parties grieved, they having used the way for many

years in passing and re-passing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. *Rez v. Tuntion, St. Mary (Inhab.)* 3 M. & S. 465. And see *Rez v. Bird*, 2 B. & A. 522.

A justice of the peace, who indicts a road for being out of repair, (the indictment being afterwards removed by certiorari), is entitled to costs, under the stat. 5 & 6 W. & M., c. 11, s. 3, if the defendant be convicted. *Rez v. Ketilworth*, 5 T. R. 33.

The prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped up, is a party grieved within the meaning of 5 & 6 W. & M., c. 11, s. 3. *Rez v. Williamson*, 7 T. R. 32.

Upon an indictment for not repairing a highway, removed by the prosecutor, if the judge at Nisi Prius certify that the defence was frivolous, the prosecutor shall have his costs, notwithstanding the defendant hath obtained a rule nisi to arrest the judgment. *Rez v. St. John, Margate*, 6 M. & S. 130. And see *Rez v. Clifton*, 2 T. R. 344.

No costs are due on a certiorari removing summary proceedings, unless a recognizance be entered into at the time of removing the proceedings: but it is discretionary in the court whether they will grant a certiorari; and in future they will compel the party to enter into a recognizance. *Rez v. Jenkins*, 1 T. R. 82.

Where a judge at the assizes refused to try an indictment for a misdemeanour (perjury), manifestly bad on the face of it, but did not order it to be quashed, and the prosecutor preferred another indictment for the same offence, and removed it into K. B., the court would not call upon the prosecutor to pay the costs of the first prosecution, before he proceeded with the second. *Rez v. Tremaine*, 5 D. & R. 413; 3 B. & C. 761; 1 R. & M. 147.

Where an indictment is removed by certiorari from the quarter sessions, the prosecutor has costs taxed by the master, which, if not paid within ten days, an attachment issues, and the recognizance stands as a security. *Anon. Loff*, 520.

The 12th section of the stat. 38 Geo. 3, c. 32, providing that no indictment shall be removed into the next adjoining county, except the persons applying for such removal shall enter into a recognizance in 40*l*. for the extra costs, &c., does not relate to indictments sent by K. B. to be tried in the next adjoining county, after a removal thither by certiorari. *Rez v. Nottingham*, 4 East, 208; 1 Smith, 51.

Where a defendant removes an indictment from a court of general quarter sessions by certiorari into K. B., and is afterwards convicted, the master of the Crown Office, in taxing the prosecutor's costs under 5 & 6 W. & M., c. 11, ought to consider those only which were incurred subsequently to the certiorari. *Rez v. Wallace, Hull on Costs*, 547.

Where a defendant had removed an indictment entered into a recognizance, been convicted and fined, and the prosecutor received one third thereof, so much shall be deducted out of costs. *Rex v. Osborne*, 4 Burr. 2125.

Where the attorney-general on behalf of the crown sued for money, and the defendant resisted the payment, though the crown succeeded in the suit: yet as there was a reasonable doubt whether the money did not belong to other parties, it was held to be too much to visit the defendant with the crown's costs. *Mucklow v. Att.-Gen.* 4 Dow, 12, 16.

On a defendant's acquittal on an information, he is not entitled under stat. 4 & 5 W. & M., c. 18, s. 2, to costs, beyond the extent of the recognizance entered into by the prosecutor in 20l., under that act. *Rex v. Filewood*, 2 T. R. 145.

The court, on granting an information, will not require the prosecutor to give security for the costs, in case the defendant should be acquitted, beyond the extent of the recognizance in 20l. required by the statute of 4 & 5 W. & M., c. 18, s. 2. *Rex v. Brooke*, 2 T. R. 190.

An indictment removed into K. B. by the defendant, and made a special jury cause by the prosecutor, came on to be tried, and was immediately referred. The order of reference stated, that if the arbitrator should be of opinion that the defendant was guilty, and the prosecutor entitled to costs, the defendant agreed to pay the costs. The arbitrator did so find:—Held, that the prosecutor could not recover the costs of the special jury, since the judge had not certified for those costs pursuant to 6 Geo. 4, c. 50, s. 34; and the order of reference did not expressly give a power of doing so to the arbitrator. Also, that the general term "costs" in this order did not include those of the reference and award. *Rex v. Moate*, 3 B. & Ad. 237.

#### CXIX. INFORMATION.

##### 1. Generally.

A criminal information is not proper to try a civil right, unless the parties will not submit to a trial at law. *Anon. Loft*, 184.

It is not to be grantable where there is contradictory evidence. *Tuit v. Faukes*, Loft, 64.

The granting it is discretionary under the circumstances. *Anon. Loft*, 323. *And see Rex v. Robinson*, 1 W. Black. 541.

On a rule for information, though the court may think a ground is laid, yet if under the circumstances the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule of the defendant's undertaking so to do. *Rex v. Morgan*, 1 Dougl. 314.

An information founded on a penal statute must negative the exceptions in the enacting clause creating the penalty, and also those contained in a former clause to which the enacting clause refers in express terms. *Rex v. Pratten*, 6 T. R. 539.

Where a prosecutor excepts in a statement only, that perjured as surplus. *And see Gill v. Je*

An introductory that outrages had in neighbourhood of not be proved that places; and fourt may be considered. *Salter*, 4 M. & S. 1

An introductory gaged in such out under the direction known person, call import that the per proof that he was s the purpose is suffi

Not grantable. *Anon. Loft*, 155.

The court will on the sole testim (uncontradicted), v the public interest, an alderman, who a justice of peace.

##### 2. Ex-officio

A defendant, in the attorney-general of venue without his 2 Price, 113.

Where a statute may recover it by a attorney-general. *R*

Information for a attorney-general, on he may grant one (*Mayor*), 4 Burr. 20

May be filed by a cancy of the office a vacancy need not be v. *Withers*, 4 Burr. (in error), 4 Bro. P.

The court will no formation filed ex-of He may stop the p prosequi, and file s Dougl. 239.

An information w the same offence wa ing, 2 Burr. 654; 2

In informations fil by the attorney-gen to be considered as of particular counts. 183.

##### 3. Agui

When a justice of or corrupt motives, t information. *Rex v*



The court will not grant an information against the magistrate of a borough for having disfranchised persons entitled to their freedom, although sworn to have been done to serve election purposes, if the defendants deny that motive, and swear that they thought there was legal ground for the disfranchisement, and the ground on which the disfranchisement went has not been decided. *Rez v. Doire*, 2 Dougl. 588.

No information shall be granted against justices acting in sessions, unless in very flagrant cases. *Rez v. Seaford (Justices)*, 1 W. Black. 432.

The court will not punish a justice in an extraordinary way for compelling a complainant to do that justice which he ought to have done of his own account, when the matter does not appear to have been done *malis animis*. *Rez v. Jackson*, Lofft, 147.

An information was granted against justices for refusing to relieve burgesses appealing against a poor's rate. *Rez v. Phelps*, 2 Ld. Ken. 570.

So a rule nisi was granted against a justice for paying over to the poor certain fines, and returning the convictions according to 19 Geo. 2. *W.'s case*, Lofft, 44.

Wherever magistrates act uprightly, though they mistake the law, no information will be granted against them. *Rez v. Jackson*, 1 T. R. 653.

Error in form is no ground for criminal information. *Rez v. Staffordshire (Justices)*, 1 Chit. 219.

And it is only granted where a magistrate has acted corruptly. *Anon.* 1 Chit. 217, (a).

On an application for a rule nisi for a criminal information against a magistrate, the question is not whether the act done might on full investigation be found to be strictly right, but whether it proceeded from oppressive, dishonest, or corrupt motives (under which fear and favour may generally be included), or from mistake, or error; in either of the latter instances the court will not grant the rule. *Rez v. Barron*, 3 B. & A. 432.

The court will grant a rule nisi for a criminal information at the end of a term against a magistrate for mal-practices during the term, but not for any misconduct before the term. *Rez v. Smith*, 7 T. R. 80.

A commitment by a justice of the peace for a time certain, as for fourteen days under the Vagrant Act, is a commitment in execution, and the party is not entitled to be bailed; and if another magistrate, on illegal and corrupt motives, discharge a person so committed, the court will grant an information against him. *Rez v. Brooke*, 2 T. R. 190.

The court will not grant an information against a magistrate, for having improperly convicted a person, unless the party complaining make an exculpatory affidavit, denying the facts. *Rez v. Webster*, 3 T. R. 388.

A criminal information was refused against a magistrate for returning to a writ of certiorari a

conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts. *Rez v. Barker*, 1 East, 186.

An information was granted against a justice, who was also a collector of customs, for sitting to decide the salvage of a vessel, under the 12 Anne, c. 18, of which he was entitled, as a custom-house officer, to part. *Rez v. Davis*, Lofft, 62.

And information goes against a justice for committing a man for not paying 1s. for discharging his warrant. *Rez v. Jones*, 1 Wils. 7.

Where facts tending to criminate a magistrate took place twelve months before the application to the court, they refused to grant a criminal information; although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till a very short time before the application was made. *Rez v. Bishop*, 5 B. & A. 612.

Nor will they grant a certiorari in the first instance to remove an order for the appointment of overseers for the purpose of having it quashed, on a suggestion that the justices made the appointment from corrupt and improper motives; the propriety of the appointment being matter of appeal to the sessions; but they will grant a criminal information against the justices, if the corrupt and improper motives for making the appointment be satisfactorily established. *Rez v. Somersetshire (Justices)*, 1 D. & R. 443.

Quære, whether a criminal information will lie against justices for making a false return to a mandamus, unless the return is corruptly and wilfully false? *Rez v. Lancashire (Justices)*, 1 D. & R. 485: S. C. not S. P. 5 B. & A. 755.

Rule nisi for an information against justices of peace (*inter alia*) making a commitment without previously taking the prosecutor's oath, who was a peer of the realm, and also for neglecting to take the noble prosecutor's recognizance to prosecute, discharged, these being deemed only irregular, not criminal. *Rez v. Fielding*, 2 Burr. 719.

An information will be granted against a justice of the peace, as well for granting as for refusing an ale license improperly. *Rez v. Holland*, 1 T. R. 692.

An information was granted against justices of peace, for refusing to grant an ale license from motives of resentment. *Rez v. Harris*, 3 Burr. 1716. And see *Rez v. Young*, 1 Burr. 556.

An information against a justice, upon a charge of refusing to grant a license, will be refused, if the reasons assigned for the refusal prove false in fact. *Rez v. Aibey*, 2 Burr. 653.

So where the other party does not appear quite free from imputation. *Anon.* Lofft, 314.

An information was granted for refusing to grant licenses to those publicans who voted against their recommendation of candidates for members of parliament for the borough. *Rez v. Williams*, and *Rez v. Davis*, 3 Burr. 1317.

But where the justices had not appeared to have acted corruptly, an information was refused. *Res v. Baylis*, 3 Burr. 1318.

Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons, requiring the offender to appear before himself, or some other magistrate, and purporting that informations had been given to him (the magistrate) on oath, whereas no oath had been taken, and the information had been communicated by the magistrate to the informer, the court, in discharging a rule for a criminal information against the magistrate, refused to give him his costs. *Res v. Whately*, 4 M. & R. 431.

#### 4. Against Parish Officers.

If a parish officer make an alteration in a poor rate, after it has been allowed by two justices, but without the approbation of the justices, he shall not be punished by information. *Res v. Barrett*, 2 Doug. 465.

An information lies for a conspiracy by parish officers and others to marry persons settled in different parishes, if the delinquents are of good situation in life, but not if they are low and indigent. *Res v. Compton*, Cald. 246.

Refused against an overseer for bribing a man to marry a chargeable pauper, where the parties had delayed three terms. *Anon. Lofft*, 272.

Granted against overseers for procuring a marriage to change a settlement. *Res v. Herbert*, 2 Ld. Ken. 466.

Granted against an overseer for procuring a pauper to marry another pauper with child of a bastard. *Res v. Tarrant*, 4 Burr. 2106.

Granted against overseers for procuring a soldier to marry a poor woman who was an idiot, and chargeable to the parish. *Res v. Watson*, 1 Wils. 41.

Refused against an overseer for removing a pauper to prevent her being chargeable. *Res v. Rusby*, 1 Bott, P. L. 335.

#### 5. In other Cases.

An information for not taking an office in a corporation is not to be filed against one neither usually resident therein, nor obstinately refusing. *Res v. Denison*, 2 Ld. Ken. 259.

The court will not grant a criminal information against the members of a corporation for a misapplication of the corporation money. *Res v. Watson*, 2 T. R. 199.

Where an information of seizure lays the number of things seized under a videlicet, the allegation is material; and the proof, verdict, and judgment, are limited to the number so laid, or a number within it; and it seems that such an information requires an averment of the quantity of things seized, and would be bad without it. *Att.-Gen. v. Jeffreys*, 1 M'Clel. 270; 13 Price, 545.

Where an information for smuggling, founded

on the statute 45 Geo. 2, c. 121, s. 7, stated the offence minutely, so as to bring it within that statute, and alleged, that, by reason thereof, the defendant having illegally on board foreign spirits, valued at 711l. 5s., his boat was forfeited, according to the statute in that case made and provided; and it also, after stating another matter of offence, that the defendant was found on board the said vessel, charged, that thereby he had forfeited the sum of 2,133l. 15s., the commissioners of customs having, by virtue of the said statute, elected to sue for the treble value of the said goods, instead of the penalty: and objections were made, first, that the information did not state the offence to be contrary to the form of the statute; secondly, that it omitted, in stating that the defendant had forfeited the sum of money, to allege "according to the form," &c.: thirdly, that the information did not aver that the sum charged to be forfeited was the treble value of the goods seized; and, lastly, that the name of the defendant was omitted in the concluding averment, that the commissioners had made an election to sue for the treble value: the court of Exchequer held, that in a revenue information, where upon the whole record the offence and statute were so plainly stated, as that the court might see that an offence had been committed with reference to the particular statute, the objections did not afford ground for arresting the judgment, on a motion made for that purpose. *Att.-Gen. v. Rattenbury*, 9 Price, 397.

Where an information on the stat. 33 Geo. 3, c. 52, s. 62, prohibiting officers of the East India company, residing in India, from receiving presents, charged that the defendants, being British subjects, on the 1st of January, 1794, and from thence for a long time, to wit, until the 29th of November, 1795, held certain offices under the company, and during all that time resided in the East Indies; and that whilst they held the said offices as aforesaid, and whilst they resided in the East Indies as aforesaid, to wit, on the 29th of November, 1795, they received certain presents:—Held, that the context showed that the word "until" was to be taken inclusive of the 29th of November, 1795, but that if it had been incapable of receiving an inclusive construction, the words under the first videlicet, "until the 29th of November, 1795," could not have been rejected as surplusage; for that can never be where the allegation is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, though laid under a videlicet, and however inconsistent with an allegation subsequent. *Res v. Stevens*, 5 East, 244; 1 Smith, 437.

In an information on a count, framed on the statute 42 Geo. 3, c. 38, s. 12, stating that the defendant, between the 31st day of August, 1819, and on each and every of divers, to wit, twenty other days, between that day and the day of exhibiting the information, did mix a large quantity, to wit, twelve gallons of strong beer with a large quantity, to wit, twelve gallons of table beer, in each and every of divers, to wit, five casks, whereby, &c. the defendant had, for each of the said offences, forfeited the sum of 200l.,

amounting in the whole to 21,000*l.*—Held, that this might be supported, although it was objected, first, that it was cumulative and multifarious, being a single count for many penalties: whereas each separate offence ought to have been made the subject of a separate count; secondly, that the divers other days on which, &c., ought to have been specified and stated; thirdly, that the charge was uncertain, unintelligible, and repugnant; and, lastly, that from the calculation as to the amount of the sums alleged to be forfeited, it appeared that the defendant was charged with five offences on each day, whereas he could not, in point of law, be considered to have committed more than one offence on each particular day. *Att.-Gen. v. Freer*, 11 Price, 183.

An information on 48 Geo. 3, c. 143, for selling "beer or ale" without an excise license is bad, and a conviction thereon, showing that the defendant had sold ale only, quashed. *Rex v. North*, 6 D. & R. 143.

It is not necessary to state, in an information against a maker of vinegar for the duties of excise under the 42 Geo. 3, c. 69, schedule (A.) that the liquor was preparing for sale, but that may be proved. *Att.-Gen. v. Green*, 4 Price, 224.

In an information for exercising a trade, not having served an apprenticeship, it need not be averred that the defendant did not exercise the trade at the time of making of the act. *Bull. q. t. v. Cobus*, 1 Burr. 366.

In an information for post-dating a draft, it is not necessary to set it out in the language in which it was originally drawn. *Att.-Gen. v. Valabreque*, Wightw. 9.

An information lies for a false return to a mandamus. *Anon. Loftt*, 185.

But refused against a man who has refused to serve the office of one of the sheriffs of London. *Rex v. Grosvenor*, 1 Wils. 18; 2 Str. 1193.

The court granted an information against a person refusing to take on himself the office of sheriff, because the vacancy of the office occasioned the stop of public justice, and the year would be nearly expired before an indictment could be brought to trial. *Rex v. Woodrow*, 2 T. R. 731.

So, for endeavouring to procure the appointment of certain person to be overseers of the poor, with a view to derive a private advantage to the party. *Rex v. Joliffe*, 1 East, 154, n.

The surveyor of a high road having improperly expended a large sum of money, borrowed by the trustees under an act of parliament, without the consent of the trustees, which the act required, to sanction the expenditure, the court refused a criminal information, no corrupt motive being expressly alleged: and they will not convert a civil into a criminal injury. *Rex v. Friar*, 1 Chit. 702.

An information was granted against commissioners for exceeding their powers, &c. *Rex v. Rogers*, 1 Ld. Ken. 373.

But refused against twelve commissioners for pulling down a turnpike, on a suggestion of irre-

gularity in the time and manner of the meeting. *Anon. Loftt*, 199.

So, against a husband for endeavouring to make his wife contrary to articles. *Rex v. Ven*, (Lord) 1 W. Black. 18.

So, for embezzling money collected on a church brief. *Rex v. St. Botolph, Bishopsgate*, 1 W. Black. 443.

So, for burying a dead body found in a river, without sending for the coroner. *Rex v. Proby*, 1 Ld. Ken. 250.

But granted for maliciously pressing. *Rex v. Webb*, 1 W. Black. 19.

An information for a nuisance will be refused, if an application to the party be not shown. *Rex v. Green*, 1 Ld. Ken. 379.

Whether or not the particular schemes denounced by the stat. 6 Geo. 1, c. 18, a. 18, is manifestly tending to the common grievance, prejudice, and inconvenience of great numbers of subjects in their trade and other affairs, such as raising a great many subscriptions for trading purposes, and making the shares on the joint stock transferable, be in themselves unlawful, and prohibited, without reference to the fact of such tendency in a particular instance in the opinion of a court and jury; at any rate, the inviting of such subscriptions, by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, seems to be an offence within the act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to this application to the court, they refused to interfere, by granting an information, though they discharged the rule without costs. *Rex v. Dadd*, 9 East, 516. And see *Rex v. Webb*, 14 East, 406.

An information does not lie for a riot, if the parties did not disperse, and are within the penalty of the Riot Act; otherwise it does. *Anon. Loftt*, 253.

Nor for pretending to read the Riot Act. *Rex v. Spriggins*, 1 W. Black. 2.

All persons by their presence, countenancing a riot, are liable to an information. *Rex v. Hunt*, 1 Ld. Ken. 108.

An information was granted for attempting to bribe a privy councillor to procure a reverend patent of an office grantable by the king under the great seal. *Rex v. Vaughan*, 4 Burr. 264.

An information was granted on the deposition of two persons, to the offer of a bribe by the defendant at an election. *Rex v. Ingham*, 2 Ld. Ken. 202.

#### 6. Application for Criminal Information.

See *Rex v. Borron*, 3 B. & A. 432; *Rex v. Parkyns*, 3 B. & A. 668; and *Rex v. Hunt*, 4 B. & A. 430.

One information only may, by leave of court, be exhibited under the Irish statutes 19 Geo. 2.

c. 2, s. 4, against different persons, and against the same persons for usurping different franchises; and there is no necessity to state such leave upon the record. *Symmers v. Rex* (in error), Cowp. 489.

A joint information against several defendants cannot issue upon distinct rules for one or more information or informations against each. *Rex v. Haydon*, 3 Burr. 1270.

A *qui tam* information for penalties under the game laws is not an information within the meaning of the 43 Geo. 3, c. 58, so as to entitle the plaintiff to enter an appearance and plea, when the defendant himself neglects to appear and plead. *Davies q. t. v. Bint*, 5 D. & R. 353.

The motion for a criminal information must be made by the law officers of the crown, or by a barrister, and not by a private individual. *Rex v. Lancashire (Justices)*, 1 Chit. 602.

The party applying for an information must come with clean hands into court. *Rex v. Eden*, Lofft, 72.

Therefore an information will be refused to cheats and gamblers against others of the same description. *Rex v. Reach*, 1 Burr. 548.

So, an information for a challenge was denied to the first sender of it. *Rex v. Hankey*, 1 Burr. 316.

A party applying for an information must waive his right of action; but if the court, on hearing the whole matter, are of opinion that it is a proper subject for an action, they may give the party leave to bring it. *Rex v. Sparrow*, 2 T. R. 198; 1 Tidd's Prac. 8.

An information was refused where the charge of giving a challenge was made under false and ambiguous colours; the words spoken admitting of a favourable interpretation. *Prideaux v. Arthur*, Lofft, 393.

So, where the party is unreasonably late in his application. *Id.*

A criminal information may be moved for against magistrates, for misconduct in the execution of their offices, in the second term after the offence committed, there being no intervening assizes. *Rex v. Harries*, 13 East, 270.

The court will not grant a rule nisi for a criminal information against a magistrate, so late in the second term after the imputed offence, as to preclude him from the opportunity of showing cause against it in the same term. *Rex v. Marshall*, 13 East, 322.

An information against a magistrate must be moved for within the second term after the offence, time enough for him to answer the affidavits. *Rex v. Taylor*, Nolan, 204.

If a complaint for an information against a justice of peace prove frivolous, the attorney as well as the original complainant must pay the costs. *Rex v. Felding*, 2 Burr. 654; 2 Ld. Ken. 386.

#### 7. Affidavits.

An affidavit to found a motion for a criminal information must distinctly negative the charge; and it is usual to do so in the words of the charge. *Rex v. Wright*, 2 Chit. 162.

And on a motion for such information against two persons for a conspiracy in endeavouring to raise the price of oil, it must appear distinctly that they combined together, as it is no offence for an individual separately so to endeavour. *Rex v. Hilbers*, 2 Chit. 163.

If circumstances of suspicion only are stated, in affidavits in support of a rule for criminal information:—Held, to be insufficient, unless the deponents add their belief that the party against whom it is moved acted from corrupt motives. *Rex v. Williamson*, 3 B. & A. 582.

An information on stat. Hen. 5, c. 4, against a person for practising as an attorney whilst he was under sheriff, was refused because the affidavit did not mention what particular acts he did as an attorney, of which the court should judge. *Rex v. Bull*, 1 Wils. 93.

Affidavits, upon which an information is applied for, must not be sworn before the attorney in the prosecution. *Rex v. Ipswich (Jailer)*, 2 Ld. Ken. 421.

An affidavit by A., stating that B. had brought him a challenge from C., and that B. had refused to make an affidavit that C. sent him with it, is not evidence in which the court will grant a rule nisi for a criminal information against C. for sending the challenge. *Rex v. Willett*, 6 T. R. 294.

Rule to show cause for an information for challenge, granted, upon producing only copies of the letters containing it. *Rex v. Chappel*, 1 Burr. 402.

When any defendant shall be brought up for sentence on any indictment, or information, after verdict, the affidavits produced on the part of the defendant, if any such be produced, shall be first read, and then any affidavits produced on the part of the prosecution shall be read; after which the counsel for the defendant shall be heard, and lastly, the counsel for the prosecution. *Reg. Gen. K. B. M. T.* 29 Geo. 3. *Rex v. Bunts*, 2 T. R. 683.

Where a defendant was convicted of a libel, which purported to have been written in consequence of his having seen a statement of facts in different newspapers, an affidavit that he read those statements in such newspapers may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible. *Rex v. Burdett (Bart.)*, 4 B. & A. 314.

The court granted a peremptory rule for an attorney, concerned in showing cause against a mandamus, to file his affidavits on the morrow, the rule for the mandamus having been made absolute. *Rex v. Middlesex (Justices)*, 1 Chit. 368.

When a defendant who has been convicted on an indictment comes up to receive judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, and which affidavits the defendant is at liberty to answer. *Rex v. Sharpness*, 1 T. R. 228.

Where a defendant is brought up to receive judgment after conviction, an affidavit by the

prosecutor in aggravation, stating that a third person, who refuses to join in the affidavit, had informed him that the defendant after the trial had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without swearing that such third person was under the control or influence of the defendant. *Rez v. Pinkerton*, 2 East, 357. And see *Rez v. Withers*, 3 T. R. 428, and *Rez v. Mawbry*, 6 T. R. 627.

Affidavit entitled "in the King's Bench," upon which the attorney-general had filed an information ex-officio against the defendant, permitted to be read in aggravation after judgment by default. *Rez v. Morgan*, 11 East, 457.

An affidavit, to put off a trial at Nisi Prius, being returned to the court of K. B., they granted another information on it against the defendant, considering the affidavit taken at Nisi Prius as taken under the authority of the court. *Rez v. Joliffe*, 4 T. R. 285.

It should be stated in the affidavit, in support of an application to postpone a trial on account of a commission to examine witnesses not having returned, that the return is expected, and when. *Att.-Gen. v. Laragoity*, 3 Price, 221.

In an information at the suit of the attorney-general to recover penalties, an affidavit by a defendant to ground a motion to postpone the trial on account of the absence of a witness, must be minute and circumstantially particular as to all the matters therein stated. *Att.-Gen. v. Tyson*, 11 Price, 229.

And must show where the witness is. *Att.-Gen. v. Phillips*, M'Clel. 251.

But the trial of an excise information was ordered to be postponed, where the court of Exchequer were not unanimous in considering the affidavit on which the application was founded to be sufficiently circumstantial. *Att.-Gen. v. Dodsworth*, 11 Price, 232.

When a defendant, who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with affidavits disclosing his own case (if he mean to produce any affidavit at all); but, if in the course of the inquiry the court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day. *Rez v. Wilson*, 4 T. R. 487.

Affidavits allowed to be read on a defendant's being brought up for judgment, stating that the defendant had made use of expressions aggravating his guilt, in the presence of two persons who had related them to the persons making the affidavits, and the prosecutor swearing that the persons who heard the expressions refused to come forward, and were supposed to be under the influence of the defendant. *Rez v. Archer*, 2 T. R. 203, n.

Where the party applied for time to send to Trinidad for an affidavit of the truth of certain matters in a libel, in order to show cause against such a rule, the court would not grant further time. Affidavits abroad, before judges there, and verified, although receivable as affidavits of

debt, are not to be received on rules to show cause, in opposition to affidavits made in K. B. *Rez v. Draper*, 3 Smith, 391.

A rule nisi for an information cannot be served on a clerk in court, employed formerly by the defendants. *Anon.* 2 Ld. Ken. 496.

### CXX. PRISONS.

[See *Brandling v. Kent*, 1 T. R. 8.]

The house of correction for the county of Middlesex, adapted to the separate reception of those pursuant to the 22 Geo. 3, c. 64, and other acts, is a legal prison for the safe custody of persons under a charge of high treason. *Ex parte East*, 8 T. R. 172.

The court of King's Bench has no authority to interfere in the regulation and management of the jails in the kingdom; therefore, where persons had been found guilty of a misdemeanor, and confined in a county jail under the sentence of the court, prayed to be allowed the same indulgences as prisoners confined for felony, the court refused to make any order upon the jailor for that purpose. *Rez v. Carlile*, 1 D. & R. 56. But see *Anon.* Loft, 257.

The lord of a franchise is not, as such, bound to repair a jail within it, but he may be subject to such a charge by immemorial usage. *Rez v. Exeter (Bishop)*, 6 T. R. 373.

One convicted upon the stat. 9 & 10 W. 4, c. 41, s. 2, of having unlawfully in his possession, or concealing the king's naval stores, cannot, since the stat. 39 & 40 Geo. 3, c. 83, s. 1, be sentenced to hard labour. *Rez v. Bridges*, 1 East, 53.

Semble, that a jailor bringing a prisoner out of his county, to be present at the trial of an information on the game laws, in which he is defendant, without having a habeas corpus or judge's order for that purpose, is liable to an action for false imprisonment, at the suit of such prisoner. *R. Bint v. Lavender*, *T. Bint v. Same*, and *Fin v. Same*, 1 C. & P. 659—Littledale.

Assumpsit for money had and received will lie against a jailor, where, by the regulations of a prison made by the magistrates, certain rates are settled for lodgings, &c. within the prison, and the jailor takes more than that sum, even though he has paid it over to the magistrates to whom he accounts. *Miller v. Arie*, 3 Esp. 231—Keppel.

### CXXI. TRANSPORTATION.

5 Geo. 4, c. 84.

By the word "transportation" in the 8 Geo. 4, c. 15, is meant not merely the conveying of a felon to the place of transportation, but his being so conveyed and remaining there during the term for which he is ordered to be transported; and therefore, a felon attainted is not by that statute restored to his civil rights till after the expiration of the term for which he is ordered to be so transported. *Bullock v. Dodds*, 2 B. & A. 232.

Where a prisoner was convicted of perjury &

the assizes at Chester, and the sentence of transportation was entered on the record as follows: "Wherefore, all and singular the said premises being seen by the said justices here, and fully understood, it is therefore ordered that he the said L. K. be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years."—Held, on error brought, that this was no judgment, but merely an order. *Res v. Kenworthy*, 3 D. & R. 173; 1 B. & C. 711.

The king's sign manual may be given in evidence by the prisoner, on an indictment for returning from transportation; and if not revoked, and the condition be literally, though not substantially complied with, it shall discharge the prisoner from that indictment. *Res v. Miller*, 2 W. Black. 797.

The stat. 3 Geo. 4, c. 38, s. 2, which enacted "that if any servant shall steal any money, &c., from his master, and shall be convicted thereof, and be entitled to benefit of clergy, he, instead of being subject to such punishment as may now by law be inflicted upon persons so convicted, and entitled to benefit of clergy, may be transported for fourteen years," did not extend to cases of petty larceny. *Res v. Ellis*, 8 D. & R. 173.

A judgment of transportation for fourteen years, if bad for excess, is bad in toto, and cannot operate as a good judgment of transportation for seven years. *Id.*

Where a court of quarter sessions have passed an erroneous judgment of transportation, the court will not send it back to be amended, but will reserve it, on writ of error. *Id.*

### CXXII. ARTICLES OF THE PEACE.

Articles of the peace ought to be exhibited in the neighbourhood, that the security may be given there. *Res v. Waite*, 2 Burr. 780: S. C. nom. *Res v. A. B.* 2 Ld. Ken. 511.

Where a person exhibits articles of the peace, and swears that her life is in danger, the truth of the facts cannot be controverted. *Lord Vane's case*, 13 East, 172, n.

There ought to be a reasonable foundation on the face of the articles, to induce a fear of personal danger, before the court will require sureties of the peace. *Id.*

A wife may sue a supplicavit in Chancery against her husband, and to find sureties not to beat or evil intreat her, aliter quam causa regiminis et castigationis. *Id.*

The facts stated in the articles are to be considered as true till the contrary appears upon a proper prosecution. *Id.*

Where there are articles of separation between the husband and wife, if the husband afterwards confine her, she may have a habeas corpus, and be set at liberty. *Id.*

One, against whom articles of the peace are exhibited, is not entitled to read affidavits on his behalf, in contradiction of the facts sworn to

against him in such articles. *Res v. Doherty*, 13 East, 171.

Upon articles of the peace exhibited, the court have power of requiring bail for such a length of time as they shall think necessary for the preservation of the peace, and are not confined to a twelve-month. *Res v. Bowes*, 1 T. R. 696.

Where the court had at first required bail for fourteen years, they afterwards lessened the time to two years, upon its appearing to them that an information was depending against the defendant on the same account, which must necessarily be determined within that time. *Res v. Bowes*, 1 T. R. 696.

Where articles of the peace appeared malicious and untrue, the court stayed process on them, and committed the exhibitant for perjury. *Res v. Parnell*, 2 Burr. 806.

The court ordered that directions to justices of peace to take security, specifying the sums wherein principals and sureties should be bound, to be indorsed on the attachment of the peace. *Huti's case*, or *Res v. Bowmaster*, 2 Burr. 1039.

CROPS—See DISTRESS—EXECUTION.

CURATE—See ECCLESIASTICAL LAW.

### CUSTOM AND PRESCRIPTION.

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VIII. OTHER CUSTOMS.

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4. Corporations—See CORPORATION.

5. Mines—See MINES.

6. Timber and Trees—See TIMBER AND TREES.

### I. VALIDITY GENERALLY.

A custom may be to do a thing several ways, if not inconsistent. *Anon. Loft*, 398.

A custom is void which is unreasonable, uncertain, savours too much of arbitrary power, and tends to make a lord of a manor a judge in his own cause. *Wilkes v. Broadbent*, 1 Wils. 63.

It is no objection to a custom that it is not conformable to the common law of the land. *Horton v. Beckman*, 6 T. R. 760, 764. And see *Hardy v. Holliday*, 4 T. R. 718, n.

But the usage of a particular place cannot vary the general law. *Rez v. Salkern*, Cald. 444.

A custom for the inhabitants of a particular place to take a profit in alieno solo, is bad; a right to take such a profit can be claimed by prescription only. *Grimstead v. Marlowe*, 4 T. R. 717.

No one can claim a prescription in his own land. *Cooper v. Barber*, 3 Taunt. 99.

A prescription cannot be where the creation of the thing upon which it is claimed is within the time of memory. *Rez v. Johns*, Loft, 76.

An ancient grant, without date, does not necessarily destroy a prescriptive right; for it may be either prior to time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. *Addington v. Clode*, 2 W. Black. 989.

A custom, regulating the rights of the owners of all lands bordering on the sea, is so general that it need not be pleaded. *Rez v. Yarborough (Lord)*, 2 Bligh, N.S. 147; 1 Dow, N.S. 178; 5 Bing. 163.

Unity of possession has the effect of suspending an easement, but does not extinguish a prescription. *Canham v. Fisk*, 1 Price's P. C. 148.

## II. AS TO LANDLORD AND TENANT.

A custom that tenants, whether by parol or deed, shall have the away-going crop after the expiration of their terms, is good. *Wiglesworth v. Dallison*, 1 Dougl. 201. *And see* 1 Bligh, 287.

So, a custom that a tenant may leave his away-going crop in the barn, &c., of the farm after he has quitted the premises, is good. *Beaven v. Delahay*, 1 H. Black. 5; *S. P. Lewis v. Harris*, 1 H. Black. 7, n.

Quære, whether a custom to demise by parol an incorporeal hereditament, (for instance, a right of common,) can be supported at law? *Lathbury v. Arnold*, 1 Bing. 219; 8 Moore, 72. *And see Rez v. Lane*, 1 D. & R. 76; 5 B. & A. 488.

Where, to trespass quare clausum fregit, the defendant pleaded a custom applicable to all farms within the parish, which were not exempted by special agreement or otherwise:—Held, that, to avail himself of the fact that his particular farm was exempted, the plaintiff ought not to traverse the custom generally, but to confess it, and avoid it by showing that the exception applied to his farm. *Evans v. Ogilvie*, 2 Y. & J. 79.

## III. RESPECTING PARISHES.

Where a parish contained within itself a borough not co-extensive with it, and the mayor of the borough, on a return to a mandamus for allowing a poor rate made by the churchwardens and overseers of the whole parish, stated a custom which had existed since the 43 Eliz. of appointing separate churchwardens and overseers, and of making separate rates for the borough,

and for those parts of the parish which lay without the borough; it was holden that such custom was invalid; and the return was quashed accordingly. *Rez v. Gordon*, 1 B. & A. 524.

A custom, that every pound of butter sold in a particular market-town should weigh eighteen ounces, is bad. *Noble v. Durell*, 3 T. R. 271.

Quære, whether a custom to sell butter in lumps of a certain weight may not be good? *Id.*

A custom for all the inhabitants of a parish to play "at all kinds of lawful games, sports, and pastimes in the close of A., at all seasonable times of the year, at their free will and pleasure," is good; but a similar custom "for all persons, for the time being, being in the said parish," is bad. *Fitch v. Rawling*, 2 H. Black. 393.

A person who rents a tenement within a parish, which he uses occasionally, but does not actually reside there, is within a custom for all the inhabitants of a parish. *Fitch v. Fitch*, 2 Esp. 543—Heath.

A prescription as lord of the manor for toll of all goods landed within the manor, in consideration of repairing a wharf within the manor, not confining it to the wharf, is good. *Colton v. Smith*, Cowp. 47; Loft, 463.

A prescription for taking three bushels of barley out of every ship's cargo, brought to a certain quay to be exported, is reasonable and good. *Sergeant v. Read*, 1 Wils. 91.

An annual officer of an hundred, to which the privilege of holding a fair has been granted, may prescribe to hold it, although not a corporation. *Taylor v. Rendeau*, 2 Ld. Ken. 50.

Evidence of a custom, to perambulate the boundaries of a parish, is not sufficient to support an allegation in pleas in trespass of a right to perambulate the boundaries of a liberty. *Grant v. Kearney*, 12 Price, 773.

No person has at common law a right to glean in a harvest field: neither have the poor of a parish, legally settled (as such), any such right. *Steel v. Houghton*, 1 H. Black. 51. *And see Worledge v. Manning*, 1 H. Black. 53, n.

But in one case it was held, that the right or privilege by law or custom of gleaning or leasing must be exercised under proper circumstances and restrictions. *Rez v. Price*, 4 Burr. 1295.

A custom for poor and indigent householders living in A. to cut and carry away rotten boughs and branches in a chase in A. cannot be supported; the description of the persons entitled being too vague. *Selby v. Robinson*, 2 T. R. 758.

Therefore where the defendant justified, in trespass, under such a custom, which was found for him, the court set aside the verdict on that issue, and entered a verdict for the plaintiff, with nominal damages. *Id.*

## IV. CUSTOMS OF MANORA.

### 1. Generally.

An immemorial custom, for the steward of a

manor to nominate the jury to serve on the court-leet at the election of the mayor of a borough, is good in law. *Rex v. Jolliffe*, 3 D. & R. 240; 2 B. & C. 54.

Twenty years' regular usage, uncontradicted and unexplained, is cogent evidence for a jury to presume that a custom for the steward of a manor to nominate the jury to serve on the court-leet, at the election of the mayor of a borough, is an immemorial custom. *Id.*

A custom, to swear the jurors at one court-leet to inquire and return their presentments at the next court, is bad in law. *Davidson v. Mescrop*, 2 East, 56.

A custom within a manor that lands shall descend to the eldest sister, where there is neither a son nor a daughter, does not extend to an eldest niece; but the lands must descend according to the rules of the common law, in default of such son, daughter, and sister. *Denn v. Goodwin v. Spray*, 1 T. R. 466.

A court-leet, holden on the 28th of April, was adjourned, after the jury had been sworn in, till the 15th of December, which day was given them to make their presentments:—Held, that an adjournment of such duration (which was admitted to be according to the custom of the manor) was not unnecessarily unreasonable. *Wilcock v. Windsor*, 3 B. & Adol. 43.

A custom in a manor, for the leet jury to break and destroy measures found by them to be false, is lawful. In a plea of justification grounded on such custom, it is enough to say that the measures were found by the jury to be false, without alleging that they were so. *Id.*

In trespass, for seizing weights and measures, four defendants pleaded that they were sworn, with divers, to wit, twenty others, as a leet jury, according to the custom of the manor of Stepney; and that it was the custom of the jury so sworn to examine weights and measures within the manor, and seize them if defective; and they alleged that they, the defendants, being on such jury so sworn as aforesaid, examined and seized the plaintiff's weights and measures, which they found defective. Replication, *de injuria*. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop when the defendants made the seizure there, though the rest were close at hand; but the judge refused to let any question go to the jury on this part of the case, being of opinion that the objection was on the record:—Held, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court-leet, according to custom. *Sheppard v. Hall*, 3 B. & Adol. 433.

In an action by a copyholder against the lord of a manor for a false return to a mandamus, in which mandamus a custom was set forth in respect of copyholds granted for two lives, that the surviving life should renew, paying to the lord such fine as should be set by the homage, to be equal to two years' improved value, and not guilty pleaded. Depositions made in an ancient

suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine, to be set by the lord or his steward, and which depositions were made by witnesses on behalf of the said copyholder, were held to be admissible evidence for the lord, as depositions of persons called on behalf of a person standing in *pari jure* with the new copyholder, although it was not proved that the persons making such depositions were copyholders, but it appeared only from the depositions themselves, that they were such, or were persons acquainted with the customs of the manor; and their depositions, supposing them to be only admissible as declarations of persons deceased, were not inadmissible on account of their being made post *litem motam*, because the same custom was not in controversy in the former suit as in the present. *Freeman v. Phillips*, 4 M. & S. 486.

Leases, without proof of enjoyment under them, are admissible in evidence to prove a particular custom of a manor. *Clarkson v. Woodhouse*, 5 T. R. 412, n.; 3 Dougl. 189.

Trespass for breaking and entering three closes in S. Pleas in justification:—1. A right of common of turbary; 2. of pasture. Replication, that the closes are parcel of S. Moss, within the manor of S.; that there are divers ancient messuages, which have had common of turbary and pasture upon the waste. The replication then stated a custom within the manor of S., for the owners of S. Moss, by themselves or their Moss reeves, to assign to the owners of such ancient messuages, certain reasonable proportions of the Moss dales, to be by them held in severalty, for the purpose of getting turves; and, after the Moss dales shall have been cleared, the owners of the Moss shall hold the same in severalty, discharged from all common of turbary and pasture. The replication then stated the clearing and approvement of the closes accordingly. Rejoinder, traversing the custom; and verdict for the plaintiff. On motion in arrest of judgment, it was objected, 1. that the custom was bad, as extending to messuages without the manor; 2. that it was bad, as repugnant to the right claimed in the plea; 3. that it was bad, as not being to extend to all the ancient messuages; 4. that it was bad, in stating that "reasonable proportions" were to be assigned:—Held, that the custom, as stated in the replication, was good. *Id.*

## 2. To grind Corn.

A custom "that all the inhabitants of a manor shall grind all their corn, grain, and malt, which by them or any of them shall be used or spent on the ground within a manor, at a certain mill," is good. *Cort v. Birkbeck*, 1 Dougl. 218.

A custom "that all the tenants, residents, and inhabitants within a manor, should grind at the lord's mill all their corn and grain, as well growing within the manor as brought from other places, and spent or consumed in a ground state in their respective houses," within the manor,



may be a good custom; but it does not extend to restrain the inhabitants who do not grow corn and grain, or who have no corn and grain of their own, from buying or using in such houses, ground corn or flour, though it may not have been ground or grown within the manor, but produced from corn ground at other mills. *Richardson v. Walker*, 4 D. & R. 498; 2 B. & C. 827.

And where by the custom of a manor all the tenants, residents, and inhabitants within the manor were bound to grind all their corn, grain, and malt, as well growing within the manor as brought from other places, and which, after the grinding thereof, should be spent or consumed in a ground state in their houses, at two ancient mills belonging to the lord, or one of them, at their own option, and the lord having pulled down one of the mills, so as to deprive the tenants of their option:—Held, that the custom was suspended. *Richardson v. Capes*, 4 D. & R. 512; 2 B. & C. 841.

In an action upon the case upon a custom for not grinding at plaintiff's mills, plaintiff may declare generally upon a custom for a certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll; and a continuance of uniform payment and acquiescence is evidence of its reasonableness, and the court shall judge under all the circumstances what is reasonable. *Gard v. Callard*, 6 M. & S. 69.

#### V. CUSTOMS OF TRADE.

The custom of merchants is part of the law of the land. *Vallesjo v. Wheeler*, Loft, 631.

The custom of merchants is the general established law, not any special local custom. *Edin v. East India Comp.*, 1 W. Black. 299; 2 Burr. 1216.

But it must be controlled by adjudged cases. *Id.*

The opinion of merchants is not the custom of merchants. *Id.*

But evidence of the general opinion of merchants is allowed to be given to prove the custom of merchants. *Camden v. Cowley*, 1 W. Black. 417—Mansfield.

An usage of trade cannot be set up in contravention of an express contract; therefore, on a warranty of prime singed bacon, evidence is not admissible of a practice in the bacon trade to receive bacon to a certain degree tainted as prime singed bacon; nor of a practice to preclude the purchaser from all remedy, if he does not discover and point out the defect by an early day. *Yates v. Pym*, 6 Taunt. 446; 3 C. nom. *Yates v. Pym*, 2 Marsh. 141; Holt, 95.

Seemingly, that there is not any custom in the cloth trade, by which a tailor, who receives cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shows that he has delivered it to the seller's order in writing. *Davies v. Halton*, 5 C. & P. 69—Tindal.

To prove the manner of conducting a particu-

lar branch of trade at one place, evidence may be given to show the manner in which the same branch is carried on in another place. *Noble v. Kenneway*, 2 Doug. 510.

It seems that a custom for bankers to use bills deposited with them, (which were never written short, but entered to the full amount, on the day they were paid in, in the pass-book, and also in the books of the bank, to the credit of a customer, as "bills," not as "cash," and after such entry the customer was at liberty to draw to the full amount, by checks), by paying them away in the course of their banking business, is not good in law, and cannot bind the customer without his express assent. *Thompson v. Giles*, 3 D. & L. 733; 2 B. & C. 422.

There is a custom in London to let cart-houses for heavy trades. *Ex parte Wiggins*, 1 Mont. & Bligh, 168.

#### VI. CUSTOMS OF LONDON.

The court cannot take notice of a custom of London, unless it has been certified by the recorder. *Hartop v. Hoare*, 1 Wils. 8; 3 Bos. 1187.

The court takes notice of such of the customs of London as appear to have been certified by the recorder. *Blacquire v. Hoskins*, 1 Doug. 78.

If a custom of London be put in issue which has never been certified, it is properly triable by the mayor and aldermen, certified at the bar of the court in term, by the mouth of the recorder. *Plummer v. Bentham*, 1 Burr. 248.

The courts will not take judicial notice of the custom in London to cart whores: it must be proved. *Skinston and Wye v. Jones*, 3 Sels. 5 P. 1225—Mansfield.

There is no custom in London giving the vest-bailiff power to cut unlawful nets or seine fish. *Bulbroke v. Goodere*, 1 W. Black. 569.

It does not appear that a female covert and trader by the custom of London has authority to contract a debt by bond, or give a warrant of attorney, or prosecute or defend an action in a court of common law, without her husband's name being joined. *Jewson v. Read*, Loft, 124.

A woman's real estate is not affected by its custom. *Id.*

#### VII. PLEADING.

Whoever pleads an easement must plead it specially. *Hawkins v. Wallis*, 2 Wils. 173.

A party in pleading may prescribe for him that he is entitled to claim. *Trenchebury (Bailiff) v. Bricknell*, 1 Taunt. 142.

All prescriptions are in their nature entire, and when they are pleaded, the adverse party cannot deny a part only, but must either disown or reverse the whole. *Morsewood v. Wood*, 1 T. R. 157.

Therefore, if to an action of trespass is the common called A., the defendant pleads that A. and B. commons lie open to each other, and the

prescribe for a right in both commons, the plaintiff must traverse the whole prescription. *Id.*

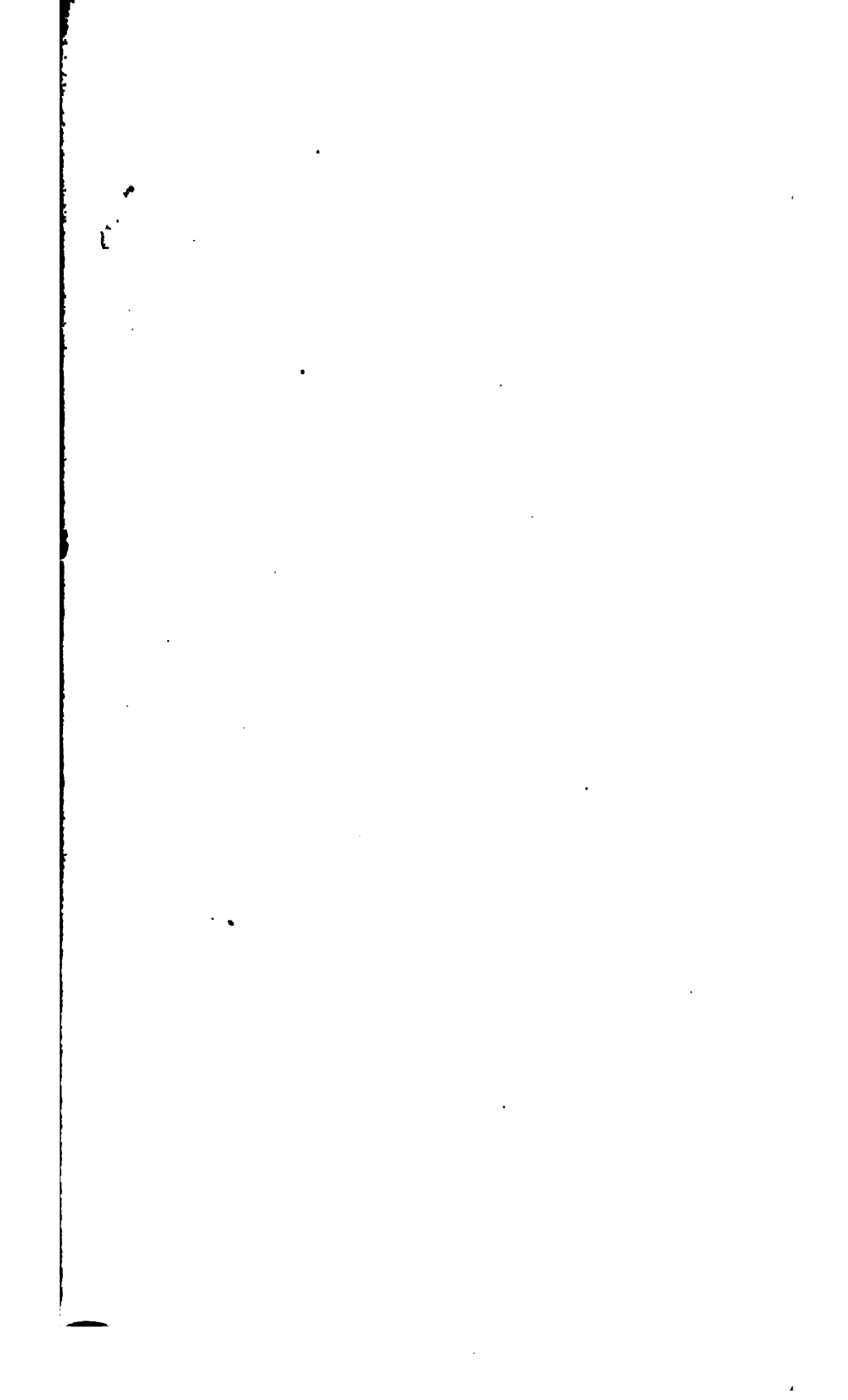
If a custom be set forth generally, and it be proved that there are exceptions, it is a fatal variance. *Griffin v. Blandford*, Cowp. 62. *And see Peter v. Kendall*, 6 B. & C. 703.

If a custom be pleaded, another custom repugnant to it cannot be replied without a traverse, although a custom or matter consistent with it may. *Kenchin v. Knight*, 1 Wils. 253; 1 W. Black. 49.

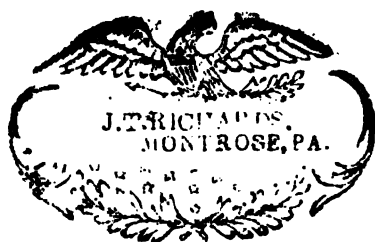
If a custom be set up by the lord of a manor to have the best live or dead chattel as an heriot, quære, if the tenant can modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot? *Parkin v. Radcliffe*, 1 B. & P. 282. *And see Kingsmill v. Bull*, 9 East, 185.

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CUSTOMS—See REVENUE.

















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